US EPA ARCHIVE DOCUMENT

Waters of the US Rule Comment Compendium
Topic 17 – Non-Technical Comments (Volume 1)

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 comments about Non-Technical Comments 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.

Note: While the contractor established a placeholder in this document for the "Agency Response," the rule is promulgated by the Environmental Protection Agency and the Department of the Army and the responses are those of the agencies.

US EPA ARCHIVE DOCUMENT

TOPIC 17. NON-TECHNICAL COMMENTS **21**
17.1. GOVERNMENT/INDUSTRY (NON-GENERAL PUBLIC) **21**
Hennepin County Public Works, Minneapolis, Hennepin County, Minnesota (Doc. #0008) 21
National Association of Home Builders (Doc. #0010) 21
The U.S. Conference of Mayors (Doc. #0825.1) 22
Skamania County Board of Commissioners, Washington (Doc. #0841.1) 23
National Stone, Sand and Gravel Association (Doc. #0843) 23
Minnesota Golf Course Superintendents' Association (Doc. #0844) 23
Responsible Industry for a Sound Environment (Doc. #0845) 24
Department of Agriculture, New Mexico (Doc. #0854) 24
Duke Energy (Doc. #0855) 24
Western Coalition of Arid States (Doc. #0923.1) 25
Bijou Irrigation System (Doc. #0924) 25
Wilbur-Ellis Company (Doc. #0953) 25
Kittson County Board of Commissioners (Doc. #1022.1) 26
Alabama State House D-31 (Doc. #1151) 26
Dynegy Inc. (Doc. #1240) 27
Whitman, Requardt & Associates, LLP (Doc. #1330) 27
NextEra Energy and Florida Power & Light Company (Doc. #1345) 28
Anonymous (Doc. #1371) 28
House of Representatives, Congress of The United States (Doc. #1375) 28
House of Representatives, Congress of the United States (Doc. #1376) 29
United States Senate (Doc. #1377) 29
Congress of The United States (Doc. #1434) 30
Stowers, K. (Doc. #1446) 31
Knicely, T. and D. (Doc. #1472) 31
United States Senate (Doc. #1512) 32
Tehama County Board of Supervisors (Doc. #1619) 33
National Federation of Independent Business (Doc. #1653) 33
Maryland Conservation Council (Doc. #1667) 33
Save the Dunes (Doc. #1706) 34
North Dakota Department of Agriculture (Doc. #1756) 34
Arizona Public Service Company (Doc. #1757) 35
Grant County Board of Commissioners (Doc. #1761.1) 35
Clearwater County Highway Department, Minnesota (Doc. #1762.1) 35
Catawba County Board of Commissioners, North Carolina (Doc. #1763) 36
Pinnacle Construction & Development (Doc. #1807) 37
F. W. Henderson (Doc. #1981) 37
County Engineers of Ohio (Doc. #1997) 38
Anonymous (Doc. #2082) 38
Orleans Audubon Society (Doc. #2113) 38
South Creek Township (Doc. #2252) 39
Anonymous (Doc. #2282) 39
Anonymous (Doc. #2317) 40
Hyde County Board of Commissioners et al. (Doc. #2472) 41

US EPA ARCHIVE DOCUMENT

Anonymous (Doc. #2376) 41
T. Moxley (Doc. #2520) 42
Anonymous (Doc. #2578) 42
Anonymous (Doc. #2636) 43
Anonymous (Doc. #2639) 43
Brown County Commission (Doc. #2728) 43
EarthAction and 2020 Action (Doc. #2863) 44
Anonymous (Doc. #2952) 44
Anonymous (Doc. #3005) 45
Anonymous (Doc. #3010) 46
Minnesota Association of Townships (Doc. #3090) 47
Anonymous (Doc. #3093) 48
Collins, D. Member of Congress, U. S. House of Representatives (Doc. #3097) 48
M. Sharp (Doc. #3233) 49
Southern Nevada Home Builders Association (Doc. #3251) 49
Washington Farm Bureau (Doc. #3254.2) 50
Sheridan County Commission (Doc. #3271.2) 51
Anonymous (Doc. #3300.1) 51
Delaware Township Board of Supervisors (Doc. #3308) 52
Sweet Grass Conservation District (Doc. #3310.1) 52
Pendleton County Commission (Doc. #3530.2) 52
Midwest Hardwood Corporation (Doc. #3531.2) 53
Environment Council of Rhode Island (Doc. #3532.2) 53
United States Senate (Doc. #3536) 54
Pennington County Weed & Pest Board (Doc. #3719) 55
Kuzniar, M. (Doc. #3902) 55
Anonymous (Doc. #3985) 56
Gladstone Land (Doc. #4039.2) 56
Wicomico County, Maryland (Doc. #4118) 57
Bullhead City, Arizona (Doc. #4185) 57
REMAX Advantage Plus, Cottage Grove, Oregon (Doc. #4235) 58
W. V. Giniecki (Doc. #4262) 58
Albemarle Area QUWF Chapter, et al. (Doc. #4292) 59
Daviess County Indiana Board of Commissioners (Doc. #4295) 59
Mohave County Water Authority (Doc. #4346) 60
Feltes, T. and E. (Doc. #4352) 61
Ryman, J.L. (Doc. #4355) 61
Pennington County Board of Commissioners (Doc. #4384) 62
Anonymous (Doc. #4476) 62
Anonymous (Doc. #4499) 63
Growmark, Inc. (Doc. #4514) 63
Kimble County Commissioners' Court, Kimble County, Texas (Doc. #4534) 64
Harrison County Engineer's Office, Indiana (Doc. #4603) 64
Board of County Commissioners, Rio Blanco County, CO (Doc. #4679) 65
Delta Conservation District (Doc. #4719.2) 66
Michigan State Senator (Doc. #4769) 66

US EPA ARCHIVE DOCUMENT

Meader, N.M. (Doc. #4861) 67
The Senate of Maryland (Doc. #4870) 67
Travis County, Texas (Doc. #4876) 68
Pendleton County Economic and Community Development Authority (Doc. #4877) 68
Bonner County Board of Commissioners (Doc. #4879) 69
Hickey, R. (Doc. #4895) 69
Congress of the United States (Doc. #4901) 70
House of Representatives, Alaska State Legislature (Doc. #4902) 71
Kansas House of Representatives Committee on Energy & Environment (Doc. #4903) 71
Congress of the United States (Doc. #4905) 71
United States Senate, Committee on Environment and Public Works (Doc. #4907) 72
America's Great Waters Coalition (Doc. #4957) 73
American Gas Association (Doc. #4980) 75
Polk County Farm Bureau (Doc. #4981) 75
Congress of the United States (Doc. #4983) 76
New Hampshire Audubon (Doc. #4984.2) 76
Michigan Association of County Drain Commissioners (Doc. #5057.1) 77
Winkelmann, K. (Doc. #5141) 78
Attorney General of Texas (Doc. #5143.2) 79
Illinois Soybean Association (Doc. #5144.1) 80
Wheatland Irrigation District (Doc. #5176.1) 80
Anonymous (Doc. #5187) 81
League of Women Voters of Michigan (Doc. #5204) 82
Lake Havasu City (Doc. #5205) 82
Anonymous (Doc. #5243) 82
Andermann, J. (Doc. #5272) 83
Oregon Cattlemen's Association (Doc. #5273.1) 84
Duncan, B. (Doc. #5455) 85
Pike County Economic Development Corporation (Doc. #5460) 85
Agricultural Council of Arkansas (Doc. #5463) 86
Wisconsin Wildlife Federation (Doc. #5468) 87
Perry County, Mississippi Board of Supervisors (Doc. #5484) 88
Nye County Water District Governing Board (Doc. #5486) 88
North Cass Water Resource District (Doc. #5491) 88
Poepping, P. (Doc. #5513) 89
Pike and Scott County Farm Bureaus (Doc. #5519) 89
Rural County Representatives of California (Doc. #5537) 90
Monroe County, District 26 et al. (Doc. #5555.1) 93
Horcher, P. (Doc. #5573) 93
Sen. T. Westrom, MN-District 12 (Doc. #5558.1) 94
Carroll Area Development Corporation (Doc. #5600) 95
Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1) 95
Sparks, D. (Doc. #5773) 96

US EPA ARCHIVE DOCUMENT

First State Bank/First State Insurance (Doc. #5920) 96
Doriot, B. (Doc. #5950) 97
East Coventry Township (Doc. #6068) 97
Black Hills Corporation (Doc. #6248) 98
Martin Marietta Materials (Doc. #6250) 100
Poepping, Stone, Bach & Associates (Doc. #6251) 101
Allegheny Township Board of Supervisors (Doc. #6253) 102
Ruppel, W. (Doc. #6605) 103
Brady, D. (Doc. #6653) 104
Hassle, T. (Doc. #6830) 105
Walker, J. (Doc. #6849) 106
South Carolina Forest Association (Doc. #6855) 107
Pike County Highway Department (Doc. #6857) 108
McGee Creek Levee & Drainage District (Doc. #6858) 109
Hillsdale County Road Commission (Doc. #6875) 110
Herrington, P. (Doc. #6943) 110
Southpace Properties, Inc. (Doc. #6989.1) 111
Naffziger Farms, Inc. (Doc. #7085.1) 112
Spencer County Soil & Water Conservation District (Doc. #7091.1) 113
Anonymous (Doc. #7151) 113
Anonymous (Doc. #7158) 114
Pike County Democratic Central Committee (Doc. #7188.1) 114
Anonymous (Doc. #7203) 115
Greater Hall Chamber of Commerce (Doc. #7314) 115
Wellman, S. (Doc. #7332.2) 116
Schiffer, M.D. (Doc. #7645) 116
Pike County Chamber of Commerce (Doc. #7932) 117
Tillamook County Soil and Water Conservation District (Doc. #7934.1) 117
University of Missouri (Doc. #7942.1) 118
City of Naples, Florida (Doc. #7943.1) 119
Office of Advocacy, Small Business Administration (Doc. #7958) 120
Florida Stormwater Association, Inc. (Doc. #7965.1) 120
Iowa State University (Doc. #7975) 122
Illinois House of Representatives (Doc. #7978) 122
Pike County Republican Central Committee, Pike County Republican Party, Illinois (Doc. #7984) 123
Southern Association of State Departments of Agriculture (Doc. #7995) 124
City of St. Marys, GA (Doc. #8144) 125
Sierra Club, Cumberland Chapter (Doc. #8356) 126
City of Philadelphia Water Department (Doc. #8359) 126
New Salem Township (Doc. #8365) 126
State of Iowa (Doc. #8377) 127
Scott County Soil and Water Conservation District (Doc. #8410) 129
Greater Lafourche Port Commission (Doc. #8411) 129
Tri-County Economic Development Corporation, Northern Kentucky Tri-ED (Doc. #8536) 130

US EPA ARCHIVE DOCUMENT

North Houston Association et al. (Doc. #8537) 130
City of Borough of Sitka (Doc. #8651) 131
Gulf Coast Soil and Water Conservation District (Doc. #8655) 132
Franconia Township (Doc. #8661) 132
United Country/American Real Estate & Auction Co LLC (Doc. #8675) 133
Anonymous (Doc. #8757) 133
Anonymous (Doc. #8778) 134
Kramer, J. (Doc. #8802) 134
Anonymous (Doc. #8808) 135
Anonymous (Doc. #8822) 135
Anonymous (Doc. #8835) 136
Anonymous (Doc. #8862) 136
Anonymous (Doc. #8895) 137
Anonymous (Doc. #8912) 137
Californian Indian Environmental Alliance (Doc. #9103) 138
Wilson, T. (Doc. #9121) 139
Smith, B. (Doc. #9213) 140
Pascua, J. (Doc. #9226) 140
Richard, M. (Doc. #9291) 142
Wilken, M.J. (Doc. #9354) 143
Eriksen, D. (Doc. #9369) 144
Linck, T. (Doc. #9403) 145
Dey, L. (Doc. #9404) 146
Clearwater Watershed District, et al. (Doc. #9560.5) 146
Watershed Protection Department, City of Austin, Texas (Doc. #9600) 147
Pattillo, Kathy, Sirius Solutions, L.L.L.P. (Doc. #9663) 148
Reagor, T. (Doc. #9689) 148
Plains Cotton Cooperative Association (Doc. #9698) 149
Londonberry Township Trustees (Doc. #9727) 150
North Newton Township (Doc. #9731) 151
City of Omaha Nebraska (Doc. #9733) 151
Iberia Parish Levee and Conservation District (Doc. #9829) 152
Kane County Division of Transportation (Doc. #9831) 152
Zwilling, P. (Doc. #9885) 153
Cook, O.M. (Doc. #9878) 153
Washington State Association of Counties (Doc. #9976) 154
Florida Association of Counties (Doc. #10193) 155
Michigan Farm Bureau, Lansing, Michigan (Doc. #10196) 157
Farris Law Group PLLC (Doc. #10199) 157
Rosebud County (Doc. #10309) 158
Thompson Contractors (Doc. #10365) 158
Todd, C. (Doc. #10583) 159
Griffin, J. and D. (Doc. #10645) 159
Brandt Consolidated (Doc. #10667) 160
Dimock Township, Susquehanna County, Pa. (Doc. #10737) 160
RiverStone Group, Inc. (Doc. #10742) 161

US EPA ARCHIVE DOCUMENT

Anonymous (Doc. #10756) 162
Greater North Dakota Chamber (Doc. #10850) 162
Sadsbury Township Board of Supervisors, Lancaster County, Pennsylvania (Doc. #10968) 163
Minnesota Association of County Agricultural Inspectors (Doc. #10970) 164
Ducks Unlimited (Doc. #11014) 165
Krause, D. (Doc. #11117) 168
Southwest Kansas Royalty Owners Association (Doc. #11346) 168
Cass County Electric Cooperative, Inc. (Doc. #11454) 169
Anonymous (Doc. #11480) 170
Scott County Development Corporation (Doc. #11542) 170
Anonymous (Doc. #11606) 171
Nelson County Farm Bureau (Doc. #11687) 171
John Wood Community College (Doc. #11770) 172
County of Kane (Doc. #11788) 173
Carpenter, H. (Doc. #11793) 174
Anonymous (Doc. #11815) 175
Professional Landcare Network (Doc. #11831) 176
National Wild Turkey Federation (Doc. #11833) 176
Abell, B. (Doc. #11837) 177
Fuller, K. (Doc. #11862) 177
Rosborough, M. (Doc. #11892) 178
New York Farm Bureau et al. (Doc. #11922) 178
Iowa Drainage District Association (Doc. #11924) 179
Hancock County, Indiana (Doc. #11980) 180
Indiana Association of County Commissioners (Doc. #11983) 181
Bourbon County Farm Bureau (Doc. #11986) 182
Davidson Soil and Water Conservation District Board of Supervisors, North Carolina (Doc. #11997) 183
Watson, V. (Doc. #12081) 183
Krause, T. (Doc. #12137) 184
Brock, L. and P. (Doc. #12189) 185
Bona Fide Ditch Company (Doc. #12258) 185
Chartwell Golf and Country Club (Doc. #12346) 185
Ernst Concrete (Doc. #12347) 186
National Association of Conservation Districts (Doc. #12349) 188
Georgia Department of Agriculture (Doc. #12351) 188
Cieslewicz, P. (Doc. #12691) 189
Dailey, Jr., J. L. (Doc. #12692) 190
Elrod, H. M. (Doc. #12696) 190
Cowley, P. H. and J. R. (Doc. #12701) 191
Orlet, T. J. (Doc. #12702) 192
Montana Farm Bureau Federation (Doc. #12715) 193
Musselshell County, Montana (Doc. #12719) 194
Uintah County, Utah (Doc. #12720) 195
Owyhee County Board of Commissioners (Doc. #12725) 197

US EPA ARCHIVE DOCUMENT

Sierra Alta Ranch LLC (Doc. #12730) 198
Communities for Clean Water (Doc. #12739) 199
Montezuma Township, Pike County, Illinois (Doc. #12743) 200
Elko County Board of Commissioners, Nevada (Doc. #12755) 201
Water ReUse Association (Doc. #12758) 202
Texas Conservation Alliance (Doc. #12777) 203
Friona Industries, L.P. (Doc. #12831) 204
AEP Ohio (Doc. #12847) 205
Yosemite Farm Credit, ACA (Doc. #12851) 205
Aust, E. (Doc. #12861) 206
Bayless and Berkalew Co. (Doc. #12967) 206
Duke Energy (Doc. #13029) 207
Monterey County Farm Bureau (Doc. #13045) 211
Charlotte County Government (Doc. #13061) 212
New-Mac Electric Cooperative (Doc. #13068) 213
Pennsylvania Coal Alliance (Doc. #13074) 214
Vermont League of Cities and Towns (Doc. #13075) 214
International Erosion Control Association, Region 1 (Doc. #13174) 215
South Dakota Grain & Feed Association (Doc. #13201) 215
Spencer Brook Township, Princeton, MN (Doc. #13222) 216
Rio Grande County, Colorado (Doc. #13266) 217
Iowa Corn Growers Association (Doc. #13269) 218
Portland Cement Association (Doc. #13271) 219
S. Barnes (Doc. #13329.1) 220
Maumee River Basin Commissioner (Doc. #13461) 221
American Association of Port Authorities (Doc. #13559) 221
TriBasin Natural Resources District (Doc. #13564) 222
Kennewick Irrigation District, Kennewick, WA (Doc. #13571) 222
Roads and Drainage Department, DeKalb County, Georgia (Doc. #13572) 223
Walnut West Creek Watershed District No. 72, Toronto, KS (Doc. #13574) 225
Edmonson County Courthouse, Brownsville, KY (Doc. #13575) 225
City-County Health Department, Water Quality Advisory Council, Missoula, MT (Doc. #13576) 226
Lafourche-Terrebonne Soil and Water Conservation District, Thibodaux, LA (Doc. #13582) 226
Newmont Mining Corporation (Doc. #13596) 227
Ameren Corporation (Doc. #13608) 228
National Young Farmers Coalition (Doc. #13618) 228
N. W. Electric Power Cooperative, Inc. (Doc. #13623) 229
Little Sioux Inter-County Drainage District (Doc. #13629) 230
Campbell County Conservation District (Doc. #13630) 230
Wilson, J. (Doc. #13657) 231
River des Peres Watershed Coalition (Doc. #13950) 232
Murray Energy Corporation (Doc. #13954) 232
Niobrara Conservation District, Wyoming (Doc. #13955) 233
National Ready Mixed Concrete Association (Doc. #13956) 234

US EPA ARCHIVE DOCUMENT

Pascua, J. (Doc. #13970) 235
The Florida Electric Power Coordinating Group (Doc. #13993) 237
NRG Energy (Doc. #13995) 238
Berkshire Hathaway Home Services GA Properties (Doc. #14028) 239
Hampden Township Board of Commissioners (Doc. #14035) 240
Wiedower, R. (Doc. #14037) 241
Lewis & Clark County Board of Commissioners (Doc. #14065) 241
Thomas, R. B., Jr. (Doc. #14067) 242
Illinois Farm Bureau (Doc. #14070) 243
Pluma County Board of Supervisors (Doc. #14071) 246
Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072) 247
American Sugarbeet Growers Association (Doc. #14086.1) 248
Palo Alto County Board of Supervisors (Doc. #14095) 249
Swift County Farm Bureau (Doc. #14098) 251
Nebraska Farmer and Cattlewoman (Doc. #14113) 252
Biopesticide Industry Alliance (Doc. #14117) 253
Iowa Waters Advocacy Coalition (Doc. #14120) 255
North Carolina Forestry Advisory Council (Doc. #14123) 255
City of Rockville, Maryland (Doc. #14126) 256
Association of Oregon Counties (Doc. #14127) 256
Texas Farm Bureau (Doc. #14129) 258
Maricopa County Board of Supervisors (Doc. #14132.1) 258
Southern Company (Doc. #14134) 259
John Deere & Company (Doc. #14136.1) 260
Iowa Department of Agriculture and Land Stewardship (Doc. #14148) 264
Namron Business Associates (Doc. #14173) 266
Pacific Northwest Waterways Association et al. (Doc. #14272) 267
Spectra Energy (Doc. #14273) 268
Texas Commission on Environmental Quality (Doc. #14279.1) 269
Georgia Department of Transportation (Doc. #14282) 269
County of Mendocino Board of Supervisors (Doc. #14309) 270
San Joaquin Farm Bureau (Doc. #14311) 271
The Board of County Commissioners of Otero County New Mexico (Doc. #14321) 272
Responsible Industry for a Sound Environment (Doc. #14431) 273
Pennsylvania Chamber of Commerce and Industry (Doc. #14401) 274
Southern Illinois Power Cooperative (Doc. #14402) 274
Reabe Spraying Service (Doc. #14404) 275
Wyoming Farm Bureau Federation (Doc. #14406) 276
Western Coalition of Arid States (Doc. #14407) 277
Indiana Pork Advocacy Coalition (Doc. #14410) 279
National Stone, Sand and Gravel Association (Doc. #14412) 281
Westlands Water District (Doc. #14414) 283
Lyman-Richey Corporation (Doc. #14420) 286
Minnesota Farmers Union (Doc. #14429) 288
Georgia Chamber of Commerce (Doc. #14430) 288

US EPA ARCHIVE DOCUMENT

Responsible Industry for a Sound Environment (Doc. #14431) 304
Shelby County Farm Bureau, Kentucky (Doc. #14449.1) 308
Adams County Beef Producers (Doc. #14455) 308
Soil Horizons (Doc. #14456) 309
Wyoming Mining Association (Doc. #14460) 310
Florida League of Cities, Inc. (Doc. #14466) 311
National Chicken Council, National Turkey Federation and U.S. Poultry & Egg Association (Doc. #14469) 312
Louisiana State Senate (Doc. #14501) 313
Public Works Administration, City of Billings, Montana (Doc. #14504) 314
City of Dallas, Texas (Doc. #14513) 314
Ann Marie Cain, Manager, Winnebago-Boone Farm Bureau (Doc. #14518) 315
Tennessee Chamber of Commerce & Industry (Doc. #14522.1) 316
California Building Industry Association et al. (Doc. #14523) 317
Whiteshire Hamroc (Doc. #14524.1) 319
Ann Arbor Brewing Company, et al. (Doc. #14526) 319
SC Chamber of Commerce (Doc. #14535) 320
Good For You Girls Natural Skincare (Doc. #14536.1) 323
Texas Poultry Federation (Doc. #14542) 323
Bangor Area Storm Water Group, Hampden, Maine (Doc. #14543.1) 324
Middle Niobrara Natural Resources District (Doc. #14552) 325
Eco-Justice Ministries (Doc. #14554.1) 325
Connecticut Marine Trades Association (Doc. #14558) 326
Todd County Farm Bureau (Doc. #14559.1) 327
Union for Reform Judaism (Doc. #14560) 327
Hoosier Energy (Doc. #14561) 328
Jefferson Parish, Louisiana (Doc. #14574.1) 328
Alliance Coal, LLC (Doc. #14577) 330
County Commissioners Association of Pennsylvania (Doc. #14579) 331
State of Wyoming (Doc. #14584) 332
Central Arizona Water Conservation District (Doc. #14585) 333
City of Henderson, Nevada (Doc. #14588) 334
Waters of the United States Coalition (Doc. #14589) 335
CalPortland Company (Doc. #14590) 335
National Council of Farmer Cooperatives (Doc. #14597) 336
Southern Arizona Cattlemen's Protective Association (Doc. #14598) 337
New Belgium Brewing Company (Doc. #14601) 337
Northwest Farm Credit Services (Doc. #14606) 339
Washington State Potato Commission (Doc. #14609) 339
American Soybean Association (Doc. #14610) 340
Virginia Agribusiness Council (Doc. #14612) 341
Minnesota Milk Producers Association (Doc. #14615) 341
Commercial Real Estate Development Association (Doc. #14621) 342
Natural Resources Council of Maine (Doc. #14622) 344
State of Oklahoma (Doc. #14625) 344
Maryland Grain Producers Association (Doc. #14627.1) 345

US EPA ARCHIVE DOCUMENT

New Jersey State Senate (Doc. #14628) 346
The Humane Society of the United States (Doc. #14629) 346
CropLife America (Doc. #14630.1) 348
Brevard County Natural Resources Management Office (Doc. #14632) 348
New Mexico Association of Commerce and Industry (Doc. #14638) 350
Arizona Chamber of Commerce and Industry (Doc. #14639) 350
Exelon Corporation (Doc. #14641) 352
Vulcan Materials Company (Doc. #14642) 353
Tarrant Water Regional Water District (Doc. #14643) 353
Ohio Corn & Wheat Growers Association (Doc. #14646) 354
Resource Development Council (Doc. #14649) 355
Berkshire Hathaway Energy Company (Doc. #14650) 356
Minnesota Farm Bureau (Doc. #14653) 357
City of Pittsburg (Doc. #14660) 358
Pima Natural Resource Conservation District (Doc. #14720) 358
Chilton Ranch, LLC (Doc. #14724) 359
Great Plains Canola Association (Doc. #14725) 359
Oregon Farm Bureau (Doc. #14727) 360
Lake County Division of Transportation, Lake County, Illinois (Doc. #14743) 361
Wisconsin Pork Association (Doc. #14745) 362
South Carolina Forestry Commission (Doc. #14750) 364
Minnesota United Snowmobilers Association (Doc. #14758) 365
Clean Water Action Colorado et al. (Doc. #14760) 366
Farm Credit Illinois (Doc. #14767) 366
QEP Resources, Inc. (Doc. #14772) 367
Irvine Ranch Water District (Doc. #14774) 369
PPL Services Corporation (Doc. #14777) 370
Washington Farm Bureau (Doc. #14783) 372
Royalty Owners & Educational Coalition (Doc. #14795) 373
Ingram Barge Company (Doc. #14796) 375
Florida Agricultural Aviation Association (Doc. #14797) 377
ProLawn Plus (Doc. #14800) 378
Abilene Chamber of Commerce (Doc. #14817) 379
Anderson, R. (Doc. #14818) 380
Georgia Agribusiness Council (Doc. #14859) 381
H. G. & N. Fertilizer (Doc. #14869) 382
Steele Ranch, Inc. (Doc. #14874) 384
Clean Water Action Connecticut et al. (Doc. #14884) 384
National Sunflower Association (Doc. #14894) 385
Indiana Cast Metals Association (Doc. #14895.1) 386
Florida Rural Water Association (Doc. #14897) 390
The Wildlife Society (Doc. #14899) 391
Golden Gate Salmon Association and Pacific Coast Federation of Fishermen's Association (Doc. #14900) 392
Arizona's Generation & Transmission Cooperatives (Doc. #14901) 393
Golf Course Superintendents Association of America et al. (Doc. #14902) 395

US EPA ARCHIVE DOCUMENT

Browns Valley Irrigation District (Doc. #14908) 402
Northwest Public Power Association (Doc. #14909) 404
Oklahoma Pork Council (Doc. #14911) 405
The Fertilizer Institute (Doc. #14915) 406
Devon Energy Corporation (Doc. #14916) 409
Region 10 Tribal Caucus (Doc. #14927) 411
Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928) 412
Kansas Cooperative Council (Doc. #14938) 416
Association of American Pesticide Control Officials (Doc. #14940) 417
Soil and Water Conservation District (Doc. #14943) 417
Environmental Defense Fund (Doc. #14946) 418
Gessner, L. (Doc. #14959) 419
Williams, E.H. (Doc. #14961) 419
Nucor Corporation (Doc. #14963) 420
Santa Barbara County Farm Bureau (Doc. #14966) 421
Citizens Campaign for the Environment (Doc. #14967) 422
Office of the Governor, State of Alabama (Doc. #14969) 423
Cassia County, Idaho Board of Commissioners (Doc. #14972) 424
National Association of County Engineers (Doc. #14981) 425
Nuclear Energy Institute (Doc. #14985) 425
Missouri Soybean Association (Doc. #14986) 426
New Jersey Farm Bureau (Doc. #14989) 426
Department of Public Works, City of Northglenn, Colorado (Doc. #14990) 427
Orange County Public Works, Orange County, California (Doc. #14994) 428
Arizona State Senate, Legislative District 14 (Doc. #14995) 428
Anonymous (Doc. #15006) 430
OG&E Corp (Doc. #15012) 432
Utility Water Act Group (Doc. #15016) 434
Association of American Railroads (Doc. #15018.1) 447
Jackson Family Wines (Doc. #15019) 448
National Wildlife Federation (Doc. #15020) 449
Alaska Miners Association (Doc. #15027) 449
Edison Electric Institute (Doc. #15032) 451
Colorado Agricultural Aviation Association (Doc. #15033) 456
California State Assembly, District 17 et al. (Doc. #15035) 457
Institute of Scrap Recycling Industries, Inc. (Doc. #15041) 457
Iowa Environmental Council (Doc. #15042) 459
Great Lakes Indian Fish and Wildlife Commission (Doc. #15048) 459
Hawkes Company (Doc. #15057) 460
National Mining Association (Doc. #15059) 462
National Mining Association (Doc. #15059.1) 463
Arizona Farm Bureau Federation (Doc. #15064) 464
Montana-Dakota Utilities (Doc. #15066) 464
American Electric Power (Doc. #15079) 466
United States Senate (Doc. #15083) 467

US EPA ARCHIVE DOCUMENT

Fresno County Farm Bureau (Doc. #15085) 470
State of Missouri (Doc. #15091) 470
Harris County Attorney's Office (Doc. #15097) 471
Luminant (Doc. #15100) 471
Coalition of Alabama Waterways (Doc. #15101) 472
Board of Commissioners, Phillips County, Montana (Doc. #15102) 474
Texas Association of Counties (Doc. #15106) 475
National Association of State Aquaculture Coordinators (Doc. #15111) 477
Mountain States Legal Foundation (Doc. #15113) 477
Northern Colorado Water Conservancy District, Berthoud, Colorado (Doc. #15114) 477
American Petroleum Institute (Doc. #15115) 478
Colorado Wildlife Federation (Doc. #15119) 480
Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al (Doc. #15123) 480
Nebraska Public Power District (Doc. #15126) 482
American Forests et al. (Doc. #15132) 484
Chickaloon Village Traditional Council (Doc. #15137) 486
American Coatings Association (Doc. #15138) 487
Sinclair Oil Corporation (Doc. #15142) 488
AR Wildlife Federation (Doc. #15143) 489
Lea Soil and Conservation District Board of Supervisors (Doc. #15144.1) 490
Council for Quality Growth (Doc. #15147.1) 491
Watershed Watch in Kentucky, Inc. (Doc. #15159) 491
Ohio Coal Association (Doc. #15163) 492
Louisiana Department of Environmental Quality (Doc. #15164) 493
American Horse Council (Doc. #15165) 494
Public Works Department, Charleston County, South Carolina (Doc. #15166) 494
Pennsylvania Independent Oil and Gas Association (Doc. #15167) 495
National Hispanic Landscape Alliance (Doc. #15171.1) 499
International Brotherhood of Electrical Workers (Doc. #15174) 502
Katy Area Economic Development Council, Inc. (Doc. #15182) 502
Attorney General, Colorado (Doc. #15191) 505
Aquatic Ecosystem Restoration Foundation (Doc. #15204) 507
American Wind Energy Association (Doc. #15208) 508
Southern Illinois Power Cooperative (Doc. #15214) 510
Missouri Farm Bureau Federation (Doc. #15224) 512
Humboldt River Basin Water Authority (Doc. #15229) 513
United States Durum Growers Association (Doc. #15232) 513
Oregonians for Food & Shelter (Doc. #15239) 514
Sierra Club Kansas Chapter (Doc. #15240) 515
National Association of Convenience Stores, et al. (Doc. #15242) 515
Ohio Attorney General (Doc. #15243) 518
National Alliance of Forest Owners (Doc. #15247) 518
Union Pacific Railroad Company (Doc. #15254) 521
Pennsy Supply, Inc. (Doc. #15255) 526

US EPA ARCHIVE DOCUMENT

Hereford Bed & Biscuit (Doc. #15260) 526
Solid Waste Association of North America (Doc. #15264) 528
Cain, D. (Doc. #15286) 529
Automotive Recyclers Association (Doc. #15343) 531
Missouri Coalition for the Environment (Doc. #15344) 531
Environmental Defense Fund (Doc. #15352) 532
Children's Environmental Health Network (Doc. #15354.1) 533
Farm Credit Council (Doc. #15355) 535
Blue Water Business Consortium (Doc. #15359) 536
The Little River Drainage District (Doc. #15361) 536
Landmark Legal Foundation (Doc. #15364) 537
Arizona State Senate, Legislative District 14 (Doc. #15370) 537
International Brotherhood of Boilermakers, et al. (Doc. #15373) 538
Alaska Independent Fishermen's Marketing Association (Doc. #15387) 539
National Association of State Departments of Agriculture (Doc. #15389) 539
Weyerhaeuser Company (Doc. #15392) 540
Council of Industrial Boiler Owners (Doc. #15401) 542
East Kentucky Power Cooperative (Doc. #15402) 542
Wisconsin Electric Power Company and Wisconsin Gas (Doc. #15407) 543
Dow Chemical Company (Doc. #15408) 544
National Association of Manufacturers (Doc. #15410) 545
Steel Manufacturers Association and Specialty Steel Industry of North America (Doc. #15416) 547
Trinity River Authority of Texas, General Office (Doc. #15417) 548
City of Monroe, North Carolina (Doc. #15422) 549
Grand Junction Area Chamber of Commerce (Doc. #15425) 549
Texas Wheat Producers Association (Doc. #15430.1) 550
Texas Chemical Council (Doc. #15433) 551
Wyoming County Commissioners Association (Doc. #15434) 554
Natural Resources Defense Council et al. (Doc. #15437) 555
United States Steel Corporation (Doc. #15450) 557
Idaho Association of Commerce & Industry (Doc. #15461) 558
Greater Houston Builders Association, et al. (Doc. #15465) 560
Cameron Parish School Board (Doc. #15468) 561
Crook County Land Use Planning & Zoning Commission (Doc. #15471) 562
Berns, Clancy and Associates (Doc. #15474) 563
City of Fountain, Colorado (Doc. #15478) 565
Oregon Water Resources Congress (Doc. #15488) 566
State of Indiana Office of the Governor (Doc. #15493) 567
Kentucky Coal Association (Doc. #15498) 567
La Jolla Community Fireworks Foundation (Doc. #15500) 568
Idaho Power Company (Doc. #15501) 570
Izaak Walton League of America (Doc. #15503) 572
Oklahoma Panhandle Agriculture and Irrigation Association (Doc. #15506) 573
Association of Nebraska Ethanol Producers (Doc. #15512) 573
Illinois Coal Association (Doc. #15517) 573

US EPA ARCHIVE DOCUMENT

Club 20 (Doc. #15519) 576
Georgia Farm Bureau (Doc. #15527) 577
Washington County Water Conservancy District (Doc. #15536) 577
Business Council of Alabama (Doc. #15538) 579
East River Electric Power Cooperative (Doc. #15539) 580
ProGrass Lawn and Ornamental Care (Doc. #15563) 581
South Carolina Association of Counties (Doc. #15573) 581
Iberia Parish Farm Bureau (Doc. #15585) 582
Pitts, B. (Doc. #15615) 582
Staker Parson Companies (Doc. #15618) 583
Salinas Valley Water Coalition (Doc. #15625) 584
National Barley Growers Association (Doc. #15627) 585
Iowa Farm Bureau (Doc. #15633.1) 586
Corn Producers Association of Texas (Doc. #15638) 587
Board of County Commissioners, Klickitat County (Doc. #15648) 587
West Central Cooperative (Doc. #15659.1) 588
Jo Daviess County Board (Doc. #15661) 589
Martin, J. (Doc. #15669) 591
Anonymous (Doc. #15683) 592
Anonymous (Doc. #15691) 592
Chartwell Golf and Country Club (Doc. #15701) 592
Indiana Manufacturers Association (Doc. #15704) 593
Upper Trinity Regional Water District, Denton County, Texas (Doc. #15728) 594
Anonymous (Doc. #15736) 595
Haase, D. (Doc. #15756) 595
Worley, S. (Doc. #15764) 597
City of Jackson (Doc. #15766) 597
Walter Development Corporation (Doc. #15768) 598
National Association of State Conservation Agencies (Doc. #15778) 599
Leigh Hanson, Inc. (Doc. #15781) 599
Council of Alaska Producers (Doc. #15782) 600
White, K. (Doc. #15790) 601
Dillon, L. (Doc. #15791) 601
Chavez, J. (Doc. #15817) 602
Lowell, J.D. (Doc. #15834) 602
Kentucky Corn Growers Association (Doc. #15836) 603
Maryland Chapters of NAIOP (Doc. #15837) 603
Yazoo Valley (Doc. #15838) 604
Anonymous (Doc. #15840) 604
Rooks, S. (Doc. #15882) 605
Anonymous (Doc. #15910) 605
Anonymous (Doc. #15921) 606
Anderson D., (Doc. #15943) 606
Townley, N.J. (Doc. #15945) 607
Westrich, K. (Doc. #15948) 607
Tunget, B. (Doc. #15951) 608

US EPA ARCHIVE DOCUMENT

Keller, J. (Doc. #15952) 608
Bushfield, M. (Doc. #15953) 609
Kosters, K.A. (Doc. #15954) 610
Wittenborn, D. (Doc. #15958) 610
Esplin, T. and J. (Doc. #15976) 611
Heggedahl, L. (Doc. #15977) 613
Boca West Country Club (Doc. #16119) 613
Kentucky Farm Bureau Board of Directors, and Courtney Farms (Doc. #16123) 614
Anonymous (Doc. #16128) 614
Association of Illinois Electric Cooperatives (Doc. #16168) 615
Pesticide Policy Coalition (Doc. #16169) 617
Colorado Association of Commerce and Industry (Doc. #16172.1) 618
Gotschall, E. (Doc. #16196) 620
Anonymous (Doc. #16241) 620
Cain, L. (Doc. #16242) 620
Hecht, M. (Doc. #16263) 621
Anonymous (Doc. #16275) 622
Oswald, J.C. et al. (Doc. #16279) 622
Anonymous (Doc. #16290) 623
Wyoming Ag-Business Association (Doc. #16300) 623
Anonymous (Doc. #16324) 624
Wabash Valley Power Association (Doc. #16336) 625
Dominion Resources Services (Doc. #16338) 627
Chickasaw Pointe Golf Club (Doc. #16350) 628
Sunflower Electric Power Corporation (Doc. #16352) 628
Tester, R. (Doc. #16355) 629
Martin Marietta (Doc. #16356) 632
Associated Builders and Contractors, Inc. (Doc. #16358) 633
Delaware County Department of Public Works (Doc. #16362) 634
Terrebonne Levee and Conservation District (Doc. #16365) 634
Airports Council International - North America (Doc. #16370) 635
South Dakota Soybean Association (Doc. #16371) 637
National Wildlife Federation, et al. (Doc. #16377.1) 637
Meeteetse Conservation District (Doc. #16383) 638
Anonymous (Doc. #16384) 640
McPherson Law Firm, PC (Doc. #16397) 641
Anonymous (Doc. #16400) 641
Anonymous (Doc. #16402) 642
Anonymous (Doc. #16407) 643
Anonymous (Doc. #16409) 643
Waterkeeper Alliance et al. (Doc. #16413) 644
Anonymous (Doc. #16415) 647
Anonymous (Doc. #16424) 647
Dyrdal, D. (Doc. #16426) 647
Association of Electronic Companies of Texas (Doc. #16433) 648

US EPA ARCHIVE DOCUMENT

George Transmission Corporation (Doc. #16439) 648
League of California Cities (Doc. #16442.1) 649
Ouray County, Colorado (Doc. #16444) 650
Basin Electronic Power Cooperative (Doc. #16447) 651
Building Industry Association of Greater Louisville (Doc. #16449) 651
Cambridge Brewing Company et al. (Doc. #16452) 652
Clark County Department of Environmental Services (Doc. #16455) 652
Dairy Cares (Doc. #16471) 654
Minnesota Chamber of Commerce (Doc. #16473) 655
Thelma Worick Revocable Trust (Doc. #16476) 657
Board of County Commissioners, Fremont County, Colorado (Doc. #16479) .. 658
South Metro Water Supply Authority, Colorado (Doc. #16481) 659
Louisiana Landowners Association (Doc. #16490) 660
W. E. Walpole Farms (Doc. #16508) 662
Farm Credit of New Mexico (Doc. #16511) 662
Texas Association of Builders (Doc. #16516) 663
Inland Empire Utilities Agency, California (Doc. #16520) 664
South Dakota Farm Bureau (Doc. #16524.1) 664
Kentucky Association of Manufacturers (Doc. #16525) 665
Oklahoma Municipal League (Doc. #16526) 666
Kentucky Oil and Gas Association (Doc. #16527) 666
Riceland Foods (Doc. #16530) 668
Kentucky Department of Environmental Protection (Doc. #16535.1) 669
Utah Farm Bureau Federation (Doc. #16542) 669
Utah Farm Bureau Federation (Doc. #16542.1) 671
Washington State Water Resources Association (Doc. #16543) 672
ARIPPA (Doc. #16545) 673
Lafarge North America (Doc. #16555) 674
Cucamonga Valley Water District (Doc. #16556) 675
Texas Water Development Board (Doc. #16563) 676
Local Government Advisory Committee (Doc. #16574) 678
Duke Sherwood Contracting (Doc. #16588) 680
Virginia Poultry Federation (Doc. #16604) 680
Cortland County Soil and Water Conservation District (Doc. #16607) 684
Genesse County Agricultural and Farmland Protection Board (Doc. #16608) .. 684
Stutzman, H. (Doc. #16620) 685
Bayou Concrete LLC (Doc. #16629) 686
Hardee County Board of County Commissioners, Wauchula, Florida (Doc. #16634) 687
North Dakota Wildlife Federation (Doc. #16638) 687
Anonymous (Doc. #16646) 688
Peace River Valley Citrus Growers Association (Doc. #16654) 688
Greater Louisville Inc.'s Energy & Environment Committee (Doc. #16673) 689
Murnin, D. (Doc. #16709) 690
Sullivan County Highway Department (Doc. #16789) 691
Mississippi Manufacturers Association (Doc. #16790) 691

US EPA ARCHIVE DOCUMENT

Beaver County Conservation District (Doc. #16791) 692
Commissioners for Somerset County (Doc. #16795) 692
Hendrix, C.D. (Doc. #16863) 693
Montana Water Resources Association (Doc. #16889) 693
Transportation Corridor Agencies (Doc. #16897) 694
Arkansas Attorney General (Doc. #16899) 695
Association of Equipment Manufacturers (Doc. #16901) 696
Bennett, J. (Doc. #16911) 699
Lake and Trail Properties (Doc. #16913) 700
Illinois Agri-Women (Doc. #16916) 701
Texas Oil & Gas Association (Doc. #16917) 702
Johnston N. (Doc. #16920) 703
Coachella Valley Water District (Doc. #16926) 703
Border Soil & Water Conservation District, Elida, NM (Doc. #16977) 704
Island County Board of Commissioners (Doc. #16999) 704
Lower Wind River Conservation District (Doc. #17013) 705
Terrebonne Parish Council (Doc. #17016) 705
Association of Texas Soil and Water Conservation Districts (Doc. #17020) 706
Placer County Water Agency (Doc. #17027) 706
Mississippi Department of Environmental Quality (Doc. #17031) 707
Arizona House of Representative (Doc. #17041) 707
Ames Construction, Inc. (Doc. #17045) 708
San Gabriel Basin Water Quality Authority (Doc. #17049) 709
St. Charles Parish, Office of the Parish President (Doc. #17053) 710
St. John the Baptist Parish, Office of the Parish President (Doc. #17054) 710
City of Portsmouth (Doc. #17057) 711
Castaic Lake Water Agency (Doc. #17061) 711
Anderson-Cottonwood Irrigation District, Anderson, CA (Doc. #17085) 711
South Dakota Soybean Association (Doc. #17097) 712
Lander County Board of Commissioners (Doc. #17098) 713
Anonymous (Doc. #17112) 714
Office of the Parish President, Terrebonne Parish Consolidated Government (Doc. #17165) 715
Shumnaker, Loop & Kendrick (Doc. #17166) 715
Cook Farms & Cattle Company (Doc. #17203) 716
South Big Horn County Conservation District (Doc. #17264) 717
Walpole, W. (Doc. #17310) 718
Fields, F.S. (Doc. #17352) 719
City of Poquoson (Doc. #17358) 720
Tangipahoa Parish Government (Doc. #17369) 720
Upper Macungie Township (Doc. #17370) 721
Georgia Transmission Corporation (Doc. #17371) 722
The Nature Conservancy (Doc. #17453) 722
Congress of the United States (Doc. #17454) 723
United States House of Representatives (Doc. #17457) 724
United States House of Representatives (Doc. #17460) 725

US EPA ARCHIVE DOCUMENT

City of Natchitoches, LA (Doc. #17469) 725
Tennessee Valley Association (Doc. #17470) 726
Pyramid Lake Paiute Tribe (Doc. #17472) 727
Strout, D. (Doc. #17683) 727
Harrison, S. (Doc. #17892) 728
Water Advocacy Coalition (Doc. #17921.1) 728
Lovett's Speed Shop, Inc. (Doc. #17978) 729
Hassel Haven Ranch (Doc. #17990) 729
Tennessee Citizens for Wilderness Planning (Doc. #18014) 729
Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #18016) 730
United States Senate (Doc. #18022) 731
United States Senate (Doc. #18025) 732
Xcel Energy (Doc. #18023) 733
United States Senate (Doc. #18027) 734
Plu's Flying Service (Doc. #18028) 735
Peters Township, McMurray, PA (Doc. #18311) 735
Wilson, M.D. (Doc. #18403) 736
Whittingham, J. (Doc. #18426) 736
Reitmeier, J. C. (Doc. #18429) 737
Fogg III, F. W. (Doc. #18446) 738
DeGrandchamp, J. (Doc. #18478) 738
Indiana Coal Council, Inc. (Doc. #18495) 739
Meike, D.L. (Doc. #18550) 739
Snyder, S. (Doc. #18555) 740
Grether, S. (Doc. #18668) 741
Indiana Wildlife Federation (Doc. #18723) 742
National Governors Association (Doc. #18790) 742
Philadelphia Sustainable Businesses (Doc. #18794) 743
Friends of Shades Creek (Doc. #18816) 744
Earth Bread + Brewery et al. (Doc. #18817) 745
Virginia Manufacturers Association (Doc. #18821) 745
Indiana Republican Congressional Delegation (Doc. #18822) 746
Florida Department of Transportation (Doc. #18824) 748
City of Goose Creek, South Carolina (Doc. #18827) 749
Concerned Citizens of Long Branch and NJ Environmental Justice Alliance (Doc. #18829) 750
BMG Marine, Inc. (Doc. #18855) 750
The Honorable Kevin Boyle, et al. (Doc. #18858) 751
Action United, et al (Doc. #18859) 751
South Carolina Public Service Authority (Doc. #18860) 752
Western Farmers Electric Cooperative (Doc. #18861) 755
American Public Gas Association (Doc. #18862) 756
Hagerman-Dexter Soil and Water Conservation District (Doc. #18863) 757
Independent Petroleum Association of America, et al. (Doc. #18864) 757
Teichert Materials (Doc. #18866) 759

US EPA ARCHIVE DOCUMENT

Pioneer Natural Resources USA, Inc (Doc. #18874) 760
Marcellus Shale Coalition (Doc. #18880) 760
U.S. Shorebird Conservation Partnership (Doc. #18881)..... 762
Kankakee River Basin Commission (Doc. #18886)..... 763
Pottawattamie County, Iowa (Doc. #18889)..... 764
Georgia Association of Manufacturers (Doc. #18896)..... 764
Cross Three Quarter Horses and Livestock (Doc. #18902)..... 765
West Valley Planned Communities (Doc. #18906)..... 765
Clark Canyon Water Supply Company (Doc. #18932) 767
Wyoming Board of Agriculture (Doc. #18938)..... 769
Progressive Farm Credit Services (Doc. #18948)..... 770
Maryland Building Industry Association (Doc. #18978) 771
City of Hanahan, South Carolina (Doc. #18983)..... 772
Abbott, P. (Doc. #19212)..... 773
Park County Commissioners, Montana (Doc. #19240)..... 774
South Carolina Farm Bureau (Doc. #19246) 775
Pinnacle Real Estate (Doc. #19249) 776
U. S. House of Representatives (Doc. #19303) 777
United States Senate (Doc. #19307) 778
Smith's Ready Mix, Inc. (Doc. #19313) 780
Louisiana House of Representatives (Doc. #19316)..... 782
Upper White River Watershed, Missouri (Doc. #19323) 783
F & W Forestry Services, Inc. (Doc. #19326) 783
Board of Madison County Commissioners, Virginia City, MT (Doc. #19370) . 785
West Virginia Sustainable Business Council (Doc. #19423) 785
American Legislative Exchange Council (Doc. #19468) 786
CEMEX (Doc. #19470) 786
National Agricultural Aviation Association (Doc. #19497)..... 788
Home Builders Association of Mississippi (Doc. #19504) 790
Mitchell Environmental Health Associates, et al. (Doc. #19533) 793
Clark Fork Coalition (Doc. #19539)..... 794
National Association of Home Builders (Doc. #19540)..... 794
Clean Up the River Environment (Doc. #19551) 803
Ohio Pork Council (Doc. #19554)..... 804
Union Craft Brewing Co. (Doc. #19559)..... 804
American Society of Civil Engineers (Doc. #19572) 805
St Charles Parish, Louisiana (Doc. #19582)..... 806
Home Builders Association of Central Arizona and Southern Arizona Home Builders Association (Doc. #19588)..... 808
Butte County Administration, County of Butte, California (Doc. #19593)..... 809
Louisiana House of Representatives, District 12 State Representative (Doc. #19648) 810
Centennial Water and Sanitation District (Doc. #19650) 812
Miami County Farm Bureau Association (Doc. #20336)..... 812
Empire District Electric Company (Doc. #20501) 815
Lapeer County Board of Commissioners (Doc. #20503) 816

US EPA ARCHIVE DOCUMENT

Topic 17. NON-TECHNICAL COMMENTS

17.1. GOVERNMENT/INDUSTRY (NON-GENERAL PUBLIC)

Hennepin County Public Works, Minneapolis, Hennepin County, Minnesota (Doc. #0008)

17.1.1 The proposed amendment codifies how the USACOE has been making case by case decisions regarding whether or not they had jurisdiction subsequent to the supreme court rulings. Of note, the proposed change does narrow their jurisdiction per the court decisions, but still maintains their jurisdiction over tributaries to navigable waters and wetlands "adjacent to these tributaries". Truly isolated wetlands still must be reviewed for jurisdiction and may or may not be subject to federal protection/regulations. (p. 1)

Agency Response: **The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus affirmative jurisdictional determination has been made in the point of entry watershed, all similarly situated waters in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in a region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.**

National Association of Home Builders (Doc. #0010)

17.1.2 The Agencies' interpretation of the meaning of "Waters of the U.S." (WOTUS) under the Clean Water Act (CWA) continues to be a major concern for NAHB's members as it impacts several programs that require them to obtain permits. For example, many builders and developers must obtain Section 404 permits for the "discharge of dredged or fill material" before they construct their residential, commercial and mixed-use projects. In addition, most of NAHB's builder members are required to obtain Section 402 permits

US EPA ARCHIVE DOCUMENT

and meet state Section 303(d) requirements to be allowed to discharge stormwater into a water body that is considered to be a WOTUS.

Because of the significant impact this rule could have on our industry, it is imperative that it be finalized only after all parties are provided sufficient opportunity to give careful thought and consideration to all aspects of the rule and its implementation. Unfortunately, the current deadline fails to provide this opportunity. The Agencies' proposal is lengthy, complex and raises many scientific, legal and policy issues that require careful consideration. The docket for this issue also includes several hundreds of pages of data, information and legal opinions – all of which must be reviewed and analyzed. Likewise, NAHB and other stakeholders will be required to collect additional information to fully assess the proposal's impact because the rule will have different results in different geographical regions. (p. 1-2)

Agency Response: **The agencies provided public commenters over 200 days to submit comments. In addition, this rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.**

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 U.S. Conference of Mayors (Doc. #0825.1)

17.1.3 It is our belief that changes to the CWA definition of "waters of the U.S." will have far-reaching effects and could have unintended consequences to a number of state and local CWA programs, including the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, and Spill Prevention, Control and Countermeasure (SPCC) programs. Because the agencies' analysis is "incomplete," our organizations need additional time to further develop an economic analysis to help us more completely understand how all waters will be impacted, beyond the current analysis of Section 404 permit applications. (p. 1-2)

Agency Response: **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 provided the public over 200 days to submit comments. This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis. The economic**

US EPA ARCHIVE DOCUMENT

analysis estimates costs and benefits for Sections 311, 401, 402 (stormwater, pesticide general permit, Confined Animal Feeding Operation permits) and 404 programs to account for an estimated increase in permitting and activities that would result from the rule when compared to the baseline of current practice.

Skamania County Board of Commissioners, Washington (Doc. #0841.1)

17.1.4 [T]his proposed rule has the potential of adding cumbersome federal permitting processes for even the simplest of roadway maintenance activities and putting our county in a liability situation from not being able to perform work that might be delayed by added bureaucracy. (p. 1)

Agency Response: The rule creates no new permitting processes. Importantly, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

National Stone, Sand and Gravel Association (Doc. #0843)

17.1.5 NSSGA members rely on Clean Water Act permits to operate, and changes to what is jurisdictional can significantly affect aggregates operations. (p. 1)

Agency Response: The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Minnesota Golf Course Superintendents' Association (Doc. #0844)

17.1.6 Your proposed rule is a significant expansion of the Clean Water Act that will affect every American, and have significant impact on my business and community due to the proposed increased jurisdiction over all waters. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many golf course water features, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Responsible Industry for a Sound Environment (Doc. #0845)

17.1.7 Your proposed rule is a significant expansion of the Clean Water Act that will affect every American, as well as those businesses working to protect communities from harmful pests and invasive species on public and private lands. EPA-approved pesticide products play a vital role in protecting public health, the environment and maintaining green spaces across the nation. By expanding the definition of "waters of the U.S." and subjecting all waters to regulation, every pesticide and fertilizer application is impacted, whether it's done by a professional or consumer. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not establish any new regulatory requirements for pesticide and fertilizer applications. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Department of Agriculture, New Mexico (Doc. #0854)

17.1.8 The proposed rule will substantially impact the agricultural community and their practices. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Duke Energy (Doc. #0855)

17.1.9 Duke Energy operates electric generating and delivery facilities in several states that would be affected by EPA's proposal and therefore has a significant interest in the outcome of the rulemaking. (p. 1)

Agency Response: The agencies appreciate that the Clean Water Rule is of significant interest to many Americans. The rule will make the process of identifying waters protected under the CWA clearer, simpler, and faster.

US EPA ARCHIVE DOCUMENT

Western Coalition of Arid States (Doc. #0923.1)

17.1.10 We believe that the proposed rule must give local water providers clarity and certainty with regard to whether a water body is subject to the Clean Water Act. We are also concerned that the regulatory burden borne by our member agencies, particularly as it relates to permitting, be as transparent and straightforward as possible. (p. 2)

Agency Response: The rule will provide clarity. In this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Bijou Irrigation System (Doc. #0924)

17.1.11 The suggestion of giving the Environmental Protection Agency (EPA) extended jurisdiction to govern all water in the United States (US) that would include but not be limited to drainage areas, ephemeral streams, plias, road side barrow ditches, and or any area that rainfall tends to collect is not a realistic and would have an adverse effect economically to the agricultural industry throughout the U.S. (p. 1)

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

Wilbur-Ellis Company (Doc. #0953)

17.1.12 This proposed regulation has the potential to cripple agriculture and forestry here in the Pacific Northwest. Due to our mountainous and rolling prairie terrain, every slope will have small runoff areas and seasonally wet drainage areas. These pose no issues with fish or wildlife but, potentially, would bog down our entire industry in unnecessary paperwork and restrictions. The current system works well and protects that waters that need protections. (p. 1)

US EPA ARCHIVE DOCUMENT

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

Kittson County Board of Commissioners (Doc. #1022.1)

17.1.13OPPOSITION TO NEW EPA REGULATIONS

WHEREAS, Kittson County, Minnesota has experienced long term and costly delays to its road construction projects and also to private projects located in this county due to the EPA and Army Corps definitions for "Waters of the U.S. (…)

WHEREAS, the EPA now wishes to adopt new regulations which will indeed grant them final authority in matters dealing with waters of the U.S. and will include regulation of man-made ditches, public drains, tributaries, adjacent & neighboring wetlands, ecoregion, significant nexus, surface connection, ground water connection, discharge and possibly much more. Regulation of these latter items has currently resulted in high levels of confusion, delays and increased permitting costs for the applicants. It has also allowed the EPA and the Corps to far exceed their applicable regulatory, statutory and constitutional limits. In addition, this regulation is redundant to State wetland regulations that are already in place and mitigate wetland impacts from a prepaid wetland bank of credits for road projects. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United 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 agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance") and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA.**

Alabama State House D-31 (Doc. #1151)

17.1.14This rule will have dire implications for farms and businesses. By significantly expanding the scope of navigable waters subject to Clean Water Act jurisdiction, previously unregulated areas such as ponds, ditches and puddles could easily fall under federal regulation and scrutiny. The potential for increased costs and time delays related to

US EPA ARCHIVE DOCUMENT

obtaining permits for simple, everyday farm activities would place undue burdens on farmers who already deal with countless federal rules. (…)

The proposed rule does not provide clarity or certainty as EPA has stated. The only thing that is clear and certain is that, under this rule, it will be more difficult to farm or make changes to the land. Farmers were the first stewards of the land and continue to take great pride in ensuring our nation's land and water resources are cared for properly. This rule simply goes too far.

Alabama farmers will be severely impacted by this bad rule. Therefore, I ask you to withdraw the proposal. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will in fact provide greater clarity regarding the identification of waters protected under the Clean Water Act.The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

Dynegy Inc. (Doc. #1240)

17.1.15Dynegy would be significantly affected by the proposed rulemaking to define the scope of Clean Water Act (CWA) jurisdiction. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will in fact provide greater clarity regarding the identification of waters protected under the Clean Water Act.**

Whitman, Requardt & Associates, LLP (Doc. #1330)

17.1.16Claiming jurisdiction over erosional gullies, particularly those that can be clearly be shown to have been caused by a stormwater outfall, where no natural channel ever existed, can significantly hamper localities in their efforts to repair erosional gullies and prevent downstream export of sediment and degradation of downstream waters. (p. 1)

Agency Response: **Ephemeral erosional features, such as gullies and rills that do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called "gullies" (or**

US EPA ARCHIVE DOCUMENT

the like) even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

NextEra Energy and Florida Power & Light Company (Doc. #1345)

17.1.17NEE would be significantly affected by the proposed rulemaking to define the scope of Clean Water Act (CWA) jurisdiction. (p. 1)

Agency Response: The agencies appreciate that the Clean Water Rule is of significant interest to many Americans. 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 agencies believe that the rule will in fact provide greater clarity regarding the identification of waters protected under the Clean Water Act.

Anonymous (Doc. #1371)

17.1.18WHEREAS, the proposed rule, if adopted would require Counties and special districts to obtain costly and burdensome Section 404 Permits from the USACE for the construction of small bridges and culverts, and routine maintenance of some ditches, canals, and other such water conveyances; (p. 1)

Agency Response: The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

House of Representatives, Congress of The United States (Doc. #1375)

17.1.19These concerns raise the complexity of this rule as a whole, and the potential increased scope of the rule will only create additional burdens to Iowa farmers. While interpretation of this proposed rule continues to unfold, I ask for you to please address the above concerns listed so I'm able to better understand the potential effect this rule could have on Iowa farmers and other industries. (p. 2)

US EPA ARCHIVE DOCUMENT

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

House of Representatives, Congress of the United States (Doc. #1376)

17.1.20I write to express my concerns about the Environmental Protection Agency's (EPA) proposed rule to expand its permitting authority under the Clean Water Act (CWA) by redefining "waters of the United States." As written, I believe this proposed rule will have an unintended negative impact on farmers, construction workers, miners, manufacturers, and private landowners. (p. 1)

Agency Response: **The rule does not expand the EPA's permitting authority. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The rule responds to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, 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.The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

United States Senate (Doc. #1377)

17.1.21In addition, unlike other states, Arizona is literally crisscrossed with man-made canals that are essential for critical water delivery. Under EPA's proposed assumptions, it is possible that every mile of these canals - including those that are not currently jurisdictional - will fall under CWA regulation. Taken together, it is easy to see the additional regulatory burden that the rule as proposed would create on industries that comprise the very backbone of the state' s economy such as home building and construction, agriculture, ranching, mining, and water delivery. It is worth nothing that this regulatory burden for newly jurisdictional waters would extend beyond wetlands permitting to all of the various CWA regulatory requirements. (p. 1-2)

Agency Response: **The agencies believe that the rule will provide clarity on which features in Arizona, and across the country, are subject to Clean Water Act jurisdiction. The agencies do not believe that the rule will create an undue regulatory burden. Rather, the Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses.The agencies have consistently regulated aqueducts and canals as "waters of the United**

US EPA ARCHIVE DOCUMENT

States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. In contrast, the agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have included an exclusion that applies to water distributary systems in paragraph (b)(7), which codifies the long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.

Congress of The United States (Doc. #1434)

17.1.22On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) released a proposed rule that would assert CWA jurisdiction over nearly all areas with any hydrologic connection to downstream navigable waters, including man-made conveyances such as ditches. Contrary to your agencies' claims, this would directly contradict prior U.S. Supreme Court decisions, which imposed limits on the extent of federal CWA authority. Although your agencies have maintained that the rule is narrow and clarifies CWA jurisdiction, it in fact aggressively expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity. Moreover, the rule is based on incomplete scientific and economic analyses. (p. 1)

Agency Response: **The agencies disagree that the rule would directly contradict Supreme Court decisions, expand federal authority and create ambiguity. 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. To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters. This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.**

US EPA ARCHIVE DOCUMENT

Stowers, K. (Doc. #1446)

17.1.23 Based upon my thirty years of government service, I guarantee that within days of the implementation of any proposed permitting process that you will be carrying a growing backlog of unprocessed permit applications. Will that projected backlog blithely be allowed to extend on into the future as job security for existing employees and as justification to hire even more employees to create a bureaucratic empire? What is the point of creating such a burden on our people and our economy, if you cannot stop the big polluters? Is it because the little people will be unable to push back? When, if ever, will permits be approved? There was a homestead application in Alaska that lingered for 60 years. We were dealing with grandchildren of the original applicant.

For me as a farmer it will be devastating to wait months, or years, to obtain a permit to mow my hay, to build a fence or some other small project to manage my cattle more efficiently and to protect the environment. Maintaining a grass cover, installing a tiny water impoundment, a spring development, or a fence will actually mitigate the impact of my farming activities on water quality. Adhering to the guidelines of the Natural Resources Conservation Service, as I currently do, makes good sense to me. (p. 2)

Agency Response: **The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid.**

Knicely, T. and D. (Doc. #1472)

17.1.24 This water bill is a serious threat to farmers, ranchers and other landowners. This would put lots of agricultural people out of business. I thought that government suppose to be for the people, not against the people. This destructive bill is against the people. This bill is communistic. My husband and I run a small farm here in WV. It would put us out of business and many other farmers here in WV an across the US. Our freedoms is been taken away slowly by the stroke of a Pen us in Washington. This is the most alarming regulation that ever seen here is the US. This change in EPA's definition of Waters of the US is a clear and present threat to private property rights for all Americans". This bill gives license to EPA , the Corps, and NRCS to dictate land use across the USA If this bill go in place, it will shut down America. I believe it will lead to starvation in this country. IT will bring devastation and ruin to this country. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid.**

United States Senate (Doc. #1512)

17.1.25I write specifically today to challenge the Administration's claim that the proposed "waters of the United States" (WOTUS) rule is about "protecting our natural resources."[1] It is clear that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are resorting to an unfounded narrative in order to mask the hardship the rule will bring to private landowners. Indeed, if finalized, the proposed WOTUS rule would result in the federal takeover of private property owned by millions of American families, farmers, small businesses, and municipalities. However, as explained below, EPA and the Corps ignore the agencies' history under the Clean Water Act (CWA) of shutting down local conservation efforts as well as the likelihood that other stewardship projects could be impeded if the proposed rule is finalized. (…)

Unfortunately, the proposed WOTUS rule will only expand the agencies' authority to obstruct environmental stewardship efforts. As one witness recently testified before the Senate Environment and Public Works Subcommittee on Water and Wildlife, the proposed rule "will hinder many projects that would benefit the environment" in part because it effectively precludes local implementation of best management practices and treatment controls that benefit downstream, navigable waters.[2] Further, if the examples above are an indication of how the agencies will implement and enforce the proposed rule, many Americans will be surprised to learn that the rule could turn weekend environmental restoration projects near community ponds, creeks, or streams into nightmare ordeals complete with red tape, federal bureaucracy, onerous permitting requirements, and the threat of environmental litigation from far-left advocacy organizations. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

[1] U.S. Environmental Protection Agency, EPA Administrator Gina McCarthy Gives Overview of EPA's Clean Wa1er Act Rule Proposal, YouTube (Mar. 25. 2014), http://www.youtube.com/watch?v=ow-n8zZuDYc.
[2] *Solving the Problem of Polluted Transportation infrastructure Stormwater Runoff: Hearing Before the Subcomm. On Water and Wildlife of the S. Comm. On Environment and Public Works*, 113 Cong. 19 (2014) (testimony of J.G. Andre Monette, Attorney, Best Best & Krieger LLP).

US EPA ARCHIVE DOCUMENT

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

Tehama County Board of Supervisors (Doc. #1619)

17.1.26 The proposed new rule would modify existing regulations regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA) and these changes may have significant impacts on county-owned roads, flood control and stormwater ditches. (p. 1)

Agency Response: The rule does clarify which waters fall under federal CWA jurisdiction, but does not establish any regulatory requirements. The agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. 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. Additionally, many ephemeral and intermittent ditches are now excluded from coverage by the Clean Water Rule under (b)(3).

National Federation of Independent Business (Doc. #1653)

17.1.27 Specifically, it is clear from a reading of the proposed rule that this rulemaking will have a tremendous impact on small businesses across virtually every sector. Therefore, NFIB needs additional time to reach out to our small business members, educate them about the changes proposed, and then assess impact on these members. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies believe that sufficient time has been provided for review of the rule as they provided the public over 200 days to submit comments. This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

Maryland Conservation Council (Doc. #1667)

17.1.28 Therefore, we believe all our waterways should be clean enough to drink from, fish from and swim in without risk of pollution -- from our local rivers and streams, to iconic waters, especially our beloved Chesapeake Bay. Unfortunately, loopholes in the Clean

US EPA ARCHIVE DOCUMENT

Water Act have left many of our smaller waters unprotected, including those that feed and filter the drinking water for 117 million Americans.

Thank you for taking a major step forward to restore Clean Water Act protections to America's streams and wetlands and for your commitment to protecting our waterways. I urge you to move forward as quickly as possible to finalize a strong rule that will restore Clean Water Act protections to all America's waterways – including isolated wetlands – and protect our environment and health. (p. 1)

Agency Response: **Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Save the Dunes (Doc. #1706)

17.1.29 We believe that clear protections for wetlands and headwater streams have been in question for far too long given the SWANNC and Rapanos Supreme Court cases and other realities. It is time to protect the country's streams, wetlands, ponds and other waters from pollution. The rule will help achieve this quickly. One of our highest considerations is protecting drinking water; this rule will make a significant difference in protecting this invaluable resource. It will also protect innumerable streams and wetlands throughout the country. (p. 1)

Agency Response: **The agencies agree that this final rule will improve protection of human health and the environment.**

North Dakota Department of Agriculture (Doc. #1756)

17.1.30 In its current state, the rule's scope is drastically wide and its impacts could be detrimental on agriculture, an industry that utilizes water in almost every operational aspect. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. 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.

Arizona Public Service Company (Doc. #1757)

17.1.31 The impact of the proposed rule on these waters is unclear, and it appears that APS would be significantly affected by the revised scope of Clean Water Act (CWA) jurisdiction. (p. 1)

Agency Response: The agencies appreciate that the Clean Water Rule rule is of significant interest to many Americans. The rule will make the process of identifying waters protected under the CWA clearer, simpler, and faster. 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.

Grant County Board of Commissioners (Doc. #1761.1)

17.1.32 Since stormwater activities are not explicitly exempt under the proposed rule, I as an elected county commissioner, have valid concerns on complying with federal regulations while maintaining the safety of our roads that our schools and citizens must drive every day. Ultimately, I understand that a county is liable for maintain the integrity of our ditches, even if federal permits are not approved by the federal agencies in a timely manner. (p. 2)

Agency Response: The exclusion in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

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

17.1.33 With today's technology and GIS systems each agency jurisdiction coverage area could be laid out on a map. By separating out the jurisdiction and having predetermined mapped areas of jurisdiction this would greatly reduce future litigation costs for the agencies and provide clear direction to the applicants of water related impacts. (p. 3)

US EPA ARCHIVE DOCUMENT

Agency Response: **The preamble addresses the use of remote sensing and mapping to assist in establishing the presence of water. Such tools include the USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. However determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of different remote sensing and desktop tools and a field visit.**

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

17.1.34 The proposed rule will present unreasonable and burdensome regulations for Americans to build in their backyards, grow crops, manage livestock, expand small businesses, and carry out other activities on private lands. (…) This rule and ambiguous definitions presents the potential for expanded challenges to many industries that involve construction and development of facilities. It applies to all Clean Water Act programs, including the Corps §404 dredge and fill permits, §303 water quality standards, §401 state water quality certifications, §311 Oil Pollution Act (including SPCC), and §402 program (including NPDES permits, pesticide general permit, and storm water). (…) Regulatory costs associated with changes in jurisdiction and increases in permits will erect bureaucratic barriers to economic growth, negatively impacting farms, small businesses, commercial development, road construction and energy production, to name a few. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays. In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land.**

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Pinnacle Construction & Development (Doc. #1807)

17.1.35I am interested in this definitional change because I believe it will materially impact not only my business but the entire construction industry. I firmly believe the proposed rule, despite assurances to the contrary, contains changes that could significantly expand federal jurisdiction, triggering additional expensive and time-consuming permitting and regulatory requirements.

As an individual engaged in the construction business, I want to comply with common sense regulations and best management practices to ensure the application of the rule as currently written would be a regulatory overreach whose limited benefit is vastly outweighed by its unintended consequences. (p. 1-2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Further, the agencies believe that the rule will in fact provide greater clarity regarding the identification of waters protected under the Clean Water Act, which the agencies believe will result in reduced regulatory demands, ultimately resulting in jurisdictional determinations and permits being made more swiftly. Additionally, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

F. W. Henderson (Doc. #1981)

17.1.36As a rancher and former University of Wyoming Extension educator, I have stayed abreast of current practices. A key refrain of the last few years has been to "be sustainable". I have worked diligently to make my ranch sustainable from an economic, ecological and environmental perspective. Under this proposed rule, ranching will be nearly impossible and those goals will be crushed (in addition to the myriad other regulations being imposed due to the Sage Grouse issues, the Fish and Wildlife Service, etc.). It merely proves that those who are creating these rules have no idea that what they are regulating impedes the "boots on the ground" reality of what provides for the best environmental good. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The final rule includes a provision that waters subject to established, "normal" farming,

silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

County Engineers of Ohio (Doc. #1997)

17.1.37 Proposed changes in the definition of Waters of the United States have many potential impacts on our ability to deliver maintenance and capital improvements to our constituents. Costs of ensuing changes, in our opinion, far outweigh the benefits of perceived water quality, especially without more detailed scientific reasons. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The scientific basis for the rule is strong. The rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.**

Anonymous (Doc. #2082)

17.1.38 Meeting onerous Federal regulations would constitute a hardship for us and we could lose the farm which the family managed to save through the depression and various farm crisis since. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.**

Orleans Audubon Society (Doc. #2113)

17.1.39 Further, a clear understanding of the Clean Water Act's reach and application is essential to the regulated community and the American public. Farmers and other landowners cannot confidently proceed with planned projects without knowing which waters on their land are under jurisdiction of the CWA. The public relies on the ecological services

US EPA ARCHIVE DOCUMENT

provided by rivers, lakes and bays, which are fed by smaller wetlands, lakes, and streams. If some of these smaller bodies of water remain unprotected, ecological services such as flood and storm surge protection and pollution filtration will be lost.

Please consider the enormous value of all bodies of water in this country to wildlife, their habitats, and ourselves as you move forward in the rule making process. (p. 2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

South Creek Township (Doc. #2252)

17.1.40 The South Creek Township Board of Supervisors is concerned that the understanding has always been that the land owner owns the land, but the State of Pennsylvania owns the water in the creeks, streams, etc. Pennsylvania has a gigantic list of rules and regulations governing the waterways of the state. Under the proposed regulation, whose rules would we go by the Federal EPA rules or the State rules? This is a real issue for us as we have lots of streams, wetlands, ponds etc. We are a tiny (population 1238) municipality and find it difficult to keep up with the present stream of rules and regulations emanating from the state. Thank you for your consideration of this matter. (p. 1)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.**

Anonymous (Doc. #2282)

17.1.41 As a former Conservation Commissioner for the Town of Townsend, Massachusetts I can appreciate the importance of protecting waters and wetlands and also the impact that regulations have on the economy and landowners. As a farmer and landowner I understand the impact these rules and regulations have on people and I also do my best to ensure that the land and water is protected. I am a good steward of the land and all its

US EPA ARCHIVE DOCUMENT

occupants. I don't need more over site by the Government. These rules are in my opinion unnecessary and add increased burden for no legitimate reason. It seems to me this is a solution looking for a problem. It is already too costly and burdensome to comply with existing regulations and in my opinion we should be moving in the opposite direction. I see no need to adopt these new regulations and in fact believe that a review should be performed with the intent to lesson regulations. There comes a point when people's property rights are being infringed upon and they have every right to demand relief. I see this as an example.

My farm is very wet during certain times of the year and I need to occasionally clean ditches and travel over and through wet areas. It would be impossible for me to request permission every time I need to perform these activities and fear that these new rules will create an excuse to limit my activities. I am opposed to this expansion of the definition of waters of the US and hope you consider the detrimental impacts it will have on people like me. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The 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.**

Anonymous (Doc. #2317)

17.1.42My concern, as a non-point source polluter, is that in the Clean Water Act there is no provision for cost/benefit analysis when new regulations are introduced or old regulations changed. Point source polluters have this protection. Under these new definitions of "waters of the US" what is actually regulated and not regulated is very open to interpretation. As a farmer I am very concerned that I can be forced to make changes that could put my family farm in jeopardy.

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that**

US EPA ARCHIVE DOCUMENT

clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

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

17.1.43WHEREAS, the Hyde County Board of Commissioners and The Hyde Soil & Water Conservation District Supervisors acknowledge that this proposal would potentially cause a major shift in policy and would negatively impact the rights and freedoms of all land owners and would take away the flexibility in which states may have in making their own rules for waters in the state. This would not be favorable to the production of agriculture and land owners across the country. (p. 2)

Agency Response: **The rule does not affect the rights of states. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.**

Anonymous (Doc. #2376)

17.1.44I am a farmer in Michigan. All of my fields are tiled. I am very concerned that you will use this rule to regulate where and how I install tile, my tile maintenance activities, how much water I drain from the fields, as well as the contents of the water that exit from the tile outlets into drainage ditches (e.g. manure, fertilizers, herbicides). As I read the rule, you could potentially try to regulate how many cows I put in a pasture abutting a stream. I don't believe Congress has given EPA the authority to regulate such day-to-day farming activities. (p. 1)

Agency Response: **The rule interprets the intent of Congress and reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers to protect and conserve natural resources and water quality on agricultural lands. While waters subject to normal farming, silviculture, or ranching practices may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis instead of by rule. The agencies also recognize that waters subject to normal farming, silviculture, or ranching practices are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination. The agencies note that the maintenance exemption provided within the Clean Water Act remains unchanged**

US EPA ARCHIVE DOCUMENT

by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

T. Moxley (Doc. #2520)

17.1.45Never in my lifetime have farmers and ranchers been more careful with their resources. I reject the notion that the Clean Water Act must be expanded. It is an overreach that places enormous burdens upon landowners like myself for little or no outcome. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). 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.

Anonymous (Doc. #2578)

17.1.46I believe the principles of private property and land ownership instill in an individual the responsibility and the desire to improve property for an owner's good and the rest of society. Let farmers and other landowners make their property the best it can be, rather than being dictated by someone in Washington who doesn't understand Iowa farming. (p. 1)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

US EPA ARCHIVE DOCUMENT

Anonymous (Doc. #2636)

17.1.47I am the landowner of a 160-acre farm which is rented this year, but may not be rented next year. As it stands, the acreage is under contract with a developer. My thought is, "STAY OUT OF MY DITCH." (p. 1)

Agency Response: The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.

Anonymous (Doc. #2639)

17.1.48This proposal would virtually paralyze their ability to conduct normal business of watering livestock, raising crops, or managing water resources by effectively making every body of water, even those that might only occur after occasional heavy rain and be dry the rest of the year, and whether or not they are connected to any navigable body of water, subject to EPA micromanagement. The added cost of continually having to obtain permits, and resulting limits on what they can do will be cost prohibitive to these businesses, and will only have negative effects on food prices at the grocery store in the end. For, if you increase the cost of production, someone ultimately has to pay that extra cost to make it all work, and it can't be the farmer/rancher, otherwise they go out of business. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. With the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Brown County Commission (Doc. #2728)

17.1.49It is our belief that changes to the CWA definition of "water of the U.S." will have far-reaching effects and could have unintended consequences that would affect our entire county and almost any project that we would try to accomplish. (p. 1)

Agency Response: The agencies appreciate that the Clean Water Rule is of significant interest to many Americans. 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

US EPA ARCHIVE DOCUMENT

regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. With the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

EarthAction and 2020 Action (Doc. #2863)

17.1.50I personally, and EarthAction and 2020 Action, the two organizations for which I am the Director, very much support the recent rule, EPA-HQ-OW-2011-0880, that the EPA has introduced regarding the Clean Water Act. This rule will help clarify which water bodies and water ways are subject to the Clean Water Act and will go a long way to restoring and keeping America's water clean and unpolluted. I applaud your leadership. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Anonymous (Doc. #2952)

17.1.51As a retired land owning farmer I have come to realize that any farm that depends on outflow of drainage of water from rains can only survive well and avoid becoming impossible to farm if many of the maintenance work actions are not applied at the earliest scheduling as the problems happen and are discovered. Maintaining outflow of excess water for example must be continual and close in time to the overloading (rain) event. If extraneous material has fallen in a drainage way it must be removed to prevent blockage problems which tend to start small and get big. Therefore applying for permits for minor or ongoing small maintenance should be exempt from permit requirements. (p. 1)

Agency Response: **The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."**

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Anonymous (Doc. #3005)

17.1.52My husband and I are farmers. (…) As we live in the Marcellus Shale region of the Endless Mountains, clean water is especially important to us. I have had three extensive water tests of our private water well done in the past three years to ensure that our water supply continues to be safe. On our farm, we take measures to protect not only our own water, but also that of a neighbor's nearby 5 acre pond which borders our property.

This proposal seeks to control my land, not improve water quality. The proposed rule would significantly expand the scope of navigable waters subject to Clean Water Act jurisdiction by regulating small and remote waters many of which are not even wet or considered waters under any common understanding of that word.

On our farm we have forest which has a dry floor the majority of the time, except during heavy spring rains when puddles form. We care for this forest and do not allow our cattle in the woods, to avoid compaction of the soil. I can't afford to pay for a permit, which would be required under this proposal, if I wish to enter my own forest to clear dead trees and cut firewood. (Which we would do in the fall, not spring.)

We also have ditches that are dry most of the time running alongside our fenced fields. I can only imagine the headaches this proposal would create in regards to them. (p. 1)

Agency Response: **As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.**

17.1.53Our eldest son is 34 years old. He enlisted in the military in 1999, during his senior year of high school, because he wanted to serve his country. At age 20, he inherited a farm. He plans to one day operate the farm himself, but currently he leases his cropland to a young farmer, while he first completes his military career in anticipation of military retirement. The "normal" farm exemption would not apply in his case- nor would it apply to my husband and I, for although we have been farming since 1972, we left agriculture for a period during 1985-1988. Nor would the exemption apply to our five other children to whom we plan to transfer our farm deed, reserving a life estate for ourselves.

On my son's farm there are several forests, one of which has a stone farm road passing through as access to back cropland and pasture. His woods are similar to our own- dry most of the year, except during heavy spring rains when puddles form. He can't afford expensive permits in order to annually cut back brush from his private farm road to allow farm equipment to pass through to back fields. He also respects his woods and does not allow cattle to occupy them. Nor does he allow the electric company to spray herbicide on their right-of-way through the woods- brush is cut manually. He also has a small farm pond, which he carefully maintains for the benefit of wildlife and fire prevention- cattle are not allowed in it. (…)

Farmers like me and my extended family will be severely impacted by the proposed rule- a rule that could very well create the end of many family farms and I ask that you withdraw it. Please remember that with every farm lost, we become more dependent on

imports from other countries and a nation that ceases to produce the food, fiber, and lumber to feed, clothe, and shelter its citizens, will soon find itself at the mercy of other rulers. (p. 1-2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. 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.**

Anonymous (Doc. #3010)

17.1.54I own a small ranch in southern Colorado. I understand that under the new proposals, a good deal of new property will come under the jurisdiction of the federal government as waterways. Most of the 'new' property will not actually be navigable waterways, but may be defined as such under the regulation. That means even ditches I cut in fields for irrigating pasture will now by under federal jurisdiction. It also likely includes washes that only have water in them after a REALLY big rain or during spring snow melt, and that only for a day or so.

Doing the routine things that must be done around a farm will become overly burdensome (if not completely impractical) if daily projects are subject to permitting, inspection, or prohibition from use..... even though the 'waterway' has no effect whatsoever on the world beyond the borders of my farm. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. 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. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. Finally, ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a bed and banks and**

US EPA ARCHIVE DOCUMENT

an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

Minnesota Association of Townships (Doc. #3090)

17.1.55Whereas, The proposed expanded scope of the Clean Water Act would likely trigger secondary issues involving matters such as storm water and water reuse (p. 1)

Agency Response: The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6). Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

17.1.56WHEREAS, the proposed new rule calls for regulatory requirements which will create a major burden to the residents, businesses and governmental agencies in the Parishes of Southwest Louisiana by expanding the list of projects requiring administrative review and permitting thereby creating additional regulatory delays for projects which will in turn result in more delays and costs for each parish, add additional paperwork and time to the time required for parishes and municipalities to complete public infrastructure projects due to the new regulatory process, slow down business expansion and add additional restrictions to development through wetland mitigation and significantly alter the benefit cost ratio on some much needed restoration and protection projects in the Chenier Plain of Southwest Louisiana (p. 3)

Agency Response: The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that

US EPA ARCHIVE DOCUMENT

would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Anonymous (Doc. #3093)

17.1.57I ask the EPA to totally abandon these new proposals as it will only cripple the very industry that feeds you. YOUR food and its cost to you depend on the costs that go into producing it, just like anything else. The more it costs to produce, the more it costs at the grocery store, plain and simple, and these regulations will only fuel that fire. Also, meat animals will die without clean water, so how many cattle or hogs or chickens do you encounter on a daily basis that die from drinking contaminated water? Want to save the fish? Ok, then ensure basic manure management rules are followed and let those that know a lot more about manure and waste than you do, manage it, and do what they already know how to do! No matter if you eat meat, are vegan, eat only organic, etc, this reality is true. Worried about contamination? What about the urban people who dump 50 to 100 lbs of commercial fertilizers on their tiny lawns each month of the summer so they have nice green grass for their cookouts and in which their pet can defecate? You might find that the per acre application of those products in the cities and suburban areas would far exceed that of most agricultural fields whether those ag fields had commercial fertilizer applied, or manure. (p. 1-2)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Collins, D. Member of Congress, U. S. House of Representatives (Doc. #3097)

17.1.58The ultimate goal for the EPA and Corps is to extend their power to micromanage all bodies of water, including but not limited to: intermittent streams, dry-ditches, and private irrigation ponds, in the U.S. and expand the jurisdictive scope of the CWA. (p. 1)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. With this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.

17.1.59The current exclusions from the CWA would not in any way change with the implementation of this rule. If anything the new rule further limits the possibility for

US EPA ARCHIVE DOCUMENT

exclusions. The exclusions would include: water treatment facilities which meet CWA requirements, prior converted cropland, some artificially irrigated areas, and some upland ditches which do not meet the rule's new revised definition of "tributary." Although these are exclusions to the rule, they are very narrow and in no way beneficial to the landowner if this rule were to be passed. (p. 2)

Agency Response: **The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land. In addition, the final rule adds an exclusion for puddles.**

M. Sharp (Doc. #3233)

17.1.60 If EPA's and Corp's authority is expanded in such a manner, it would allow our "federal government" to regulate water in springs, ditches both irrigation and drainage, ponds, creeks and water puddles on private property. Their overreach through a proposed private property rights. This can drastically impact farmers and ranchers who depend on these waters to keep their farms and ranches businesses viable.

We currently have some 9 springs and creeks, and 2 wells on our farms. As I read the information, all agriculture activities such as: applying herbicides (weed control) fungicides, insecticides; harvesting hay; grazing cattle, fertilization of pastures and other grasslands; moving cattle within the vicinity of one of these natural waters will require "permits". It's going to require "permits". It's going to require one full time person to apply and keep permits in effect so that we can operate the farms. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

Southern Nevada Home Builders Association (Doc. #3251)

17.1.61 By failing to properly consult with the state governors and agencies in preparing and promulgating the proposed CWA rule changes, the EPA also appears to have overlooked the various negative impacts that this rule will likely have on a number of important issues that are facing the individual states and the country as a whole. These proposed rules changes will likely impact current and future efforts to repair, replace and expand existing infrastructure and to develop new infrastructure to deal with transportation and water issues facing many of the states, including Nevada. (p. 3)

US EPA ARCHIVE DOCUMENT

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.**

Washington Farm Bureau (Doc. #3254.2)

17.1.62 Though our primary concern is the impact on agriculture, potential problems with this rule extend far beyond agriculture. Every roadside ditch on every homeowner's property, including every simple act of landscaping, spraying or mowing, could become subject to potential Clean Water Act regulations such as CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit requirements and CWA Section 404 Dredge and Fill permit requirements. (p. 2)

Agency Response: **As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.**

17.1.63 The proposed changes will impact farmland conversion rates because EPA's current rule and policy actions are "piled on" top of state and federal regulatory burdens that already exceed what many producers can reasonably afford. This compounding effect undercuts the livelihoods of the state's farm and ranch families and threatens to destroy the profitability of their operations. What happens to unprofitable farms and ranches? They get paved over and converted to subdivisions, never to be used again for agriculture production. The local jobs these lands provided are lost, as food grown on foreign soils, with little or no regulation, displaces trusted local food sources. Such terrible policy

US EPA ARCHIVE DOCUMENT

outcomes illustrate the serious problems faced by agriculture, and anyone who values local food production, today. (p. 3)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.**

Sheridan County Commission (Doc. #3271.2)

17.1.64I am extremely concerned that this proposed rule would significantly modify current, existing regulations and place undue hardships on local governments that provide needed services to our constituents. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act , Supreme Court precedent, and science. There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

Anonymous (Doc. #3300.1)

17.1.65Floodplain Management

Case 1 – Existing Floodplains

Under the proposed rule the floodplains could and many cases would be redefined. Local government has spent an enormous amount of effort, time, and funds mapping and engineering floodplain management programs. Potentially building codes would have to be modified and land use in many cases be redefined.

Conclusion

Under the proposed rule change for Waters of the United States, local government once again is taxed with the burden of funding staff, studies, and potentially lawsuits. (p. 4)

Agency Response: **For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters.**

US EPA ARCHIVE DOCUMENT

Delaware Township Board of Supervisors (Doc. #3308)

17.1.66If the change is approved, townships may not be able to perform routine maintenance on road ditches and may not be able to quickly resolve potential safety issues without having to first obtain a federal permit for such work. The cost for permits, engineering and legal fees would have a significant impact on our township's taxpayers. Also, the township's residents may be at risk if there are restrictions on the use of ponds that are used by local fire departments to suppress fires. (p. 1)

Agency Response: The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 addresses "Maintenance. "In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment.

Sweet Grass Conservation District (Doc. #3310.1)

17.1.67Ranchers in Montana currently follow some of the most comprehensive water quality laws in the country. The proposed change is being interpreted to mean any physical connection or any potential connection where water, no matter how remote or infrequent, could eventually mix with navigable waters. That could effectively allow for every pond, stream, creek bed, drainage ditch, prairie pothole, drain tile or other wet lands in Montana that might contain water at any time of the year to fall under federal jurisdiction. This is an inclusion without any substantial documentation that is will cause any increase of safe management from the current land and resource management styles. (p. 1)

Agency Response: It is not the case that any water is jurisdictional under the rule. The rule reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule establishes jurisdiction in three basic categories: waters that are jurisdictional in all instances, waters that are jurisdictional but only if they meet specific definitions in the rule, and a narrowed category of waters subject to case-specific analysis. Science demonstrates that distance is a factor in the connectivity and the strength of connectivity of wetlands and open waters to downstream waters. Thus, waters that are more distant generally have less opportunity to be connected to downstream waters. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated.

Pendleton County Commission (Doc. #3530.2)

17.1.68[W]e are convinced that these regulations are arbitrary, ambiguous, and very significantly counterproductive, relative to agricultural and commercial activity. It is our opinion that these proposed new regulations serves to expand and pervert the original purpose of the

US EPA ARCHIVE DOCUMENT

clean water act and represents unprecedented government over reach. If enacted, the Waters of the US initiative has the potential to irreparably damage Pendleton County's already fragile economy. (p. 1)

Agency Response: **Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The 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.**

Midwest Hardwood Corporation (Doc. #3531.2)

17.1.69 As business owner and employer with facilities in Wisconsin, Minnesota, South Dakota, Nebraska, Missouri and Kentucky, the Clean Water Restoration Act (CWRA) threatens Midwest Hardwood Corporation's business of procuring and manufacturing hardwoods; and it will affect many other manufacturing companies. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.**

Environment Council of Rhode Island (Doc. #3532.2)

17.1.70 Leaving critical water resources vulnerable jeopardizes jobs and revenue for businesses that depend on clean water, including outdoor activities like angling and water-based recreation. (p. 2)

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and**

US EPA ARCHIVE DOCUMENT

peer-reviewed science. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

17.1.71 The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend. (p. 3)

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.**

United States Senate (Doc. #3536)

17.1.72 This inquiry is in response to recent EPA permitting decisions which have restricted post-construction stormwater discharges at Buckley Air Force Base in Colorado and Joint Base Lewis-McChord in Washington.[3] At each base, EPA attempted to force the military to limit the flow of stormwater on impervious surfaces, despite lacking authority to do so under the CWA. DOD challenged EPA's restrictions in administrative appeals, no doubt recognizing that regulating stormwater flow into each base's municipal separate storm sewer system (MS4) would add significant costs to base construction projects and tie up the military with unnecessary red tape. (p. 1)

Agency Response: **This issue is outside the scope of the rulemaking.**

[3] *See* David LaRoss, EPA, *DOD Settle Appeal of Stormwater Retention Permits, Averting Ruling,* InsideEPA.com (May 2, 2014), http;//insideepa,com/201405022469599/EPA-Daily-News/Daily-News/epa-dod-settle-appeal-of-storrmwater-retention-permits-averting-ruling/menu-id-95.html.

US EPA ARCHIVE DOCUMENT

Pennington County Weed & Pest Board (Doc. #3719)

17.1.73The proposed expansion has the potential to negatively impact Pennington County and private, landowner's ability to effectively manage invasive weeds and pests that can cause economic and ecological harm. (p. 1)

Agency Response: The agencies appreciate that the Clean Water Rule rule is of significant interest to many Americans. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.

Kuzniar, M. (Doc. #3902)

17.1.74I do not see anything wrong with wanting to keep water as clean as possible, however I feel that these new regulations are going to have unforeseen impacts on small to medium size farm where the impact would be the greatest. Personally on the farm I operate there are several places that only have water flow during spring months or heavy rainfall periods, and it is my understanding that with the new regulations those areas would be able to be controlled by the EPA. With our small operations, my family would be hard pressed to comply with any new regulation due to the fact that we are on the lower side of the income scale. I try my best to be as environmentally responsible as I possibly can, but there is a limit to what I am able to accomplish with my limited financial resources. With the new regulations, more costs would be added to the limited financial resources available to myself. I am sure that I am not the only one in this position. I believe that regulations are necessary but feel the new ones proposed by the EPA are going too far. (…) The most notable impact would be economical in nature. I would have to sell the products of my farm (cattle, vegetables, and fruit mainly) at a higher price than people would be willing to pay for those products to cover the added costs (new fences to keep cattle out of previously acceptable areas, permits to fertilize hay fields and fruit trees and bushes where runoff could flow into streams. etc.) of new regulations. If I can't sell my products at a reasonable price I would be forced out of business. I know that I am not the only one in this position. These regulations not only affect farmers but other business as well. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where

US EPA ARCHIVE DOCUMENT

ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions, as well as the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Anonymous (Doc. #3985)

17.1.75We are opposed to this rule because we do not feel that there is any way the Federal Government could come up with any rule that could work for all livestock growers. There is no way the rules should be the same for an Iowa Confinement Beef or hog operation, a Nebraska dry land cow/calf operation. or a Vermont wet land cow/calf operation. If this rule were to go into effect I think you would lose a lot of the small cow/calf operations, that do a good job, but it would not be worth their time to do all the stuff it would take to make them compliant. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science, and is intended to improve the identification of jurisdictional waters across the country. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

Gladstone Land (Doc. #4039.2)

17.1.76The new language states that "adjacent waters, including adjacent wetlands" along with "other waters" can be placed under jurisdictional restrictions. This is much too broad of an interpretation and expands the EPA's control to small bodies of water which famers rely on unrestricted access to for irrigation of their crops. The expanded oversight will place unnecessary regulatory burdens and limitations on farmers who already responsibly manage the land and water their farm and livelihood depend on.

Farmers operate on low margins and strict time tables, so imposing cumbersome legal restrictions and fees on their ability to use water- farmers already pay extensive fees for water rights and preservation- could seriously cripple the industry and nation's food supply. In California, the severe drought has cut off much of the public supply of water flowing through the central valley. Further limiting the amount and speed which famers can access water on their own lands could end much of the farming operations in a region

US EPA ARCHIVE DOCUMENT

that produces 50% of the fresh fruits and vegetables in the United States. The EPA and U.S. Government should seek to encourage farming, not stifle it, as we have already lost more than 70 million acres of farmland during the past 30 years and net farm exports are moving against the U.S. every year, according to the USDA. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule. Further, the agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States."**

Wicomico County, Maryland (Doc. #4118)

17.1.77Expanding the definition of "Waters of the United States" will increase the costs and burdens on businesses, farmers, property owners and local governments. (p. 2)

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

Bullhead City, Arizona (Doc. #4185)

17.1.78WHEREAS, taken together, it is easy to see the additional regulatory burden that the rule as proposed would create on industries that comprise the very backbone of the city's economy such as home building and construction would be adversely affected; (p. 2)

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

US EPA ARCHIVE DOCUMENT

tributaries. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

REMAX Advantage Plus, Cottage Grove, Oregon (Doc. #4235)

17.1.79 Nearly all sectors of the economy — including agriculture, housing, utilities, energy production, and transportation — need permits required under the Clean Water Act (CWA) to conduct their daily operations. Just as importantly, private property owners who want to develop their own land must also frequently obtain these permits. The Supreme Court has affirmed on two different cases that both the U.S. Constitution and the CWA limits federal authority over intrastate waters. The EPA and the Corps are not in line with this through the proposed rule. Instead, they are expanding the scope of federal jurisdiction beyond anything that ever existed under the CWA.

In fact, if this rule were to be finalized, my own business and the activities of my clients would be negatively impacted. As a rural land broker I handle many properties that have very little running water on them. Some with only seasonal water flow. Yet your rules will hinder the ability of owners to develop their lands and even limit the ability to produce crops. It was never the intent of the CWA to take all waters into your jurisdiction. These rules are an outreach of your authority. (p. 1)

Agency Response: **The rule does not place all waters under federal jurisdiction. 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 It rule clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science, and is intended to improve the identification of jurisdictional waters across the country. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.**

W. V. Giniecki (Doc. #4262)

17.1.80 New York farmers are already committed to high water quality standards and we have an excellent water quality program that partners our farmers with state and local officials. Through our joint efforts and a combination of environmental programs, our farmers participate in mandatory and voluntary programs to ensure high water quality. This unauthorized expansion by EPA would upend our current program in the state and place extreme time and financial burdens on both our farmers and our water quality regulators. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

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

Albemarle Area QUWF Chapter, et al. (Doc. #4292)

17.1.81 North Carolinians depend on their 242,500 miles of rivers and streams for clean and abundant drinking water, diverse and abundant fish and wildlife habitat, and local fishing, hunting, bird-watching, and boating recreation that support a strong outdoor recreation economy. Wildlife recreation related activities lead to $3.3 billion spent per year in NC alone. These expenditures support more than 95,000 jobs in the state.

By standing up for these small streams and wetlands, the Environmental Protection Agency and Army Corps of Engineers are protecting some of our state's most important fish and waterfowl habitat.

We applaud the agencies for their efforts to protect these waters and look forward to working with them to finalize and implement the waters of the U.S. rule. From mountain trout anglers, to piedmont bass enthusiasts and duck hunters in eastern NC, this is a critical step towards protecting our sporting heritage and our outdoor future. (p. 2)

Agency Response: **The agencies agree. 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 health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing. About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.**

Daviess County Indiana Board of Commissioners (Doc. #4295)

17.1.82 The expanded jurisdiction will include roadside ditches that are currently maintained by the Daviess County Highway Department ("County Highway"). The inclusion of roadside ditches into the rule will increase costs, create delays, and require permitting efforts for many of the routine maintenance activities performed by County Highway. These routine activities include tasks such as maintenance of bridges, replacement of roadway drainage pipes, installation of new driveways, maintenance of roadside ditches, and maintenance of subsurface roadway drainage tiles. These changes will significantly affect the timeliness of future projects. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.**

Mohave County Water Authority (Doc. #4346)

17.1.83WHEREAS, MCW A contends that the proposed rewording of the existing regulation language greatly increases the regulation by CW A of natural and/or man made washes, gullies, rills, swales and canals found throughout Arizona; and,

WHEREAS, The aforementioned canals found throughout Arizona are essential for critical water delivery to support industries that comprise the very backbone of the state's economy, i.e., home building and construction, agricultural, ranching and mining. (p. 2)

Agency Response: **The agencies have not provided specific definitions of the terms "ditch," "gully," "rill," or "swale," in the final rule. However, the rule makes it clear that ditches are included in the definition of tributary and would have the physical features required of other jurisdictional tributaries, including bed and banks and an ordinary high water mark. Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional. The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another.**

US EPA ARCHIVE DOCUMENT

Feltes, T. and E. (Doc. #4352)

17.1.84 Currently, I lease land for specialty crops including pumpkins, gourds and vegetables. The EPA's proposed change, if implemented, would negatively impact our farming operation. These crops are vitality necessary to the success of our family business, including my wife and children's' economic well-being. Our annual Fall Festival, which is attended by over a quarter million visitors, would also be at risk. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The 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.**

Ryman, J.L. (Doc. #4355)

17.1.85 Your expansion of the definition in the proposed rule will severely limit my ability to farm my land.

The proposed rule will make it impossible for me to farm or manage my land because I will have to obtain a permit to do any normal fanning activities, such as, fertilizing my crops, manage my livestock waste, clean my drainage ditches, control the brush and undergrowth, build or maintain shelters for my livestock or crop storage.

I view this as a Federal Government Expansion of Power, because the proposed rule will enable the Environmental Protection Agency to control all land upon which rain, snow, sleet, hail, fog or any other precipitation falls. It will also allow you to control buildings, homes and paved surfaces because precipitation falls upon those, as well.

The EPA is misleading the citizens by making false claims. The proposed rule does not provide clarity or certainty, nor does it make the waters more safe or clean. The rule only expands the power and authority of the EPA to control the land and property of the population. I am against your rule change and Government Take- Over of the Nations Water Supply. Therefore, I ask you to withdraw the proposed rule. (p. 1)

Agency Response: **The rule provides clarity, and makes the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. It is not the case that permits will be required for any normal farming activities. For example, if an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation. If the proposed activity is not exempt under Section 404(f), the work may be authorized under one or more Nationwide General Permits (NWPs), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at:**

US EPA ARCHIVE DOCUMENT

http://www.usace.army.mil/cw/cecwo/reg/ and the RGPs can be found on the local Corps District regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office. Please see Section I.C. of the Technical Support Document for a discussion of "takings".

Pennington County Board of Commissioners (Doc. #4384)

17.1.86The proposed expansion would significantly and negatively impact Pennington County. In addition to tourism, agriculture is a critical piece of our local economy. We promote conservation practices to the agricultural community through the local 4-H groups, Conservation Districts, etc. This proposal would cause significant hardships .to local farmers and ranchers by taking away local control of the land uses. The costs to the local agricultural community would be enormous. This would lead to food and cattle prices increasing significantly. The effects will continue to magnify from there. The overall costs to the counties, municipalities and ultimately the taxpayers will be detrimental. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

Anonymous (Doc. #4476)

17.1.87I voluntarily use farming practices that minimize runoff, including the use of waterways, buffer and contour strips and grass headlands. You want the ability to force me to get permits to do what I already do. You want the ability to force me to submit my plans to someone who does not know my land as well as I do and doesn't have my immediate knowledge or interests at stake. This will slow down my ability to manage for best conservation and may not be the best practice for my farm.

Your schedule of fines is draconian. One fine of one day would be drastic. A week's worth of fines would force me to sell my farm.

Any citizen with an axe to grind or who doesn't like me or doesn't understand how or what I do could complain and force me to spend time and money to hire experts to refute their personal agenda. Very few family farmers could afford to spend the money to defend themselves. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and**

US EPA ARCHIVE DOCUMENT

landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Although the agencies cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Anonymous (Doc. #4499)

17.1.88 There should be financial support for farmers & business people who attempt to comply, but cannot afford it. Only state-owned, or publicly supported parks, etc. can afford this expense. The laws are putting business people out of work and causing unemployment. There should be financial relief for seekers of environmental compliance at this level. (p. 1)

Agency Response: **Financial support for compliance is outside the scope of this rule. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.**

Growmark, Inc. (Doc. #4514)

17.1.89 Also, the term floodplain is ambiguously defined with no set flood interval, but leaves this to the "best professional judgment" of agencies. This means that Clean Water Act enforcement and jurisdiction is subjective and determinations can vary not only from agency to agency, but also between individuals within the same agency. Farmers need predictability and certainty in managing their agricultural operations and cannot implement farming or conservation practices under the constraints of an unpredictable regulation. The uncertainty of the proposed definition could also hinder the industry's ability to comply in a timely manner. (p. 1)

Agency Response: **While the rule does not define floodplains, it now does set a flood interval at the 100-year interval. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. https://msc.fema.gov/portal. These maps are publicly available and provide a readily accessible and transparent tool for the public and agencies to use in locating the 100-year floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date, the agencies will rely on other available tools to identify the 100-year floodplain. Because identifying the 100-year floodplain is an important aspect**

US EPA ARCHIVE DOCUMENT

of establishing jurisdiction under the rule and the reliable and appropriate tools for identifying the 100-year floodplain may vary, the agencies will coordinate with other federal and state agencies to develop additional information for EPA and Corps field staff to further improve tools for identifying the 100-year floodplain in a consistent, predictable, and scientifically valid manner.

Kimble County Commissioners' Court, Kimble County, Texas (Doc. #4534)

17.1.90WHEREAS, Farmers. ranchers and other landowners across the countryside will face a tremendous new roadblock to ordinary land-use activities under the proposed rule. (…)

WHEREAS, If ditches and ephemeral streams in and around farm and ranch lands are deemed "navigable," many routine farming and ranching activities (such as building a fence, spraying for or pulling weeds, and insect control) will be deemed to result in a "discharge" to those so-called "navigable waters and will require a permit;

WHEREAS, the EPA will have ultimate control to deny a discharge permit and therefore restrict a farmer's ability to farm and the proposed rule would make many routine farming or ranching activities vulnerable to lawsuits by environmental interest groups threatening penalties of $37,500 per "discharge" into these so-called "navigable waters;" (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). In addition, in response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. See Ditches Compendium for further details.

Harrison County Engineer's Office, Indiana (Doc. #4603)

17.1.91This proposed rule will greatly expand the jurisdiction of the clean water act to areas that are beyond what should be considered "waters." A roadside ditch, for example, should not be considered a "water of the US." This proposed rule is an expansion of bureaucratic red tape that will have almost limitless application. The resulting over-application of regulations will continue to slow project development and increase costs in the transportation industry for what will likely be little to no measurable benefit to water quality. The effort and resources that will be squandered toward the administration of this proposed new rule would be much better applied to other efforts that can have a more direct impact on our nation's water quality. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Ditches have been regulated under the Clean Water Act as "waters of

US EPA ARCHIVE DOCUMENT

the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Board of County Commissioners, Rio Blanco County, CO (Doc. #4679)

17.1.92 The proposed rule, if adopted, will infringe on the sovereignty of the State of Colorado to appropriately regulate waters of the state. It would also require counties and special districts to obtain costly and burdensome Section 404 Permits from the Corps of Engineers for the construction of small bridges and culverts, and routine maintenance of some ditches, canals, and other such water conveyances. The proposed rule would also infringe on private property rights and impair land management activities such as development and agricultural production. (p. 1)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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 believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.**

US EPA ARCHIVE DOCUMENT

Delta Conservation District (Doc. #4719.2)

17.1.93 Under EPA's new proposed rule, waters are regulated even if they are miles from the nearest stream. The new proposal redefines its control over "Waters of the U.S." without considering any factors beyond a very narrow environmental view. It doesn't consider land use, private property rights or economics. It doesn't care about people's livelihoods. This proposed rule change poses a serious threat to farmers, the forest products industry and landowners in the Upper Peninsula of Michigan (p. 1)

Agency Response: The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial.

Michigan State Senator (Doc. #4769)

17.1.94 This confusion has put the drinking water for 117 million Americans at risk, including 1.4 million people in Michigan. Michigan has more than 51,000 miles of streams, almost half of which do not flow year round and, as a result, have been at risk for more than a decade. These small streams and wetlands provide most of the flow to our most treasured rivers, including the Grand River, St. Clair River, and the Kalamazoo River in Michigan. Protecting these networks of small streams is critical to protecting and restoring the lakes, rivers and bays that our economy and way of life depend on.

This commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade and better protection for critical water resources on which our communities depend (p. 2)

Agency Response: The agencies agree. 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

US EPA ARCHIVE DOCUMENT

four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Meader, N.M. (Doc. #4861)

17.1.95As I understand, the proposed rule will have essentially no impact upon ranches and farms that are crossed by ephemeral streams, most importantly in the West. I was raised in Iowa where farms are commonly crossed by perennial streams and rivers, and none of the routine activities of these farms was affected by the CWA. Farmers did not have to obtain permits for normal activities such as tilling the land and planting, fertilizing, and harvesting crops. In addition, cattle grazing in pastures or harvested fields was not affected in any way. The primary situation in which CWA rules applied occurred when livestock were concentrated for feeding and large amounts of animal waste accumulated with the potential of being washed into streams and rivers and contaminating them.

Thus the reaction of the agricultural community to this new rule has seemed greatly exaggerated and irrational. To determine what the impact of this rule change might be in the West, agricultural interests should examine what the current impacts are of the CWA in agricultural regions where perennial streams are the norm. That would quantify and define what the actual impacts might be. The Arizona Farm Bureau has claimed that this rule will threaten and harm all ranchers and farmers in the state, requiring them to obtain permits from the federal government to carry out their normal activities. This would subjugate them to distant bureaucrats in Washington who do not understand farming and ranching. Given the experience of farmers in areas where perennial streams are common, these fears are unfounded. Very few if any Arizona ranchers and farmers should be affected by this change if they have not already been subject to CWA rules, and this needs to be made patently clear. (p. 1-2)

Agency Response: **The agencies agree that the rule should explicitly clarify which waters are subject to CWA rules. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.**

The Senate of Maryland (Doc. #4870)

17.1.96I am writing in strong opposition to the proposed EPA regulation regarding the definition of "Waters of the United States" and the EPA's use of the Clean Water Act to control land along ditches, gullies and other ephemeral areas by claiming the sources are part of the navigable waterways. (…)

Finally, expanding the definition of the "Waters of the United States" will increase the costs and burdens on businesses, farmers and property owners and local governments. I fully believe the EPA and Army Corps of Engineers are ignoring the jurisdictional limits set by the Supreme Court in order to justify the expansion of control. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science.

Travis County, Texas (Doc. #4876)

17.1.97Travis County agrees with the Agencies that a clearer regulatory framework will enhance the protection of the Nation's water resources because the requirements are more understandable to the public, knowledge will lead to higher compliance, and the decision making may become less arbitrary. (p. 2)

Agency Response: **The agencies agree. Indeed, 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. Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement.**

Pendleton County Economic and Community Development Authority (Doc. #4877)

17.1.98At our June 24th meeting, we decided as a board that this ruling would even further hamper the economic growth of our rural county. Should a prospective business have lands that have a low lying area that holds water or ditch that carries water during a rainy period, it would require permitting from the EPA or other agency given the responsibility to monitor this ruling. Additional costs and time delays could make the difference in a business locating in our area which desperately needs new businesses and choosing another location or not starting the business at all. (…)

The proposed rule does not provide clarity or certainty as the EPA has stated. The only thing that is clear and certain is that, under this rule, it will be more difficult to farm and ranch, build homes and businesses, erect fences or make any changes to the land -even if those changes would benefit the environment. We work to protect water quality regardless of whether it is legally required by the EPA. It is one of the values we hold as a development agency. (p. 1-2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule responds to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Bonner County Board of Commissioners (Doc. #4879)

17.1.99 This proposed redefinition of waters of the U.S." will have a significant negative impact upon Bonner County, Idaho, in the following ways:

In general, the federal system of mapping and identifying wetlands is already inadequate. Further expansion of the wetlands definition will make it even more difficult for landowners to predict where wetlands may be encountered. The gap in accurate mapping will widen with the proposed amendment to the wetlands definition, putting landowners at risk of disturbing wetlands unknowingly and unintentionally. (p. 1)

Agency Response: **The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands. The preamble addresses the use of remote sensing and mapping to assist in establishing the presence of water, such tools include the USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. However determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of different remote sensing and desktop tools and a field visit.**

Hickey, R. (Doc. #4895)

17.1.100 The dedicated staff at the SCS and NRCS have been trained to advise and engage the farming community on the proper utilization of our soils, installation of conservation practices and proper stewardship. These people know our farms and we respect their knowledge and willingness to assist us. Does the USEPA have better trained staff who know our farms and are better equipped to assist us in conservation? The answer is obviously NO.

The proposed rule put forth by the USEPA both bypasses the technical conservation services we already receive; AND bypasses the authority of Congress. This rule is an

US EPA ARCHIVE DOCUMENT

attempt to circumvent years of "on the ground" conservation work completed by farmers across this country; circumvent the authority of Congress; and circumvent Supreme Court decisions and case law. This is wrong on every level. (p. 2)

Agency Response: **There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The rule will make the process of identifying waters protected under the CWA clearer, simpler, and faster. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. The 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.**

Congress of the United States (Doc. #4901)

17.1.101 We have reviewed the proposed rule that you signed on March 25" and have concluded that the rule provides essentially no limit to CWA jurisdiction. This is despite the Supreme Court consistently recognizing that Congress limited the authority of the EPA and the Army Corps of Engineers under the CWA.

There has been strong opposition to EPA's approach due to the devastating economic impacts that a federal takeover of state waters would have. Additional and substantial regulatory costs associated with changes in jurisdiction and increased permitting requirements will result in bureaucratic barriers to economic growth, negatively impacting farms, small businesses, commercial development, road construction and energy production, to name a few. (p. 1)

Agency Response: **It is not the case that the rule provides no limit to CWA jurisdiction. The agencies' aim was to define jurisdictional limits as clearly as possible. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. It is not the case that the rule provides no limit to CWA jurisdiction. 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.**

US EPA ARCHIVE DOCUMENT

House of Representatives, Alaska State Legislature (Doc. #4902)

17.1.102 In a nutshell, proceeding with these changes without clear definition of the current "rules", determination of legal claims and completion of the scientific review is irresponsible. The long term negative impact to Alaska's development will severely impact our economic growth. (…)

The current costs to industry for permitting are substantial and significantly underestimated by your EPA's analysis. Adding a vast quantity of land under the CWA jurisdiction will not only be costly to industry but will have a negative effect on any future development, especially in my state of Alaska. The economic impacts of the proposed march 25, 2014 rule will result in job loss and damage to economic growth that will span generations. (p. 1)

Agency Response: The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. 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.

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

17.1.103 As is consistent of EPA draft Rules circulated for comment, multiple claims of "benefits" associated with the proposed implementation appear without documentation or support for the claims being made. (…)

On April 21, 2014, Federal Register 1 Vol. 79, No. 76 the EPA issued the 88 page 'Waters of the United States' (WOTUS) Rule, under the Clean Water Act (CWA). The stated purpose of WOTUS is to "clarify" definition of 'Navigable Waterways'. Our interpretation of this document is that it creates more latitude for EPA to assert jurisdiction over properties that are not only non-navigable, it also lacks scientific credulity in making such claims. (p. 1)

Agency Response: The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. For purposes of this 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. See the Economic Analysis for further discussion of the benefits assessment.

Congress of the United States (Doc. #4905)

17.1.104 We are concerned about the impact of the recently proposed rule from the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) to expand Clean Water Act (CWA) authority and make changes to the "Waters of the U.S." (WOTUS) definition. If finalized, the rule would declare all hydrological connections "significant" without applying the case-by-case test traditionally administered by EPA

US EPA ARCHIVE DOCUMENT

and the Corps in conjunction with state and local authorities. These changes to the rule would significantly expand federal control of land and water resources across the Nation, triggering substantial additional permitting and regulatory requirements. (…)

Upon the release of the proposed rule, the agencies emphasized that the scope of CW A jurisdiction was narrower under the proposed rule than that under the existing regulations, and that the proposed rule did not establish jurisdiction over any new types of waters. But a closer reading suggests that the proposed rule provides virtually no limit to CWA federal jurisdiction. Instead, the proposal establishes broader definitions of existing regulatory categories, fails to define key terms and regulates new areas that are not jurisdictional under current regulations. Such vague definitions and concepts will not provide the intended regulatory certainty and will likely result in increased litigation. (p. 1)

Agency Response: **The final rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making case-specific determinations. The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. The agencies disagree that the rule results in "virtually no limit" to CWA jurisdiction, and that definitions are vague. 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.**

United States Senate, Committee on Environment and Public Works (Doc. #4907)

17.1.105 After an initial review of the proposed rule, we are deeply concerned that the agencies are attempting to obtain de facto land use authority over the property of families, neighborhoods and communities throughout the United States. Several provisions within the proposed rule demonstrate that EPA and the Corps are unwilling to accept the meaningful limits Congress placed on the agencies' authority under the CWA, limits the Supreme Court has repeatedly recognized. These include the proposed rule's categorical regulation of irrigation and stormwater ditches, unlimited aggregation approach, and broad adjacency definition.

The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today. Although EPA and the Corps may have a role in clarifying and limiting CWA jurisdiction, unfortunately the agencies' rule proposal was a significant step in the wrong direction. The decision to move forward with

US EPA ARCHIVE DOCUMENT

this proposal is a clear breach of your promise to cut through red tape.[4] In light of other recent CWA permitting decisions that have occurred during your administration, moving forward with the proposed rule will exponentially frustrate economic activity and further undermine notions of certainty in the federal permitting process. (p. 1-2)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies disagree that irrigation and stormwater ditches are categorically jurisdictional. In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow.**

America's Great Waters Coalition (Doc. #4957)

17.1.106 Supreme Court decisions and subsequent agency guidance have caused confusion in establishing Clean Water Act jurisdiction and in implementing its programs. This uncertainty led to many waters not being sufficiently protected, as well as confusion, delay, and wasted resources within the regulated community and among the agencies making jurisdictional determinations and enforcing the Clean Water Act. The proposed rule will clarify the Clean Water Act's jurisdiction, reduce uncertainty, and protect America's waters. For these reasons, the Great Waters Coalition strongly supports the proposed rulemaking.

A. Confusion from Supreme Court Cases Created a Need for Clarity in Clean Water Act Jurisdiction.

The two Supreme Court cases, *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*,[5] and *Rapanos v. United States*,[6] created a lack of clarity in

[4] Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).
[5] 531 U.S. 159 (2001).
[6] 547 U.S. 715 (2006). The *Rapanos* case produced five different opinions with no majority, as well as two different tests for determining Clean Water Act jurisdiction: relative permanence and significant nexus standards.

US EPA ARCHIVE DOCUMENT

Clean Water Act jurisdiction, which led to a loss of Clean Water Act protections.[7] The resulting confusion has especially impacted small headwater and intermittently flowing streams and adjacent wetlands. The subsequent complexity of making Clean Water Act jurisdictional determinations has negatively impacted agencies' ability to timely identify waters of the United States and appropriately issue permits, and has hampered enforcement activities when violations occur.

B. Lack of Clarity in Clean Water Act Jurisdiction Threatens Water Quality and Our Communities.

The current uncertainty and cost of establishing Clean Water Act jurisdiction puts water quality, aquatic life, and human health, and communities at risk. Headwater streams and wetlands provide most of the flow to downstream waters. They supply drinking water to public drinking water systems, and clean water supplies crucial to local economies. They store and filter flood flows, protecting water quality, reducing flood flows that can threaten communities and community infrastructure, and they provide essential fish and wildlife habitat that support robust outdoor recreation and tourism industries. When these waters are polluted, dredged, or filled, we lose their important natural benefits. Lack of clarity in which waters are protected by the Clean Water Act creates an unacceptable state of affairs for all concerned: the general public, the regulated community, and the agencies themselves. The Great Waters Coalition strongly supports the clarifications provided in the proposed rulemaking in order to protect human health, water resources, and improve consistent application of the Clean Water Act. Sufficient protection of the nation's waters and consistent application of the Clean Water Act is essential to ensure the integrity of our economy and environment which are dependent on clean, safe water supplies. (…)

The Waters of the U.S. rulemaking is integrating both peer-reviewed scientific support, the legal direction of the Supreme Court rulings, and the established Clean Water Act categorical waters of the U.S. determinations in order to address the *SWANCC* and *Rapanos* Supreme Court decisions, clarify and streamline the process of jurisdictional determinations, and restore consistent and sound protections for the nation's critical water resources.

Conclusion

America's Great Waters Coalition strongly urges the agencies to move forward expeditiously to clarify Clean Water Act protections and ensure consistency and transparency in jurisdictional determinations. (p. 1-3)

<u>Agency Response:</u> The agencies agree. 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

[7] Following the 2001 *SWANCC* case and agency guidance in 2003, an estimated 20 million acres of "isolated" (non-floodplain) waters have gone unprotected.

US EPA ARCHIVE DOCUMENT

four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

American Gas Association (Doc. #4980)

17.1.107 As just one example, the proposed rule would subjectively allow "other waters" to be defined based on a best professional judgment standard. The regulatory uncertainty this would introduce could significantly slow timelines for pipeline integrity management and maintenance projects conducted by natural gas utilities. (p. 1)

Agency Response: In the evaluation of "other waters" the SAB found that "scientific literature has established that 'other waters' can influence downstream waters, particularly when considered in aggregate." The SAB thus found it "appropriate to define 'other waters' as waters of the United States on a case-specific basis, either alone or in combination with similarly situated waters in the same region." However, there was a concern raised by other commenters about what was termed regulatory overreach and uncertainty created by the "other waters" category. Some commenters stated that the "other waters" category would allow the agencies to regulate virtually any water. To address this concern, the rule places limits on which waters could be subject to a case-specific significant nexus determination, in recognition that case-specific analysis of significant nexus is resource-intensive and to reflect the consideration for the body of science that exists. The agencies also establish by rule subcategories of waters that are "similarly situated" for the purposes of a significant nexus analysis because science supports that the subcategory waters fall within a higher gradient of connectivity. By not determining that any one of the waters available for case-specific analysis is jurisdictional by rule, the agencies are recognizing the gradient of connectivity that exists and will assert jurisdiction only when that connection and the downstream effects are significant and more than speculative and insubstantial.

Polk County Farm Bureau (Doc. #4981)

17.1.108 In fact, this rule creates a vast amount of confusion that will highly restrict agricultural production in our county as well as throughout the United States of America via increased regulation and potential 3rd party litigation in response to normal farming practices. (p. 1)

Agency Response: The EPA and ACOE are issuing this as a joint rule and are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum

US EPA ARCHIVE DOCUMENT

clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Congress of the United States (Doc. #4983)

17.1.109 We write as members of Congress representing areas located within the Chesapeake Bay watershed, to thank you for your leadership on efforts to restore the Bay and other critical waters throughout our region, and to urge you to continue to act to protect tributary streams and wetlands in our watershed and across the nation. (…)

In 2001 and 2006, Supreme Court decisions, along with subsequent agency policy guidelines, called into question the status of upstream tributaries and wetlands and jeopardized critical water resources and fish and wildlife habitat. Legal uncertainty about what the law protects has denied pollution protections under the Act to approximately 20 percent of the 110 million acres of wetlands in the continental U.S. It has also thrown into question protections for thousands of streams around the country; this affects 28 percent of the stream miles in the District of Columbia, 11 percent in Delaware, 19 percent in Maryland, 11 percent in New York, 25 percent in Pennsylvania, 30 percent in Virginia, and 36 percent in West Virginia. These wetlands and streams are critical to the health of the Bay, filtering the nutrients that have created dead zones, replenishing groundwater, and reducing the risk of flood. (p. 1)

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

New Hampshire Audubon (Doc. #4984.2)

17.1.110 We understand that New Hampshire's lakes, rivers, streams, and wetlands are vitally important as sources of clean drinking water, wildlife habitat, groundwater recharge, flood control, and recreational activities.

Headwater streams serve as spawning and rearing grounds for fish, contribute to water quality of larger rivers, lakes, ponds, and wetlands downstream, and provide drinking water for many rural areas. In New Hampshire, a total of 2,341 miles of streams (nearly 20% of the state's 12,000 stream miles) flow into surface waters that supply public drinking water systems, of which 1,311 miles (56%) are intermittent, ephemeral, or headwater streams. More than 500,000 New Hampshire residents get their drinking water from public water systems that rely at least partially on intermittent, ephemeral, or headwater streams.

US EPA ARCHIVE DOCUMENT

Wetlands also provide critical functions, including water purification through sediment and nutrient retention, filtration of pollutants, flood mitigation, water storage, ground and surface water recharge, shoreline stabilization, and critical habitat for many wildlife species. In fact, nearly one third of New Hampshire's 450 native species of reptiles, amphibians, mammals, and birds depend on wetlands or aquatic habitats for all or part of their life cycles. Protecting tributaries that flow into these habitats is essential for maintaining water quality and quantity, biodiversity, and overall ecosystem functions of wetlands. Isolated wetlands, such as vernal pools, provide critical breeding sites for several amphibian species and seasonal refuge and food sources for three turtle species that are of conservation concern.

New Hampshire's wetlands and surface waters are primary components of the state's recreation industry. A recent study indicates that boating, fishing, and swimming in the state's lakes, ponds, and rivers generate a total of $1.1 to 1.5 billion annually, including up to $340 million in annual household income and 15,000 full- and part-time jobs. These economic benefits depend on the state's ability to protect and maintain high water quality standards for these freshwater ecosystems.

New Hampshire's environment and economy will benefit from the proposed rule to clarify protection of streams and wetlands under the Clean Water Act. Without this proposed rule, the state's valuable wetlands and surface waters will be adversely affected. (p. 1-2)

Agency Response: **The agencies agree. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.**

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Michigan Association of County Drain Commissioners (Doc. #5057.1)

17.1.111 Expanding the jurisdiction of the EPA and USACE threatens the ability of Drain Commissioners to perform basic maintenance on established county drains. The increase in costly and time-consuming regulations will result in greater strains on already-scarce resources, the inability to adequately maintain drainage systems and significant delays in emergency flooding response time putting the general public at risk. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

the United 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 agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Winkelmann, K. (Doc. #5141)

17.1.112 The proposed rule would extend the regulations meant for navigable waters to ephemeral streams, ditches, and ponds. I do not have any ponds on my farm, but like all other farms I do have ephemeral steams and ditches. One of these is located about 300 feet from my house (see enclosed photo). This photo was taken after about 0.5 inches of rain. After an inch of rain, water will flow through the grass and then stop flowing, usually as soon as the sun comes out. This low area on my farm is not under any government contract for NRCS's Conservation Reserve Program. It is in grass cover because that is what I have deemed best to prevent erosion. The soil is really fertile in this area so I have planted some asparagus and cherry trees in this area for personal use.

About a week ago I had a water pipe leak in this area and had to replace some water line (notice the fresh soil in photo). If I read the rule change correctly, I would have to go through a permit process in order to dig in this area to replace my broken water line, potentially running my well dry and wasting thousands of gallons of water. I would also have to apply NPDES permits for insecticide applications to my Asparagus and Cherry trees. If insects start eating a crop I have a short window of opportunity for treatment before the crop is lost. No time to wait for a permit.

As a farmer I care about the soil and environment. I am actively engaged in practices that enhance soil and water quality. I am experimenting with and plant different cover crops for nutrient management purposes, practice no-till farming, use site specific farming practices, and maintain CRP waterways. I use intense Integrated Pest Management tools and University recommendations for pest control applications and, this spring, I enrolled in the Conservation Stewardship Program with the NRCS.

This proposed rule goes well beyond the intent of congress. I feel that it is a giant land grab by the EPA and will regulate areas that would be better taken care of by local landowners. It would impact my farm in a negative way; therefore, I ask you to withdraw the proposed rule. (p. 1-2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation**

US EPA ARCHIVE DOCUMENT

Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands. The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

Attorney General of Texas (Doc. #5143.2)

17.1.113 In sum, this rulemaking is beyond the scope of the Clean Water Act and the Constitution. The significant nexus test, upon which the proposed rulemaking so heavily relies, is not an appropriate test for jurisdiction. Most importantly, the proposed rulemaking threatens to infringe on private property rights without a clear mandate from Congress and in violation of the U.S. Constitution. Therefore, the State of Texas respectfully objects to the proposed rulemaking "Definition of 'Waters of the United States' Under the Clean Water Act" and urges the federal agencies to withdraw the proposed rule as practically, economically, scientifically, and legally deficient. If the proposed rule is not withdrawn and is made final, then the State of Texas will have no choice but to challenge the rule in federal court-where it will surely be struck down as violating federal law, exceeding the agency's statutory authority, and contravening the U.S. Constitution. (p. 7)

Agency Response: **The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis. See the preamble and TSD for additional discussion of the legal basis for this rule.**

US EPA ARCHIVE DOCUMENT

Illinois Soybean Association (Doc. #5144.1)

17.1.114 The proposed rule could make it easier for the Corps and EPA to make "desktop determinations" that any wetlands across Illinois and other states are categorically jurisdictional. This concerns Illinois soybean farmers, since the Mississippi, Ohio, Illinois and Wabash Rivers and Lake Michigan are all major waterways with very significant ecological and economical importance to our state. Additionally, some 87,000 miles of rivers and streams run through Illinois, along with more than 250,000 acres of lakes. This ruling clearly could have a huge impact on the state, and creates an enormous amount of uncertainty and risk for many of the state's family-operated soybean farms that may fall subject to a wide range of provisions under the CWA. (p. 2)

Agency Response: **The agencies believe that the rule will increase certainty regarding the identification of federally jurisdictional waters. In this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. While the preamble addresses the use of remote sensing and mapping to assist in establishing the presence of water, such tools include the USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. However determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of different remote sensing and desktop tools and a field visit.**

Wheatland Irrigation District (Doc. #5176.1)

17.1.115 While the necessity for the Clean Water Act is understood, the proposed new rule goes too far. By removing the word “navigable” from the definition of the CWA, the rule brings ditches, ephemeral drainages, ponds (natural or man-made), seeps, flood plains and other occasionally or seasonally wet areas under federal control. While the EPA maintains that there would only be 1,300 additional acres regulated under this new rule, the American Farm Bureau’s analyst, Veronica Nigh, has found the number to in fact be closer to 106 million acres. These acres would include cropland, pastureland, Conservation Reserve Program acreage, forestland, and other agricultural lands. Additionally, means of conveyance for the necessary process of irrigation could potentially come under federal scrutiny as well inhibiting day to day ranching and farming practices. This increase in control over these lands directly affects almost all farmer and ranchers of which make up a noticeable portion of the Wheatland Irrigation

US EPA ARCHIVE DOCUMENT

District. The implications of this increased federal control which provide for concern are as follows: increased regulatory costs, bureaucratic barriers and penalties disproportionate to the size of the body of water. (p. 2)

Agency Response: **Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, can significantly impact the chemical, physical, and biological integrity of downstream waters – playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.**

Anonymous (Doc. #5187)

17.1.116 I am a farmer who feels that the new ideas and regulations will affect my very ability of making a living. I have farmed for over 30 years and have always cared for the water, soil and all thing alive. Always using conversation to control all areas the best possible way I can. What the EPA has chosen to add for the rules are areas of land that do not handle navigable waters. The small spots of water and ditches hardly ever have any water in or on them ever. Many new federal permits will be required to be able to farm a piece of land. Please stop them and require them to operate by the 1972 laws passed by Congress for water. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The rule has expanded the section on waters that are not considered waters of the United States, including some ditches. In addition, the final rule expressly adds an exclusion for puddles in response to comments. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.**

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

League of Women Voters of Michigan (Doc. #5204)

17.1.117 The Clean Water Act covers all waters, whether large or small, they function as an interconnected system. Excision of parts of the system from regulation will impair health and optimal functioning of the whole. (p. 1)

Agency Response: This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Lake Havasu City (Doc. #5205)

17.1.118 This proposed rule would cause adverse impacts to landowners, businesses, the future growth of, and the economy of Lake Havasu City. (p. 1)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Finally, 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.

Anonymous (Doc. #5243)

17.1.119 As a young farmer who is just beginning to establish my operation, I'm very concerned about the EPA's proposals. The ability to fertilize, spray, and apply manure in a timely manner is of paramount importance in my operation. As I understand it, these routine activities may be in jeopardy. I understand the EPA's reassurances that routine farming activities will be protected, however the EPA does not have the authority to regulate these activities nor should they be in a position to offer me reassurances that these will be protected. The gulley's and riffs that form with abnormally heavy rainfalls are not navigable waters, and as such they do not fall under EPA jurisdiction. The EPA's proposals can truly be described as an attempted to establish authority over land which they have no right to govern or regulate.

This attempt to rewrite longstanding definitions and existing law should be resisted. The EPA's efforts pose a serious threat to my ability to farm and therefore a threat to my ability to make a living and way of life. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. The agencies have not provided specific definitions of the terms "ditch," "gully," "rill," or "swale," in the final rule. However, the rule makes it clear that ditches are included in the definition of tributary and would have the physical features required of other jurisdictional tributaries, including bed and banks and an ordinary high water mark. Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves.**

Andermann, J. (Doc. #5272)

17.1.120 …The proposed change to the definition of the "Waters of the United States" (WOTUS) will have a significant impact on my farming operation and business.

By applying the rules of the Clean Water Act (CWA) to any water or land feature that may have a "significant nexus" to a navigable water, most every operation I perform as a farmer and as a contractor will come under the regulations and permitting requirements of the CWA. Herbicide application, waterway maintenance and construction, tillage, fence line maintenance, terraces, tile drainage could all require permitting and be subject to extensive regulation. Often times pesticide application, for example, needs to be done in a timely manner; if I have to wait for a permit from the EPA, how long will that take? If a heavy rain event damages a terrace, waterway, erosion control structure (like a block structure) or the like, and I need to provide extensive engineering and wait for approvals and permitting before making repairs, how will that benefit the environment? If the same engineering and regulatory process applies to installing waterways, terraces, erosion control structures etc., how many do you think farmers will be willing to install? The last work I did that required a permit from the USACE it took almost 12 months to get the permit!

It has been said that the EPA and USACE are not looking to regulate ditches on my farm. I would submit the following as contrary evidence: http://www.sas.usace.army.mil/Portals/61/docs/regulatory/Workshop_Significant_Nexus_2008.pdf

Pay particular attention to slide # 12 which is two pictures of rather innocent looking ditches that the USACE says are examples of a surface feature that has a "significant nexus" to a navigable water. If those surface features have a "significant nexus", certainly

US EPA ARCHIVE DOCUMENT

a 60 foot wide by quarter mile long waterway on a farm will also have a "significant nexus".

Regulations for control of pollutants need to be derived from a thorough, exhaustive, and science based legislative process involving all true stake holders, not from the regulatory whim of a government agency. I as a farmer have nothing to gain by polluting the environment or destroying the soil-that is how I make my living! I and other farmers undertake extensive operations and procedures that cost many thousands of dollars that also conserve resources and protect nature, including conservation tillage, no till, variable rate application of fertilizers, gps mapping and the like. These things should be encouraged, not regulated to the point that no one will use them. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

Oregon Cattlemen's Association (Doc. #5273.1)

17.1.121 The OCA submits these comments in response to the proposed rule, and respectfully requests that the Agencies withdraw the proposed rule. The CWA and Supreme Court's interpretation of the CWA require a narrower approach to the Agencies' determination of their jurisdiction. Additionally, if the proposed changes take effect, the agricultural industry will be substantially harmed. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to requests from across the**

US EPA ARCHIVE DOCUMENT

country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The 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.

Duncan, B. (Doc. #5455)

17.1.122 Now, on my farm, waterways and low spots that are often dry for years in a row will be considered a navigable water. This is quite simply a regulatory taking of my farmland and my right to farm. I care deeply about my land and have always worked hard to maintain the highest water quality possible. My voluntary practices will now become mandatory and subject to government oversight. This is simply unacceptable. In our rural economy we need lesser regulation, greater economic development and the freedom to do what we know is best on our individual farms. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). 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. Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F).**

Pike County Economic Development Corporation (Doc. #5460)

17.1.123 We are greatly concerned that under the proposed rule many ordinary activities undertaken by small businesses would immediately become subject a wide variety of federal regulation, including permitting requirements, notifications and recordkeeping, modeling and monitoring, and use approvals. These requirements would impose direct costs, delays, and uncertainty in planning.

Municipalities such as small towns, counties, townships, road districts, water districts, drainage districts, highway departments, and municipal utilities will be profoundly impacted by the shift from state and local control of water-related land uses to federal control.

Expanding the current definition of waters of the U.S. to include ephemeral streams, isolated wetlands, and non-connected waters will subject vast areas to regulation under the Clean Water Act.

US EPA ARCHIVE DOCUMENT

The proposed rule would subject property owners, businesses, and communities to stringent new permitting requirements and use restrictions they have never had to bear.

The process of obtaining permits and use approvals under the Clean Water Act can be very costly and time-consuming. Historically, obtaining a permit to develop in jurisdictional wetlands can take longer than 12 months and cost hundreds of thousands of dollars. (p. 1-2)

Agency Response: **The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. As noted by the SAB, and consistent with the scientific literature, tributaries as a group exert strong influence on the chemical, physical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of chemical, physical, and biological processes. See, e.g., SAB 2014b. These significant effects on traditional navigable waters, interstate waters, and the territorial seas occur even when the tributary is small, intermittent, or ephemeral. Moreover, the agencies have historically considered ephemeral tributaries to be "waters of the United States." For example, for many years EPA has reviewed and approved state water quality standards for ephemeral waters under CWA section 303(c), several Corps' Nationwide Permits under CWA section 404 address discharges of dredged or fill material into ephemeral waters, and the agencies' definition of "waters of the United States" prior to this rule included all tributaries without reference to flow regime.**

Agricultural Council of Arkansas (Doc. #5463)

17.1.124 [T]he proposed rule would likely invite litigation that could be a cost to farmers, landowners, agriculture businesses and even local, state, and federal governments. Most farmers do not have the legal wherewithal or financial means to afford legal representation that this proposed rule would surely require. The rule would also subject farmers and landowners to hefty fines and penalties that would be beyond harmful. Farms and private landowners would also face substantial compliance costs through new environmental impact assessments, time spent to comply and receive regulatory reviews, and human resources to process paperwork for permits and comply with other regulatory requirements. And, it's likely that this rule would ultimately limit land use abilities on private farm lands. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule**

US EPA ARCHIVE DOCUMENT

reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.

Wisconsin Wildlife Federation (Doc. #5468)

17.1.125 Wisconsin is a headwater state in the US with major drainages to the Mississippi River, Lake Superior and Lake Michigan. Being a headwater state, Wisconsin has many small streams, and headwater wetlands that feed tributaries which eventually flow to those waters. Tens of thousands of acres are associated with those headwater tributaries and provide very critically important fish and wildlife habitat for hundreds of fish and wildlife species. That habitat is critical for the species of fish and wildlife that are hunted, fished and trapped by the 1.6 million Wisconsin anglers and 600,000 hunters. In addition the WWF is a strong supporter and advocate for the many fish and wildlife that are nongame and endangered species in the state. The proposed Waters of the US definition and the resulting Federal oversight of those wetlands is critical for their protection which in turn is important for the sustainability of this important habitat.

In addition, those wetlands provide important flood storage and clean water for the many other downstream rivers and lakes that are important to not only sportsmen and women but to the important Wisconsin tourism economy as well as the private and public property that adjoins those waterways. Hunting, fishing and trapping provides billions of dollars into the Wisconsin economy.

The WWF also supports the proposed rule change because many Wisconsin sportsmen and women also hunt, fish and trap in other states and Federal protection of wetlands in those states is important for their hunting, fishing and trapping. Migratory waterfowl is a prime example. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under**

US EPA ARCHIVE DOCUMENT

the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Perry County, Mississippi Board of Supervisors (Doc. #5484)

17.1.126 WHEREAS, the County has been advised that the proposed regulations will create more regulation and infringe upon the County's ability to construct and maintain roads and associated drainage facilities; (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Nye County Water District Governing Board (Doc. #5486)

17.1.127 The NCWD vigorously opposes the expansion of Federal agency authority over local resources. (p. 2)

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

North Cass Water Resource District (Doc. #5491)

17.1.128 However, the proposed rules effectively extend jurisdiction over virtually any and all waters and activities and this dramatic expansion will have a chilling effect on all construction activity in the entire country, certainly including any and all efforts of the District to manage water in accordance with our statutory charge. (p. 1)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. 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

US EPA ARCHIVE DOCUMENT

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

Poepping, P. (Doc. #5513)

17.1.129 All these regulations add significantly to the time it takes to move projects to completion. In many cases, when such approvals are required, worthwhile projects are not even attempted due to the uncertainly of their completion. Requiring: more approvals, permits, time delays, possible fines, increased costs, and even denial of important development work is unnecessary, where it is not now effected. In this time of reduced funding for vital infrastructure improvements we certainly do not need to add any more regulatory burden and its associated overhead to projects. It is difficult enough in Rural American to come up with funding, mostly through tax increases, for projects without putting anymore unnecessary roadblocks in the way of funding the vital needs that must be addressed. (p. 1)

Agency Response: The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Pike and Scott County Farm Bureaus (Doc. #5519)

17.1.130 The proposed rule would subject private land conservation projects to added regulatory burdens and costs therefore creating a disincentive to landowners pursuing important and needed conservation projects that benefit watersheds, waterfowl and riparian habitats. The majority of wildlife habitat in the continental United States is on private land and there should be no disincentives to their improved conservation and management. Requiring landowners to obtain Corps permits for routine erosion control and soil stabilization work, including improving and protecting riparian areas, would reduce the number of those projects on private lands and habitat and wildlife may suffer. (p. 1)

Agency Response: In this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For

US EPA ARCHIVE DOCUMENT

example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Deere & Ault Consultants, Inc. (Doc. #5521.1)

17.1.131 If federal regulators move forward with a final rule as proposed, the result will be a dramatic and unjustified expansion of federal jurisdiction over the nation's 'water bodies,' thereby increasing permitting costs and creating major delays of, and possibly preventing entirely, key construction and infrastructure projects.

As an Engineering Consultant, I have serious concerns about the impact of expanded CWA jurisdiction over industry. The aggregate and concrete industry would be further impacted as these proposed rules would greatly limit and restrict our ability to mine currently approved sites or expand into areas planned to be mined or used for concrete facilities. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies do not intend to reopen existing approved jurisdictional determinations unless requested to do so by the applicant.**

Rural County Representatives of California (Doc. #5537)

17.1.132 [A] tributary defined as a Water of the U.S. under this rule would have to be added to the list of impaired waters in the state. Such a listing will trigger a number of cost-prohibitive requirements on local governments, including but not limited to: the development of a use attainability study; the identification of designated beneficial uses; the adoption of site specific water quality objectives; the application of and compliance with numeric effluent limits, and the potential for a Total Maximum Daily Load allocation. These additional requirements will make counties subject to additional enforcement actions - including civil and criminal penalties - and place local governments at great risk of third-party litigation.

In addition, water supply systems could be defined as Waters of the U.S. under the new definition of a tributary as they convey flow to downstream water. These could include not only large federal and state water delivery systems, such as the California Aqueduct and the Colorado River Aqueduct, but also reservoirs and other water supply features constructed and managed by local and private interests. (p. 2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or**

US EPA ARCHIVE DOCUMENT

biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. States typically develop water quality standards for general categories of waters, including wetlands; in addition to creating site-specific standards and more generic standards that can apply broadly. State water quality standards have been in effect prior to and continuing after the *SWANCC* and *Rapanos* decisions. Therefore, requirements for state water quality standards to be consistent with the CWA (designated uses, criteria to protect those uses, antidegradation policies) will likely not require any changes as a result of this rule. What could change is whether or not those standards apply to a specific water. To the extent a state believes there are needs for water quality standards development for specific types of waters, those needs would exist with or without this rule.

States conduct assessments of waters based on all existing and readily-available monitoring data. Under section 303(d) states are required to list waters that are impaired, but have discretion to prioritize this list for TMDL development, which may proceed over a period of several years under EPA policy. Monitoring, assessment, and TMDL development tend to occur in water segments where the agencies assertion of jurisdiction is unlikely to change. Therefore, the agencies do not anticipate additional cost burdens associated with this rule for TMDL development and implementation.

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

17.1.133 [W]ater conveyance systems for flood control purposes may also fall under the new definitions, which could ultimately hinder counties from ensuring public safety in extreme storm events. In the face of possible climate adaptation issues from sea level rise, the need to seek permits for maintenance of such systems would be a nearly insurmountable obstacle to developing effective adaptation strategies in emergency situations, and runs counter to the Administration's recent climate adaptation policies and calls to action. (p. 3)

<u>Agency Response:</u> The agencies' longstanding practice is to view stormwater water control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or

US EPA ARCHIVE DOCUMENT

piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.

Many commenters, particularly municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressed concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems. A key element of the exclusion is whether the feature or control system was built in dry land and whether it conveys, treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems, but have never been considered "waters of the United States."

17.1.134 California has imposed stricter standards on all storm water permittees, including MS4 permit holders, and the proposed rule as it stands would only serve to exacerbate the already difficult task of compliance for rural counties in our State by causing jurisdictional confusion and dramatically increased compliance costs. Many rural California counties have either recently been required to comply with the MS4 permit, or will be required to comply within the next permit cycle. The implementation costs for new permittees would increase exponentially if the proposed rule is not modified to include clarification and exemptions for MS4 permit holders. (p. 3)

<u>Agency Response:</u> In this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the

US EPA ARCHIVE DOCUMENT

CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

Monroe County, District 26 et al. (Doc. #5555.1)

17.1.135 The expansion of the CWA's jurisdiction would have an enormously detrimental effect on landowners and businesses, especially in the agricultural sector. (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Horcher, P. (Doc. #5573)

17.1.136 The proposal is arguably an avenue for EPA to circumvent Congress by not only regulating virtually all water, but also land and land management practices. By regulating, or being someday forced to regulate land management practices, the EPA and Army Corps of Engineers are essentially taking productive farmland out of production and regulating what I can and cannot do with property that has been owned by my family for five generations. In my opinion, that would constitute a "taking" and is no different than when a unit of local government improperly exercises its power of eminent domain to "take" property.

Agency Response: **The final rule is not an attempt to circumvent Congress, but 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The**

US EPA ARCHIVE DOCUMENT

rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. Please see Section I.C. of the Technical Support Document regarding "takings."

Sen. T. Westrom, MN-District 12 (Doc. #5558.1)

17.1.137 The Environmental Protection Agency's latest proposal to change the definition of 'navigable waters' under the Clean Water Act is a naked attempt to expand their own authority beyond the scope of the law and will have devastating consequences for Minnesota's farmers, families, land owners and small business owners.

Congress was clear when it passed the Clean Water Act that the EPA's authority would cover 'navigable' waters, but this new rule will extend the EPA's authority to everything from small ponds to ditches in fields. This is government overreach, pure and simple. Federal officials are throwing the legal definition to the wayside and creating nearly limitless regulatory authority, which will hurt our communities. Any changes should be made through the legislative process, where voters can keep government accountable, rather than through a federal agency's rule making.

Farmers and small business owners in places like where I live in Elbow Lake, and our surrounding agriculture communities in northwest Minnesota, cannot afford any more burdensome regulations handed down from the federal government. After a historically harsh winter and with a sluggish economy, the last thing America's agriculture sector needs is unnecessary burden that will stifle business. We know our towns, down to the ponds and ditches in our fields, better than any unelected bureaucrat from Washington. (p. 1-2)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

US EPA ARCHIVE DOCUMENT

Carroll Area Development Corporation (Doc. #5600)

17.1.138 The Carroll Area Development Corporation would like to submit comment in opposition' to the proposed Waters of the U.S. rule due to the potential financial impacts to local governments and production agriculture, as well as timeframes associated with additional permitting needed for work done in regulated areas. (…)

In relationship to production agriculture, the rule creates concerns as to the additional cost of permitting to those farmers. Iowa farmers are not just feeding Iowa, they are feeding the world. In advocating on behalf of area producers, CADC encourages those making decisions to not add additional regulation, permitting, time and expense to the production agriculture processes. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

17.1.139 [T]he existing Federal and state regulatory requirements constrict our citywide development and maintenance projects; therefore, we are very concerned when additional Federal or state regulatory oversight is proposed. The existing Federal and state regulatory programs can be duplicative and cumbersome, requiring very time and resource intensive permitting processes. The City of Chesapeake supports efforts to streamline and clarify the existing regulatory jurisdictional and permitting process and believes in the protection of our City's precious aquatic and natural resources; however, the City will not support the proposed Waters of the US Rule. (p. 1)

Agency Response: The rule does not result in additional federal or state oversight. 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.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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

US EPA ARCHIVE DOCUMENT

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.

Sparks, D. (Doc. #5773)

17.1.140 As a cattle rancher I am proud to be the primary steward of the natural resources on my property. (…) We produce beef that feeds the world. We have dedicated our lives to protecting the land while finding a balance of food production and the long term health and condition of the land we love.

In sum, I believe the EPA and the Corps should not finalize their proposed definition for "waters of the U.S." and should scrap the entire rule. There are too many fundamental problems with the proposal. By starting fresh, the agencies could potentially have meaningful dialogue and outreach with the cattle industry. As proposed it violates the law, will not benefit the environment, and will have a negative impact on small businesses like mine. (p. 1)

Agency Response: This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

First State Bank/First State Insurance (Doc. #5920)

17.1.141 These regulations will cause significant problems for our bank's customers in crop and livestock production. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.

US EPA ARCHIVE DOCUMENT

Doriot, B. (Doc. #5950)

17.1.142 As a local elected official I oppose the expansion of the definition of Waters of the US. I am in charge of maintaining 1000 miles of county drain. This expansion will cause great delays in my job by causing more federal red tape. This already takes a simple project and adds months to a project that could be done quickly and the cost increases as the time is extended. This change is not in the good of health and general welfare of the people of the United States. Please do not pass the proposed EPA-HQ-OW-2011-0880. The current rule is fine as it is. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Further, in this final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

East Coventry Township (Doc. #6068)

17.1.143 This change will stall the development of businesses, take control of lands, and negatively impact township owned and maintained infrastructure such as roadside ditches, swales and retention/detention areas. The proposed rule, if adopted, will cause significant harm to local farmers and could bring MS4 stormwater systems under greater regulation and expense. The cost to the taxpayers will be enormous and create another unfunded mandate. It is impractical and unrealistic for the federal government to regulate every ditch, pond and stormwater feature. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The 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 agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases

US EPA ARCHIVE DOCUMENT

The rule will not bring every ditch, pond and stormwater feature under federal jurisdiction, and in fact clarifies numerous explicit exclusions. The rule has expanded the section on waters that are not considered waters of the United States, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Black Hills Corporation (Doc. #6248)

17.1.144 It is our belief that EPA is expanding the definition of waters of the U.S. Many of the proposed changes appear to codify existing guidance currently available on EPA's website. Since its development following the Rapanos decision in 2006, this guidance has been interpreted inconsistently by science professionals and agencies alike. This inconsistency causes delays in the permitting process and imposes significant legal liability particularly on utilities working to maintain critical infrastructure. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

17.1.145 2. IMPACTS TO OPERATIONS: EPA's draft definition creates numerous potential new impacts to the exploration and production of petroleum and natural gas, coal mining, the transportation and delivery of natural gas and electricity, the facilities constructed to support these operations, and to fossil fuel-based and renewable energy generation facilities. Examples of potential impacts include:

a. The definition of "adjacent waters" is so expansive that construction and the maintenance or repair of pre-existing infrastructure including power lines, pipelines, storage yards, and access roads may be severely limited. For example, a facility may be required to obtain permits for maintenance, modification, or expansion of existing facilities that had not previously gone through the permitting process. This would be due to its location in or adjacent to Waters of the State, a riparian land habitat, or other landlocked isolated wetland that could now be deemed U.S. water.

b. Man-made stormwater conveyances including detention and settling ponds, slope drains, bar ditches, and other water features constructed as best management practices (BMPs) on infrastructure projects, could become regulated under the proposed draft. These conveyances and BMPs are necessary to environmental compliance with EPA, state and local rules. The proposed rules expanding U.S. waters could create unprecedented, permitting and mitigation challenges for the regulated community in part due to delays caused by understaffed and already overburdened state and local agencies. (…)

US EPA ARCHIVE DOCUMENT

f. More federal agency permitting actions required by the proposed draft rule will trigger more agency-driven consultations and reviews unreasonably delaying even simple construction projects. Currently, agency consultations are required for the National Historic Preservation Act or the Endangered Species Act. These are triggered when the ACOE is reviewing permit applications under the Section 404 permitting program. These reviews have no clear rules and are not bound by specific time limits.

3. Impacted Activities:

a. Existing and new generating facilities (all fuels including wind and solar)

- New building or equipment storage sites
- New roads or rail extensions
- New gas or oil infrastructure (pipelines)
- Waste disposal areas (new or expanded)
- Increased points of compliance as more water features are deemed WOTUS (e.g., discharge canals, storm drains, storm water management ponds, or other waste treatment)
- Reclassifications to WOTUS (e.g., raw water impoundments or other water management features)

b. Existing and new petroleum, natural gas, and electric transmission and/or distribution systems

- New transmission towers & pads; distribution poles, and pipelines
- New Rights-of-way (ROW), access roads for construction, operations & maintenance
- New or expanded substations, natural gas treatment facilities, town border stations (city gates), and regulator stations
- Rights-of-way Management
- Vegetation Management

c. Facility decommissioning

- Filling intake and discharge channels
- Grading, material laydown, fencing

Few disagree with EPA's intent to fix a complicated rule, clarify ineffective guidance and bring consistency to its implementation by agencies, their divisions and regional offices nationwide. Regardless of EPA's statements, science professionals, technical consultants, legal representatives from the mining and petroleum industries, utilities, business and industry, agriculture, and even members of the federal government agree that the proposed draft rule will set the stage for unprecedented environmental compliance challenges that add significant cost and time delays to the construction, operations and maintenance of the nation's critical infrastructure. (p. 3-5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule recognizes that not all waters have a significant nexus to**

US EPA ARCHIVE DOCUMENT

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

The final rule includes several changes to provide the additional clarity requested. The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. See preamble and Adjacency Compendium for further discussion of adjacency.

The changes also include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Martin Marietta Materials (Doc. #6250)

17.1.146 The EPA and Army Corps of Engineers` joint proposal to redefine `navigable waters` pursuant to the Clean Water Act(CWA) falls short of the Administration`s goal of clarifying state and federal jurisdiction over the nation`s water bodies. If federal regulators move forward with a final rule as proposed, the result will be a dramatic and unjustified expansion of federal jurisdiction over the nation`s `water bodies,` thereby increasing permitting costs and creating major delays of, and possibly preventing entirely, key construction and infrastructure projects, as well as potentially sterilizing the beneficial use of valuable aggregates reserves.

US EPA ARCHIVE DOCUMENT

As an aggregates producer, I have serious concerns about the impact of expanded CWA jurisdiction over limestone quarries and sand and gravel mines. Aggregates producers site their plants adjacent to large geologic deposits of limestone or sand and gravel deposits and routinely make capital investments to access this raw material, and to deliver it to the target markets in the most efficient manner possible over the course of several decades. These investments can maximize production when expanding a facility that meets increased demand, thereby adding even more high-quality jobs to their payrolls. Additional CWA permitting requirements would not only provide disincentives to make these long-term investments, but jeopardize relatively recent investments in plant upgrades. This expansion of CWA jurisdiction could also cause the economically availability of aggregates reserves to diminish, or to cause such sites to be located further from the target market, thereby potentially increasing costs to States, Counties, Cities, and private citizens, as well as potentially increasing air emissions from over the road trucks used to deliver these important resources to the market. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule does not establish any regulatory or permitting requirements.**

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies do not intend to reopen existing approved jurisdictional determinations unless requested to do so by the applicant.

Poepping, Stone, Bach & Associates (Doc. #6251)

17.1.147 I am a civil engineer involved in public works development. One of the most costly parts of our projects is time delays. Recently there has been some movement on the part of Congress to address this issue in projects such as highways.

Now we have before us your proposal which is a step back by greatly expanding the scope of federal jurisdiction by "clarifying" the definition of Water of the US. This clarification is nothing more than adding significantly to the regulatory burden of those of us who must deal with trying to get projects out in a reasonable time. You simply do not need to expand the reach of the Clean Water Act, it is not necessary!

All these regulations add significantly to the time it takes to move projects to completion. In many cases, when such approvals are required, worthwhile projects are not even attempted due to the uncertainly of their completion.

US EPA ARCHIVE DOCUMENT

Requiring: more approvals, permits, time delays, possible fines, increased costs, and even denial of important development work is unnecessary, where it is not now effected.

In this time of reduced funding for vital infrastructure improvements we certainly do not need to add any more regulatory burden and its associated overhead to projects. It is difficult enough in Rural American to come up with funding, mostly through tax increases, for projects without putting anymore unnecessary roadblocks in the way of funding the vital needs that must be addressed.

This proposed new Water of the US definition is an unjustified invasion of property rights, a vast increase in regulatory authority, and simply needs to be STOPPED!

I am in total support of those who have coined the slogan "Ditch the Rule." (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science.**

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

Additionally, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Allegheny Township Board of Supervisors (Doc. #6253)

17.1.148 Our concern is adding tributaries of the above waters and all waters, including wetlands, adjacent to a water identified in the above categories will not only prove to be a hardship to the municipality but our residents as well. This change to the definition could cause costs of stormwater control to soar, stunting a community's economic growth and development, as well as deterring residents from improving their properties. We require any development in our Township to meet the necessary requirements for stormwater management. Another concern is the definition of floodplain. The EPA and the Corps definition is not consistent with the definition we apply as understood by FEMA. Our fear is this will lead to confusion for developers who follow FEMA's definition. Please understand while we are not in support of the changes being proposed, we do realize the importance of stormwater management and its effects on the environment. We do not feel

US EPA ARCHIVE DOCUMENT

rainwater falling into ditches or creating large puddles in a resident's back yard should fall under the same level of scrutiny as a river. This is yet another unfunded mandate, as such the costs associated with monitoring and maintaining a stormwater program would be a great burden to the citizens and municipalities alike. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction.**

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and concludes that such tributaries are "waters of the United States." As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. https://msc.fema.gov/portal.

Ruppel, W. (Doc. #6605)

17.1.149 I own a farm in the Town of N. Manchester, IN. On the north side of State Rd. 13 is a wooded area , pond, and wetlands. Due to a ditch being plugged the pond floods after rain and heavy snows. The water comes across the road and floods my pasture and yard. If this comes into affect it would create problems with my ability to use the land for farming. This bill would create extra paper work and rules that would have to be followed not only county and state but federal. It also would give the US control of private land while I would lose use of it and still have to pay taxes on it.

Also being a county official this law would create problems between State and Federal laws and would create many problems and lawsuits in trying to figure out which law is followed.

I would urge you to leave this law the way it is now. It has been working in Indiana to create more clean water. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. 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 addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction.**

Brady, D. (Doc. #6653)

17.1.150 As a landowner I am proud to be the primary steward of the natural resources on my property. The net effect of such a regulation will not be an improvement to the environment, but will place an enormous burden on landowners like myself. Please consider the following comments in evaluating the need for rule.

Currently, your proposed rule has practically no limit whatsoever. As an example, you now have included my agricultural ditches into the category of "tributaries?" This is inappropriate. The two exclusions you have provided for ditches are not adequate to alleviate the enormous burden you just placed on the entire agriculture community. "Ditches" should not be waters of the U.S. Farm ponds should not be waters of the U.S. Dry washes, dry streambeds, and ephemeral streams should not be waters of the U.S.

More red tape is the last thing my ranch needs, because it gets in the way of me putting environmentally friendly practices on the ground, many of which are not included in your list of 56. This proposal will have a negative impact on my small business and hundreds of thousands like it across the country.

In sum, I believe the EPA and the Corps should not finalize their proposed definition for "waters of the U.S." and should scrap the entire rule. There are too many fundamental problems with the proposal.

As proposed it violates the law, will not benefit the environment, and will have a negative impact on small businesses like mine. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. 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. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.**

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and

US EPA ARCHIVE DOCUMENT

banks and ordinary high water mark – and concludes that such tributaries are "waters of the United States." As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Hassle, T. (Doc. #6830)

17.1.151 I am strangled from progress at my day job (road construction industry) through erosion control regulations. These mostly don't take into account unique circumstances, or the idea of constructing these projects on-time and on-budget for the taxpayer's benefit. We spend more time and money worrying about permits and wetlands than building roads. So I am strangled during the workday, and now at night I will be choked by regulations regarding my part-time farming operation. I don't think that the intent of the Clean Water Act was ever to regulate ditches or potentially require permits for cattle in a no outlet farm pond. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. In addition, the rule provides greater clarity regarding which waters are subject to Clean Water Act jurisdiction. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

Lastly, ditches have been regulated under the CWA as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted

US EPA ARCHIVE DOCUMENT

specified activities taking place in them from the need for a CWA section 404 permit.

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and concludes that such tributaries are "waters of the United States." As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Walker, J. (Doc. #6849)

17.1.152 Water drains off my land by gravity. It is ridiculous that water run-off on my land needs to be regulated by the US EPA because none of the water runs year round. Navigable waters are those waters that flow continuously on a yearly basis. The water that I am dealing with on my farm is rain dependent. I do not know how much or when it will occur and neither do you. I have installed conservations methods to move the water off my ground, as needed, to make the ground the best piece of ground I can with the soil types present. We have been farming where we live since 1862, and the soil produces more than it ever has. Part of this is due to the way that I voluntarily take care of the land and institute conversation practices.

If I am forced to get permits, I will not be able to do the work that is needed in a timely fashion. During the crop growing season, work to protect the crops from insects, weeds, and diseases must be done as soon as it is noticed. Even waiting a day or two can do reversible damage to the crop. The wait time might also forbid the work from being done due to the weather conditions at the time. Certain work can only be done in certain weather conditions.

I have previously been involved in doing projects that involved approval from government agencies, and it took over a year and a half to gain the approval for a process to prevent bank erosion, an took me less than a week to complete. In this time frame, a lot of erosion occurred that could have been prevented. Getting the government more involved in the farming process causing a loss of efficiency. Getting the US EPA involved in the water flow process associated with farming will only hinder the quality and quantity of the crop I can produce.

…Voluntary conservation practices were never intended to be turned into regulations. Expanding the definition of waters of the U.S. will disrupt my business and open me to citizen lawsuits which would have the potential to lead to further regulations. (p. 1-2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

<u>South Carolina Forest Association (Doc. #6855)</u>

17.1.153 Although forestry activities with the primary purpose of timber production are exempted from permitting requirements, those activities must comply with federally mandated Best Management Practices (BMPs), follow state guidelines, and are fully subject to water quality enforcement and regulatory actions. Increasing the extent of WOTUS through ditches, ephemeral streams, and minor drainage features will expose more forest land and forestry activities to potential regulatory action and lawsuits. In addition, the costs of meeting these requirements during forestry activities are largely underestimated. (…)

Impact on Forest Landowners

The proposed rule will expand federal control and increase regulatory requirements for private forest landowners. The most significant impacts will occur during forest operations involving:

* Herbicide application – Chemical application for both vegetation management and site preparation for planting will be affected by the definition of WOTUS. State laws will require costly reporting, record-keeping, and compliance on more acres of forest land.

* Tree planting – Mechanical site preparation for planting pines will be subject to greater uncertainty and fewer acres may be put into productive forest use, especially in marginal wetland areas such as pine Flatwoods.

* Wildlife management – Expanded jurisdiction will limit forestry management practices that do not typically qualify for exemption under the CWA's narrow definition of silviculture. Practices to enhance wildlife habitat, recreational quality, and scenic beauty will be curtailed.

US EPA ARCHIVE DOCUMENT

* Endangered species – Habitat management for endangered species does not qualify for silvicultural exemption, and may even force landowners to choose whether to comply with the CWA or meet requirements to provide critical habitat.

* Property value – Expanded jurisdiction will reduce the highest and best use and market value of privately owned forest lands as well as limit landowner options to convert lands to their desired use. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.**

The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation. To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

Pike County Highway Department (Doc. #6857)

17.1.154 My responsibility is to maintain the county road systems. As such, I have approximately 500 miles of roadside ditches of various types and sizes to keep in operating condition. It is a never ending task to maintain them currently, and increased

US EPA ARCHIVE DOCUMENT

rules regarding them will delay my ability to address issues in a timely fashion and put my roads at risk of damage due to drainage issues.

I am very concerned that the proposed rule would modify existing regulations, which have been in place for over 25 years. Because the proposed rule could expand the scope of CWA jurisdiction, my counties could feel a major impact as more waters become federally protected and subject to new rules or standards. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act,**

Supreme Court precedent, and science. 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.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

McGee Creek Levee & Drainage District (Doc. #6858)

17.1.155 The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject our district to increasingly complex and costly federal regulatory requirements under the proposed rule which impacts local stormwater and pesticide application programs, state water quality standards designations, green infrastructure, and water reuse.

It is unclear how the proposed definitional changes would impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse, and reclamation efforts and other water delivery systems. (p. 2)

Agency Response: **This final rule interprets the Clean Water Act to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general

US EPA ARCHIVE DOCUMENT

permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Hillsdale County Road Commission (Doc. #6875)

17.1.156 I have become aware of EPA's and Corps' proposal to amend the definition of "waters of the US" and expand it to include inland ditches, creeks, drains, storm sewers, culverts that fall under a county's jurisdiction. I respectfully oppose the proposed expansion as unnecessary and the over-stepping of federal authority on local government's jurisdiction. Having worked in county road maintenance and construction for almost 40 years, I believe we are good environmental stewards of our roads, drains, culverts and bridges. We are not going to construct or maintain something that will cause us problems in the future. Having a "federal permit" is not going to improve our work! We are already under the oversight of the Michigan Dept of Environmental Quality for soil erosion and culvert/bridge structures. Our foremen are trained in soil erosion best practices. Finally, as county road department staffs have downsized due to inadequate funding, we do have the staffing ability to apply for federal permits every time we'd want to clean a ditch or replace a culvert. I respectfully request that the proposal to expand "waters of the US" be rejected. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Additionally, as discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Herrington, P. (Doc. #6943)

17.1.157 As a citizen who is concerned about clean water, property rights and economic development, I urge you to withdraw your proposed rule that would expand jurisdiction over more waters of the U.S. Like most Americans I am committed to the protection of

US EPA ARCHIVE DOCUMENT

America's water resources but if finalized, this rule will not have a measureable impact on water quality and will hinder future economic development and growth.

Nearly every sector of the economy – including agriculture, housing, and energy production – needs permits required under the Clean Water Act (CWA) to conduct their daily operations. Just as importantly, private property owners who want to develop their own land must also frequently obtain these permits. The Supreme Court has affirmed that both the U.S. Constitution and the CWA limits federal authority over intrastate waters, yet EPA and the Corps - through this proposed rule - are attempting to expand the scope of federal jurisdiction beyond anything that ever existed under the CWA. An expanded scope over more waters of the U.S. will mean more waters under EPA jurisdiction, more permits and loss of property rights.

In fact, if this rule were to be finalized, the activities of my clients would be negatively impacted. **Farmers have a huge amount of regulations they must comply with, and obtaining permits under the CWA is already time-consuming and expensive. Any increase in the number of permits required to economically and reasonably operate a farm property will hinder that process and impede economic growth in my community.**

While the water quality protections provided by the CWA are vital, so too is the ability of private property owners to utilize their property to spur economic development. (p. 1)

Agency Response: **Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. Pollution threatens these economic drivers and we all know the dangers of pollution upstream: water flows downstream and carries pollutants with it.**

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. The 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.

Southpace Properties, Inc. (Doc. #6989.1)

17.1.158 The scope of CWA jurisdiction is of fundamental importance to Southpace. Southpace engages in activities on land and water that often require a jurisdictional

US EPA ARCHIVE DOCUMENT

determination from the Corps before proceeding. Our construction and operations often require various permits under the CWA and the agencies' proposed expansion of jurisdiction will result in additional permit obligations for all CWA programs. Any change in CWA regulations that would change the scope of federal jurisdiction will, in many cases, limit our ability to finance and develop new projects or perform maintenance to existing properties. (p. 1)

Agency Response: **The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.**

Naffziger Farms, Inc. (Doc. #7085.1)

17.1.159 The proposed rule would severely impact our ability to preserve these environmental programs, much less sustain an efficient farm operation. We need to be flexible in addressing day to day issues, such as soil water and pest management. Complying with the terms of the proposed rule will not allow for normal farming practices. They will not allow for the day to day flexibility needed and will only increase our costs with no environmental benefit over current practices. The proposed rules also have a high likelihood of limiting or reducing crop production. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.**

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

US EPA ARCHIVE DOCUMENT

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation.

Spencer County Soil & Water Conservation District (Doc. #7091.1)

17.1.160 The term "adjacent" could potentially lead to the interpretation that the vast majority of county's hydrologic systems, given the relationship our land has with both the Ohio River and Wabash River tributaries, both major streams in the United States. Private land owners within our district are concerned about permitting rules to which they will be required to adhere; a process, yet to be defined and nebulous as to who would be responsible for permitting and regulating. Some fear that this could possibly see to it that large-scale, corporate farming would survive, while family farms would not be able to either afford more permitting or wait the period of time which it would take for the permits to be effective. (p. 1)

Agency Response: **The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

Anonymous (Doc. #7151)

17.1.161 I have a John Deere repair shop here in Spencer Iowa and my customer base are the small farmer. If this rule goes into effect it will cause added expense to their operation and could put them out of business and then I would go out of business and my six employees are out of a job. This rule is A VERY BAD IDEA. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

In addition, the Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Anonymous (Doc. #7158)

17.1.162 I have some water ways that connect some low areas on my farm. Under this rule I will have to get permits to do any work on the farm such as planting, mowing, fertilizing, spraying or anything close to any of these areas. My farm is hundreds of miles from any navigable waters that you have authority to regulate. The U.S. Supreme Court has already decided that you do not have control over all waters of the U.S. (p. 1)

Agency Response: The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

In addition, the final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

Pike County Democratic Central Committee (Doc. #7188.1)

17.1.163 Pike County's primary economic engine is agriculture. Expansion of federal jurisdiction of water will have a significant impact on farming in our county. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the

US EPA ARCHIVE DOCUMENT

nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f). In addition, 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.

Anonymous (Doc. #7203)

17.1.164 It is my understanding that if the rule is finalized, I would have to get a permit before I could work around my farm ditches, put up fences around or through my property spray weeds, cut brush, move dirt or graze cattle.

This would apply even if there was water present just a few days out of the year. If I don't comply with the rule, I could face fines of more than $37,000 per day. At that rate it would only take a few weeks before the EPA owned my farm. (p. 1)

Agency Response: **The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(A), which has not changed as a result of the rule.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Greater Hall Chamber of Commerce (Doc. #7314)

17.1.165 The Greater Hall Chamber of Commerce opposes the EPAs proposed change to the definition of Waters of the United States. Further expansion of the EPAs rulemaking authority will result in additional regulatory burdens, diminish private property rights, and negatively impact business and industry in Gainesville-Hall County, Georgia. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. 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.**

Wellman, S. (Doc. #7332.2)

17.1.166 For me to believe that making these drastic changes to the Clean Water Act will not affect me is burying my head in the sand. The rules could be interpreted as to require a permit for each and every project we do. We do not have time to request a permit every time we need to make fence or we need to move our cattle through non-navigable waters created from last night's rain. The agency has said that cattle "discharging" into a ditch, pond, or creek is an illegal discharge unless they qualify for the exemption, which means that if we graze without a Prescribed Grazing plan we would most likely be violating the Clean Water Act. As slowly as the government operates how long would it take to receive permits? (p. 2)

Agency Response: **The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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.**

The maintenance exemption provided within the CWA remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

Schiffer, M.D. (Doc. #7645)

17.1.167 We are very concerned about the agencies' proposed regulation of what appears to be millions of newly-designated ephemeral and intermittent conveyances, ditches or other "waters of the U.S." (WOTUS) that will be difficult for aerial applicators to identify

US EPA ARCHIVE DOCUMENT

and thus may subject commercial pilots to CWA enforcement and potential citizen suits under the CWA. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Pike County Chamber of Commerce (Doc. #7932)

17.1.168 The proposed rule would significantly expand the scope of navigable waters subject to Clean Water Act jurisdiction by regulating small and remote waters- many of which are not even wet or considered waters under any common understanding of that word. This would subject not only farmers but businesses, property owners and communities to new and different permitting requirements and use restrictions. Small businesses and small communities are likely to be among the hardest hit by the change. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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.

Tillamook County Soil and Water Conservation District (Doc. #7934.1)

17.1.169 Unfortunately, increased regulations are making it more difficult for our farmers to stay in business and continue to provide jobs to an already depressed economy. The

US EPA ARCHIVE DOCUMENT

agencies proposed rule will increase regulatory requirements by increasing the number of permitting requirements under both section404 and 402 of the Clean Water Act. These additional regulatory requirements will negatively impact our family farming operations. (…)

The Land of Tillamook County like all land collects and conveys water in some form or fashion. That natural occurrence should not provide any agency the authority to prohibit, inhibit or otherwise control what happens on that land. The proposed definition will do just that without any clarity or assurances that EPA, the Corps, or a third party litigant will not challenge our actions on the land that naturally or purposefully collects, channels, or conveys water. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.

University of Missouri (Doc. #7942.1)

17.1.170 Finally, there would most certainly be impacts to the agricultural industry but also other industries in the state may suffer including (but not limited to): construction, real estate, mining, forestry, tourism, manufacturing and many other important natural resource commodity industries. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of Clean Water Act programs (i.e., sections 303, 305, 311, 401, 402, and 404).**

Finally, the agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the

US EPA ARCHIVE DOCUMENT

intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

City of Naples, Florida (Doc. #7943.1)

17.1.171 The effects on the City of Naples are threefold:

1. Costs for activities associated with management and maintenance of waterways will increase several times over,

2. The ability to carry out routine maintenance activities associated with stormwater and to provide basic services to our residents will be greatly impeded, and

3. The City's limited resources, focused on projects and programs that have the biggest return on investment in terms of pollutant reduction and restoration of the natural environment, could be impacted to where our endeavors would have little to no effect. (p. 2-3)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The final rule does not establish any regulatory requirements and does not change permitting requirements. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404).**

The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed.

The agencies' longstanding practice is to view stormwater water control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely,

US EPA ARCHIVE DOCUMENT

the agencies view some waters, such as channelized or piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.

Office of Advocacy, Small Business Administration (Doc. #7958)

17.1.172 The courts have left much uncertainty regarding what constitutes a "water of the United States." Such uncertainty has made it difficult for small entities to know which waters are subject to jurisdiction and CWA permitting. (p. 3)

Agency Response: The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

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

17.1.173 Consequences

Given the assessment of the proposed regulations and considering all tests in total, in many areas of Florida the following types of water bodies will now be considered to be jurisdictional waters of the United States:

- Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) within the floodplain of a classic WOTUS; and
- Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) that have a direct connection to WOTUS.

Note that the expansion of the number of jurisdictional waters will be especially pronounced in coastal areas. (p. 8)

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

US EPA ARCHIVE DOCUMENT

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

17.1.174 Of specific concern is the potential for the inclusion of "flooded" areas as providing connectivity and bringing portions of the various counties' MS4s into WOTUS. The potential cost of compliance if those areas are now deemed WOTUS and are subject to the criteria under the CWA is enormous. (p. 31)

<u>Agency Response:</u> Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent

US EPA ARCHIVE DOCUMENT

are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

Iowa State University (Doc. #7975)

17.1.175 In summary, we believe the proposed rule will generate great uncertainty among farmers in making informed decisions on soil and water conservation practices. The rule as currently written may result in farmers who are more reluctant to engage in potentially beneficial conservation practices or who are hindered in their ability to effectively implement practices. As such, the proposed rule places an undue burden on the conservation services provided by state and federal agencies. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

Illinois House of Representatives (Doc. #7978)

17.1.176 Your rule aggressively expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity. Moreover, the rule is based on incomplete scientific and economic analyses. (…)

Rather than providing clarity and certainty in identifying covered waters, the rule instead creates more confusion and will inevitably cause unnecessary litigation. The rule relies heavily on undefined and vague concepts such as 'riparian areas,' 'landscape unit,' 'floodplain,' 'ordinary-high-water-mark' as determined by the agencies' 'best professional judgment' and 'aggregation.' (p. 2)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected

US EPA ARCHIVE DOCUMENT

under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. 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 agencies' interpretation of the CWA's scope in this final rule is informed by the best available peer-reviewed science – particularly as that science informs the policy judgments and legal interpretations as to which waters have a "significant nexus" with traditional navigable waters, interstate waters, and the territorial seas. A comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"[8] (hereafter the Science Report) synthesizes the peer-reviewed science. The Science Report provides much of the technical basis for the rule. The Science Report is based on a review of more than 1,200 publications from the peer-reviewed literature. EPA's Science Advisory Board (SAB) conducted a comprehensive technical review of the Science Report and reviewed the adequacy of the scientific and technical basis of the proposed rule.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. Finally, the final rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Pike County Republican Central Committee, Pike County Republican Party, Illinois (Doc. #7984)

17.1.177 Pike County's primary economic drive is the agriculture industry. Expansion of federal jurisdiction of water will have a significant impact on farming in our county. (…)

The threat of third party lawsuits along with an unfair settlement agreement by the federal government is a real and impending concern to property owners. (…)

Units of government and other jurisdictions such as towns, villages, townships, counties, school districts, drainage districts, water systems, transportation departments, and municipal utilities will be profoundly impacted by the shift from state and local control of water-related land uses to federal control.

The proposed rule would subject property owners, businesses, and communities to stringent new permitting requirements and use restrictions they have never had to bear.

The process of obtaining permits and use approvals under the Clean Water Act can be very costly and time-consuming. Historically, obtaining a permit to develop in

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

US EPA ARCHIVE DOCUMENT

jurisdictional wetlands can take longer than 12 months and cost hundreds of thousands of dollars. (p. 1-2)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

Finally, States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction.

Southern Association of State Departments of Agriculture (Doc. #7995)

17.1.178 Increased regulations will restrict farmers from using or altering parts of their property, resulting in substantial profit loss. While the list of agricultural exemptions has been expanded, it comes at the cost of being under EPA scrutiny. These exemptions are only warranted because they would now be operating under the federal jurisdiction of the EPA. This hostile directive threatens to eliminate traditional methods that have been used on our farms for decades. (…)

Increasing the scope of the CWA will undoubtedly leave our farms and small businesses at the mercy of EPA and open the door to environmental activists to pursue civil lawsuits under new interpretations of the rule change. (p. 2-3)

US EPA ARCHIVE DOCUMENT

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The final rule does not establish any regulatory requirements and does not change permitting requirements. 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.**

The rule does not affect or modify in any way the many existing statutory exemptions under Clean Water Act Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(A), which has not changed as a result of the rule.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

City of St. Marys, GA (Doc. #8144)

17.1.179 Existing manmade retention ponds designed to existing State and Local standards all have 'outflows' for when a storm event creates an overflow condition. Under the new rule, this condition will be considered 'Waters of the US' and create maintenance problems for either the City, the Home Owners Associations, or the Citizens that may own all or part of a retention area. Even ponds or wetlands that have no outlet to a Water of the US has to have an overflow outlet and a related watercourse for when it does overflow. This creates a classic Catch 22, because at that moment - under this rule - the pond/wetlands will become Waters of the US subject to regulation. In other words, every present and future retention or drainage methods that have the potential of draining will become Waters of the US, creating a nightmare of higher costs and longer permit time.

The proposed buffer requirement for "Waters of the US" - will create massive problems with existing and proposed - but unbuilt – lots/structures. Some of the lots/structures adjacent to existing wetlands have features within this proposed buffer, and this will render these lots/structures unbuildable, thereby destroying the economic value of the lots/structures, which will negatively affect the health and welfare of our citizens. (p. 1-2)

Agency Response: **The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land.**

US EPA ARCHIVE DOCUMENT

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404.

Implementation of the 404 nationwide permit program is outside the scope of this rule.

Sierra Club, Cumberland Chapter (Doc. #8356)

17.1.180 All Kentuckians should support this proposed regulation because Kentucky is a "headwaters state"; most of our big rivers (meaning most of our drinking water supplies) have their headwaters in Kentucky. We need and deserve protection from pollution of those waters. (p. 1)

Agency Response: The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

City of Philadelphia Water Department (Doc. #8359)

17.1.181 I am writing to confirm the Philadelphia Water Department's support of the U.S. Environmental Protection Agency and Army Corps of Engineers proposed Clean Water Act Rule Definition of "Waters of the United States" Under the Clean Water Act. This clarifying rulemaking restores protection for streams and wetlands previously protected under the Clean Water Act, safeguards water quality in the nation's waters, protects jobs in businesses that depend on clean water and safeguards drinking water. Over the next 25 years, the Philadelphia Water Department will invest more than $10 billion to improve Philadelphia's water, sewer and stormwater infrastructure to meet regulatory requirements and continue our pledge to protect and preserve the water resources that allow us to protect public health and provide top quality service. This ruling enhances our ability - and the ability of utilities across the nation - to honor this pledge. (p. 1)

Agency Response: The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

New Salem Township (Doc. #8365)

17.1.182 We are very concerned that the proposed rule would modify existing regulations, which have been in place for over 25 years. Because the proposed rule could expand the

US EPA ARCHIVE DOCUMENT

scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards. (…)

Key terms used by the "waters of the U.S." definition-tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed-are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays. (…)

A rule that regulates all waters lying within a floodplain but leaves to case-by-case judgment whether it's a 10-year, 100-year, or 500-year floodplain does not promote clarity or consistency. (p. 1-2)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

In addition, for purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. https://msc.fema.gov/portal. These maps are publicly available and provide a readily accessible and transparent tool for the public and agencies to use in locating the 100-year floodplain.

State of Iowa (Doc. #8377)

17.1.183 Increased Uncertainty: The proposed rule increases, rather than decreases uncertainty for various stakeholders. We are very concerned that this vacuum of uncertainty would be filled by an army of lawyers that would slow the advancement of water quality projects throughout the nation. A good regulation would be clear, so all stakeholders plainly understand what is allowed and when a permit is required. Instead, the proposed rule is more ambiguous than current law and promises to be tied up in litigation for years to come, creating uncertainty within conservation interests, industries and communities across the state. (p. 2)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public**

US EPA ARCHIVE DOCUMENT

outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.184 There are three key concepts of the rulemaking that lead us to believe that the proposed rule serves to expand coverage -- Adjacency, aggregation, & connectivity: (…)

Through the combination of these three concepts, the CWA will be expanded to reach all water-created landscape features and virtually all water bodies within the watersheds of such water-created landscape features, regardless of whether these features actually contain water for significant periods of time. (p. 5-6)

<u>Agency Response:</u> 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.

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. This final rule interprets the Clean Water Act to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial. The agencies have also determined that the single point of entry watershed is a more reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard than ecoregions.

Further discussion of exclusions is found in the summary response 7.0: Features and Waters Not Jurisdictional.

US EPA ARCHIVE DOCUMENT

Scott County Soil and Water Conservation District (Doc. #8410)

17.1.185 As we deal with rural and increasingly urban water resources, any rule should take into account its effect on home owners, small businesses, and units of local government who we also serve as a Soil and Water Conservation District. The rule as proposed significantly expands land under federal jurisdiction. We are concerned that many of the issues addressed by agriculture will be an issue with these other entities - increased cost of compliance, regulation of areas that are rarely wet, and reallocation of resources to satisfy regulatory requirements. (p. 2)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F).

Greater Lafourche Port Commission (Doc. #8411)

17.1.186 [W]e feel that this regulatory expansion has been developed without adequate input from industry, as well as state and local stakeholders such as ourselves and that it will have an unjustifiably negative impact on our economy with little substantive gains for the quality of the environment. (…)

The consequences of this proposed step change in permit applications and associated new or expanded review procedures, are that the proposed rule will greatly increase both the dollar amount and time required to obtain these permits, at a minimum, and could create such a burden on the Corps that its regulatory mission overshadows its fundamental flood control and public protection mission — thereby jeopardizing not only our Nation's economic recovery, but public safety. (p. 1)

Agency Response: This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

US EPA ARCHIVE DOCUMENT

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

Tri-County Economic Development Corporation, Northern Kentucky Tri-ED (Doc. #8536)

17.1.187 There are many concerns about whether industrial development can continue in Northern Kentucky given the impacts of the proposed rule. Many industrial developers have voiced concerns over the impacts to Northern Kentucky Tri-ED, along with the Home Builders Association of Northern Kentucky. (…)

Northern Kentucky Tri-ED looks forward to a reasonable balance between the protection of our precious natural resources and the ability for our local, state and U.S. economy to grow. The current proposed rule drastically affects the latter to occur. (p. 1-2)

Agency Response: **Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

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. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

North Houston Association et al. (Doc. #8537)

17.1.188 The new rule appears to expand the current reach of federal jurisdiction across the Western Gulf Coast Plain (WGCP) upstream and upslope: which given the flat topography, clay soils and high rainfall, reaches into the smallest of ephemeral tributaries and into ditches. In addition, federal jurisdiction will also reach into isolated wetlands that are embedded in a matrix of uplands and without any defined water course connections to traditional navigable waters (TNW's). As a result of this expansion of jurisdiction, large areas of the Houston region will for all practical purposes be subject to land-use restrictions and management, as imposed by federal agencies. We strongly believe that such a large scale land-use regulatory program is not what Congress had in mind when passing the CWA. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the Clean Water Act's (CWA) objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

City of Borough of Sitka (Doc. #8651)

17.1.189 WHEREAS, the proposed rule would amend the definition of waters of the U.S. in the Clean Water Act (CWA). Enacted in 1972, which would adversely affect Sitka and our ability to market and sell bulk water (p. 1)

Agency Response: The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another.

US EPA ARCHIVE DOCUMENT

Gulf Coast Soil and Water Conservation District (Doc. #8655)

17.1.190 As a conservation driven organization, we recognize that conservation on the ground starts with implementation of best management practices (BMPs). These universally accepted BMP's require action and maintenance upon the land to be successful. In a lot of cases, these BMP's don't always fit into the "catch all" definitions established by the regulatory agencies. Changing of any of the definitions, would further paralyze conservationists, land managers, farmers, ranchers, and other good stewards of the land from properly managing their privately owned property. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

Franconia Township (Doc. #8661)

17.1.191 In our community, we believe that reasonable growth and development is integral to our future viability and prosperity. We want our children and their children to move back home where they were raised, and to be able to raise their own families in their hometown. For that to occur, we must have the ability to support orderly development to provide housing, businesses, and industry to broaden our economic appeal. The proposed rule must not burden our local communities by setting forth newly broadened and expansive controls over local, regional and state waters, using the federal CWA to regulate such growth. Regulation over the tiniest trickles of runoff by broadly defining "tributary" as jurisdictional waters could cause untold damage to our community's ability to grow and prosper, raising the specter of pricey permitting processes and citizen lawsuits to slow or stop this modest growth, and possibly ruin the future prosperity of Franconia Township. (p. 2)

Agency Response: **Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The final rule does not establish any regulatory requirements.**

US EPA ARCHIVE DOCUMENT

Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

United Country/American Real Estate & Auction Co LLC (Doc. #8675)

17.1.192 In reading this proposed change from the EPA, my farm will be impacted in that any area deemed to be under their jurisdiction I will have to apply for permits to do routine things that I have done for years without thinking. These include things like cleaning ditches, maintaining fences, putting in new fences, spraying noxious weeds, and a multitude of other farm chores. In the small acreage that I own I could be forced to fence off some of the intermittent creeks and put in buffer zones. These are currently grazing areas and this would cut down on capacity of my herd and hence render many acres unusable. In my business the ground that is not useable is not worth anything. This will affect all farms which will affect the real estate industry. I could go on and on with how far reaching this would affect the economy but I am going to keep it personal to just me and my family. My land values would decrease, my profitability from my small herd of cattle would decrease, and my real estate business would decline due to less total value to each farm. This in turn has a domino effect on everything else. (p. 1-2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Anonymous (Doc. #8757)

17.1.193 I am very strongly against the proposed rule : definition of the waters of the US. I am a beef cattle farmer in East TN and can see that I would have undue burden placed upon my operation if the proposed rule is allowed. Though the beef industry is at a high point in the cattle price cycle - beef cattle production has a very tight profit margin and in

US EPA ARCHIVE DOCUMENT

some years will be a loss of income. Any further restriction of the use of our land could result in more farmers opting out of production.

I feel the current definition of waters is adequate. I also feel this regulation has already been addressed by the Supreme Court and the EPA is yet again over-reaching its bounds. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science.**

Anonymous (Doc. #8778)

17.1.194 This rule is not what Congress intended and is opposed by the Supreme Courts. If implemented the rule will add confusion and substantial cost to everyday farming as we know it. On my farm we are continually updating and installing conservation practices to protect water quality. If the proposed rule is implemented we would need permits to do virtually any of this construction. The permit process would only add cost and delay the construction of the conservation structures. I am asking that you please reconsider this rule and let us implement conservation without undo regulations. (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Kramer, J. (Doc. #8802)

17.1.195 The time that it takes to secure either a nationwide or an individual permit often delays my projects into the next construction year or even later. The impact or in-lieu fees

US EPA ARCHIVE DOCUMENT

are beginning to approach the total cost of the land such that land owners have had their property devalued to nothing. (p. 1)

Agency Response: **The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

Anonymous (Doc. #8808)

17.1.196 With its proposal to regulate land that is dry most of the year and miles from the nearest truly navigable water, EPA is putting farmers in a tenuous position. EPA and other supporters of the proposed rule have made much of a long-standing exemption for agriculture, and claim that it still stands; however, the proposed rule narrows that exemption and opens it up to litigation. The "normal farming and ranching" exemption only applies to a specific type of Clean Water Act permit for "dredge and fill" materials. There is also no farm or ranch exemption from Clean Water Act permit requirements for what EPA would call "pollutants." (p. 1)

Agency Response: **At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).**

Anonymous (Doc. #8822)

17.1.197 This has the potential to put farmers out of business and discourage young people from any career in production agriculture. Another side effect from this will be the cost of food production and a diminished ability to feed a hungry world. With all of the downsides that appear to go with this set of rules, it seems like maybe going back to the drawing board and making adjustments and creating a common sense approach would be best. (p. 1)

Agency Response: **The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The**

US EPA ARCHIVE DOCUMENT

final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

Anonymous (Doc. #8835)

17.1.198 …The expansive language in the proposed rule would mean that farmers could be forced to apply for federal permits and work through government red tape to do normal activities, such as building a terrace, constructing a waterway, applying fertilizer or even planting a tree. I take great responsibility in care of the land that I farm and great pride in the ability to provide food for an ever increasing world without having to consult and file paperwork to do simple tasks. (p. 1)

Agency Response: The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

Anonymous (Doc. #8862)

17.1.199 If passed, this rule will result in so much "red tape" for the American Farmer, they will have to keep an attorney on retainer just to deal with the fees and fines. With no feasible way to recoup those costs, farmers and ranchers will be forced to scale back on production and for some cease operation all together. The drop in production will lead to much higher prices for food and fuel. In an already financially strapped economy how do these government people going to feed the ever expanding urban population. (p. 1)

Agency Response: The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

US EPA ARCHIVE DOCUMENT

The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.

Anonymous (Doc. #8895)

17.1.200 As a farmer I urge you to ditch this rule. This rule is over-stepping bounds on landowners and their right to carry out agricultural activities at their discretion. As a nation we need to work to increase yields to meet future demands. This rule will only hinder this from happening. By requiring farmers to get permits to apply herbicides and fertilizer as well as installing terraces will only be burdensome and hinder efficiency on farms. For example, if a farmer is waiting on a permit to spray weeds and the weeds grow out of control and compete with the crop there will be yield loss. In addition, there will be extra costs to the farmer by having to spray higher rates of chemicals to kill the weeds. This rule goes well beyond navigable waters. For a farming business to run successfully and efficiently you cannot tie the hands of the operator, and that is exactly what this rule would do. (p. 1)

Agency Response: The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Anonymous (Doc. #8912)

17.1.201 …if we, as farmers, are charged for these permits I am not sure how much longer we can afford to farm. We are not able to pass the cost to the consumer, like other businesses, so it is a cost that will impact me directly. I am proud of the conservation efforts my family has taken on our own to ensure that my children will have a safe environment to live in. I just pray that the EPA will ditch this rule so my rights and my

US EPA ARCHIVE DOCUMENT

children's rights to this land are not in jeopardy and we can continue our water conservation practices without requiring a permit or fear that we will be fined. (p. 1)

Agency Response: **The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

Californian Indian Environmental Alliance (Doc. #9103)

17.1.202 Small streams and wetlands are no longer guaranteed to be covered by the Clean Water Act. These waters may now be vulnerable to pollution and degradation following two Supreme Court decisions in 2001 and 2006. The legal chaos that resulted from these decisions has caused significant declines in Clean Water Act implementation and enforcement. It puts significant burdens on the Agencies to repeatedly prove what we already know scientifically that small streams and wetlands are integrally linked to the health of downstream waters.

As part of this effort, we urge you to strengthen the proposed rule by more fully restoring protections to other waters, such as prairie potholes and vernal pools. What happens upstream, in small streams and wetlands, affects downstream rivers, lakes, and beaches where we swim and fish. From the smallest headwater streams to the Mississippi River, science proves that these waters are connected physically, chemically, and biologically. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. 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.**

US EPA ARCHIVE DOCUMENT

In this final rule, the agencies have identified by rule, five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they perform similar functions and are located sufficiently close together in the watershed to function as a single system in affecting downstream waters. These five types of waters are prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.

Under paragraph (a)(7), prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters in these subcategories are not jurisdictional as a class under the rule. However, because the agencies determined that these subcategories of waters are "similarly situated," the waters within the specified subcategories that are not otherwise jurisdictional under (a)(6) of the rule must be assessed in combination with all waters of a subcategory in the region identified by the watershed that drains to the nearest point of entry of a traditional navigable water, interstate water, or the territorial seas (point of entry watershed).

Wilson, T. (Doc. #9121)

17.1.203 …A big portion of our acreage is river-bottom ground, where flooding is no stranger. Therefore, we as farmers must take certain control of ditches and waterways to protect our crop from flood damage each year. This control consists of such activities as opening and closing flood gates, maintenance of floodgates, clearing out ditches to help water flow, etc.

Passing such a rule will make a huge impact on how farmers like me make our living. Its concerning to me that this rule will make it extremely difficult for us farmers to control erosion and other factors on our ground. With this being said, I kindly ask that you withhold this rule. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

US EPA ARCHIVE DOCUMENT

Smith, B. (Doc. #9213)

17.1.204 …Our ranch and farm has been and currently is family owned. Through condemnation, we lost about 80 % of our ranch to a lake that the City of Dallas put in. Most of our ranch now lies behind the dam and adjacent to the lake's spillway. When heavy rains come the lake releases water and it ends up flooding part of our land because the spillway can't handle all of it at one time. The water floods a lot of the ranch and then gradually drains. From what I understand about the proposed E.P.A. rule, this would subject this part of our ranch to further restrictions and government control which is the last thing we need in order to keep ranching and farming. In essence, it would be a "taking" of our land even though some may not see it that way - that's what it'd amount to.

Making a living in agriculture is hard enough with Mother Nature's curve balls and all of the existing government regulations. Those who think the proposed E.P.A. rule is a good idea are probably not in the agriculture business so it's easy for them to advocate this rule but for those of us actually in the business and can see firsthand the damage this would do need to be listened to the most. It affects our livelihood, not theirs. Like most ranchers and farmers, we take good care of the land or , in our case for instance, it would not be in a good enough shape after 3 generations to remain a viable operation. (p. 1)

Agency Response: **The agencies believe that the rule strengthens the protection of waters for the health of our families, our communities, and our businesses, including in the agricultural sector. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. In addition, the CWA only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.

Please see Section I.C. of the Technical Support Document for further discussion of property rights.

Pascua, J. (Doc. #9226)

17.1.205 This latest example of over-regulation makes no sense and creates more confusion than it seeks to address. Local water conveyances, such as ditches and flood control channels, may fall under federal regulation in this unworkable proposal. It is unclear how far it would extend into drainage systems. That means local governments would be required to obtain federal permits to perform routine maintenance work on a roadside ditch or stormwater drain — essential components of effective water management.

US EPA ARCHIVE DOCUMENT

In many cases, local governments are responsible for maintaining storm drains and other water-conveyance systems. They often pay a high price to wait for the federal government to issue permits. This new red tape would slow down the process even more and potentially put more people in harm's way by inhibiting projects that keep water off of roads and away from homes. The costs and delays of this federal over-regulation would have a significant impact on public safety and economic prosperity. For example, maintaining drainage is critical to keeping our roads safe and open for use and requires daily attention. This adds to the fact that our road and bridge budget is already inadequate in currently maintaining the rural road system.

Increasing fees due to additional regulatory permitting for all runoff, as anticipated by the proposal, could bring maintenance efforts to a halt. How this regulation would be administered is unclear, and it would be especially cumbersome if it went directly through federal offices not adequately equipped to accommodate heavier permitting. Specifically in Leon County and across Florida where stormwater runoff is a major concern, additional rules and regulations would create undue financial burden and time delays on our already existing challenges. Plans might be required for federal review for things such as retention ponds, runoff canals and basic ditches, since stormwater runoff will likely fall under the rule.

The expense for plan preparation would add costs not in our existing budgets. If fully exercised, every basic culvert maintenance or repair could be held up, not only placing a burden on counties financially, but also putting citizens at risk due to delays in permitting, as all these would have to first be reviewed and approved by a federal agency. The approach taken by this proposal would drain local budgets and create delays in critical repairs that are often time crucial with no demonstrated long-term environmental benefit.

Federal over-regulation and unfunded mandates unnecessarily hinder counties' ability to get things done for local citizens. All of us want to protect the environment, but we cannot allow over-regulation to do more harm than good. That's why I am against this proposal.

Local governments want to work with the federal government to ensure that we have clean, safe water for generations to come. It's my hope the federal government will work closely with county and state leaders to define and implement common-sense environmental regulations that strengthen, not hinder, public safety and growth in our communities. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent,

US EPA ARCHIVE DOCUMENT

and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. This action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538), and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Richard, M. (Doc. #9291)

17.1.206 The cost to land developers, private citizens and the public is tangible under the proposed rule. The financial burden on the permittees may increase with additional mitigation and design concerns, but the permit process would speed up with the clarification of wetland jurisdiction. Permittees are genuinely concerned with the long permit process and sever lack of clarity of regulations and guidance. As a scientist, I believe the data demands regulations be changed to support the initial goal of the CWA; wetland conservation. (p. 2)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the CWA from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public.

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams

US EPA ARCHIVE DOCUMENT

and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Wilken, M.J. (Doc. #9354)

17.1.207 Also if it weren't for field tile and catch basins, my farm would be nothing but pot holes with water standing for up to 2 weeks when these major rains occur. And seeing that plants die after extended periods under water, I have been forced to rely heavily on these ditches and my field tile. I do not farm next to a river and my land isn't highly erodible, yet the powers that be want to treat my ditch as a river and my land as highly erodible. These ditches were dug in the mid to late 1800's to DRAIN the land to BETTER ITS USE and there is no way anyone could even think of canoeing down it when its full. Coupled with field tile (clay tile first installed in the 1800's and upgraded to modern tile as the 120 year old systems have worn out or filled up dirt).

Along with solid conservation practices, these ditches have allowed me to try to put every acre to its best use and to maximize its output which is what I have to do for my business, my country, and now the world. I do not over fertilize or put chemicals down my ditches as that is simply a waste. Anyone who farms knows you can't stay in business throwing money away. In the past, people had closer ties to farms, however as time goes on, with less of a farming populace in the country, society has become very distant and I am extremely concerned about people in power today that push agendas without the basic knowledge of what or how important my farm is. And by forcing me to keep every pond on my property, because I'm all of a sudden a bad steward of the land that my family has farmed since 1872, tells me that this country no longer concerns itself with self sustainability but with the popular agenda of the time. In a nut shell a lot of us, including myself will probably be eventually put of business since it usually takes MAXIMUM YIELD FROM EVERY ACRE to deal with even tighter margins.

I also understand that this law can effectively stop us from mowing our road ditches. We frequently have accidents at rural intersections where both vehicles don't stop because they don't see each other and there have been deaths from some of these accidents. In the spring, the grass in these ditches can get up to 4 feet tall, clearly obstructing the view of any driver let alone any one not paying attention. It sure seems to me that this law is now threatening public safety. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent,

US EPA ARCHIVE DOCUMENT

and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule.

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

Eriksen, D. (Doc. #9369)

17.1.208 Concern over a section of the proposed rule reading: "seasonal rain dependent streams are protected". This could be interpreted to extend to local farms and the immediate need to irrigate crops dependent upon local high-country lakes/streams. The Federal Gov't could become a serious obstacle to local decision-making involving our economy and food supply. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

Linck, T. (Doc. #9403)

17.1.209 I am a Township Manager for a small municipality in Washington County, Pennsylvania and to have these regulations imposed on us is very unnecessary for some very simple reasons. The Township receives calls weekly about a part of a ditch in the Township that has some debris in it or a downed tree which is causing water to run on to the road or into people's property. For the Township to receive federal approval for addressing the ditch is completely unnecessary. It will cost the Township and country money to receive approval. It will delay the project for longer than the couple of hours it will take us to respond. It will greatly upset residents who will be told we have to wait for federal approval to clean a Township ditch. Please do not impose any regulation of this sort for local governments as it will be a huge hindrance to our daily operations. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, and municipalities charged with maintaining the nation's roads. The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities

US EPA ARCHIVE DOCUMENT

associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

Dey, L. (Doc. #9404)

17.1.210 As a landowner, small business owner, and steward of the land, this proposal will be detrimental both financially and to our land. This takes away our rights as property owners and will force us to make decisions based on your rule and financial outcomes rather than what is best for our animals and land. We bear the burden of developing and maintaining our wells and water systems. That task and cost will still be left to us but now there will be additional regulations and costs. This puts us in great danger of going out of business. Farming is cyclical, we don't collect salaries and can't determine what the next year will be like. We survive with water and good practices for improving our grazing land and keeping our animals alive. This regulation will destroy California Agriculture and in turn, the health of our land and people. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

Clearwater Watershed District, et al. (Doc. #9560.5)

17.1.211 Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards. (…)

The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal

US EPA ARCHIVE DOCUMENT

jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined. (…)

The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject county governments to increasingly complex and costly federal regulatory requirements under the proposed rule which impacts local storm water and pesticide application programs, state water quality standards designations, green infrastructure and water reuse. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.**

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, and municipalities charged with maintaining the nation's roads. The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

Watershed Protection Department, City of Austin, Texas (Doc. #9600)

17.1.212 The Waters of the United States provide for the protection of public health, important recreational opportunities, economic livelihood and are treasured national resources. The Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction. These strong federal standards are needed because water does not observe political boundaries and flows between states. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Pattillo, Kathy, Sirius Solutions, L.L.L.P. (Doc. #9663)

17.1.213 As a mineral owner I oppose the proposed U.S. Environmental Protection Agency-U.S. Army Corps of Engineers rule to clarify the definition of "Waters of the United States" Under the Clean Water Act. This proposal presumes EPA Clean Water Act authority over most ditches, ponds, isolated low-lying wet areas, and dry gulches that carry water only after heavy rain. It is one of the most egregious examples of federal regulatory overreach in memory. It will cost the U.S. economy billions of dollars and add several thousand dollars in surface compliance costs to every oil and gas well drilled to develop my private property. It will reduce the economic viability of my private minerals and will decrease not only my family income, but also the tax revenue flowing to the U.S. Treasury, states and communities nationwide. This rule is fatally flawed and must be rejected. (p. 1)

Agency Response: **The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Reagor, T. (Doc. #9689)

17.1.214 From a different perspective, the value of land will decrease as the acres that are not useable with the new rules will have little value. In Southern Illinois this will be a much larger percent than in many other areas of the country. Let's say that it affects 10%

US EPA ARCHIVE DOCUMENT

of the land and land is valued at $4,000 per acre. You see how fast this adds up. These rules would be taking so much collateral from farmers as a whole. This in turn would be affect through the banking system and the ability to borrow money. What about the mortgages that are already on theses farms? This could turn some farms upside down and they would owe more than what their land is worth. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

There is no change in the treatment of NRCS determinations. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

Plains Cotton Cooperative Association (Doc. #9698)

17.1.215 Most of the areas that are being categorically claimed as WOTUS are far too remote to merit that treatment. Many of these features are dry most of the time and others only have water in them for short periods. This is especially true for the majority of our owners who farm in a semi-arid climate. The dry drainage features around or near their farms will never be fishable or swimmable and do not need to be made jurisdictional in order for us to work together to protect the quality of waterways that are clearly jurisdictional. I am sure the U.S. Department of Agriculture and other federal agencies have significant data regarding rainfall and runoff in these areas. The expansion of jurisdiction also could lead to unnecessary litigation against our farmers and create unreasonable risks and costly liabilities. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the Clean Water Act. In making this determination, the agencies must rely, not only on the science, but**

US EPA ARCHIVE DOCUMENT

also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate. About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

Londonberry Township Trustees (Doc. #9727)

17.1.216 Property in our area is purchased with the primary focus on the water available for agricultural use. Under the proposed rule even building a fence or mowing grass across a ditch would require a federal permit. Thus, infringing on our private property rights to manage small and temporary bodies of water on property that we have purchased and paid for, not that the government owns. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

The agencies also recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects

US EPA ARCHIVE DOCUMENT

this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

North Newton Township (Doc. #9731)

17.1.217 The cost of obtaining federal permits, along with the engineering and legal expenses involved with applying for permits, will negatively affect our taxpayers in terms of increased taxes and long delays to resolve problems. If local governments are unable to swiftly deal with drainage issues as they arise, the result could be damage to property or even loss of life. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

Ditches have been regulated under the CWA as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

City of Omaha Nebraska (Doc. #9733)

17.1.218 The new proposed rule by EPA and U.S. Army Corp of Engineers that would amend the definition of "Waters of the U.S." and expand the range of waters that fall under federal jurisdiction will be another burden on the regional wastewater users. Complying with Section 404 permits is already extremely cumbersome, time consuming

US EPA ARCHIVE DOCUMENT

and expensive. Expanding the geographic jurisdiction of the federal government increases the likelihood that more permits will be required. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

Iberia Parish Levee and Conservation District (Doc. #9829)

17.1.219 Additionally, with more WOTUS dotting the landscape, more section 404 permits will be needed. Section 404 permits are federal "actions" that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects. (p. 1)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Kane County Division of Transportation (Doc. #9831)

17.1.220 Contrary to the intent of the proposed rule change, the proposed rule does not provide certainty for our organization, and we are concerned about an increase in potential financial and regulatory burdens. We request that the Administration remands the rule until our concerns are addressed and re-release a revised rule based on the concerns raised by state and local government stakeholders. (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

Zwilling, P. (Doc. #9885)

17.1.221 If the EPA were to claim jurisdiction over such waters, our farm would struggle financially. We can't afford to pay for more permits just to build a fence or spray for devastating pests. (p. 1)

Agency Response: **The rule will clarify and simplify implementation of the Clean Water Act consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

Cook, O.M. (Doc. #9878)

17.1.222 This sweeping new definitional category, if promulgated, would empower the agencies to determine "other waters" by using a highly subjective "significant nexus" analysis on a case-by case basis. The reality of it is, landowners will be highly unlikely to know (nor would they have reason to know) whether bodies of water on their private properties—potentially even dry fields and creek beds—are subject to Clean Water Act jurisdiction until the day a federal agent arrives to conduct an inherently subjective "significant nexus" analysis. (p. 1)

Agency Response: **The rule will clarify and simplify implementation of the Clean Water Act consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

US EPA ARCHIVE DOCUMENT

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

Washington State Association of Counties (Doc. #9976)

17.1.223 Counties are also concerned about the process used to create this proposed regulation. We have concerns over whether impacted local agencies were adequately consulted throughout the process. Under Executive Order 13,132, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. The agencies cost benefit analysis acknowledges that there may be additional implementation costs. We believe the definitional change will have a direct substantial effect on Washington's counties.

EPA and the Corps have stated their purpose in creating the rule was to provide clarity in determining jurisdiction. The definition is not clear and raises concern over whether county maintained ditches will be exempt or determined to be jurisdictional tributaries to U.S. waters. County maintained ditches can run for several miles and be wholly contained in upland, partially contained in lowlands and wetlands, or may convey portions of jurisdictional waters. It will be time consuming, costly, and cause project delays if every county road ditch has to be determined by a federal agency whether it is exempt or in some way contributes flow to a water of the U.S. (p. 1-2)

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

US EPA ARCHIVE DOCUMENT

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States.

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

<u>Florida Association of Counties (Doc. #10193)</u>

17.1.224 With regard to the economic impact, expert analysis indicates that the proposed expansion of federal jurisdiction will result in an extraordinarily burdensome cost of compliance, several orders of magnitude greater than that espoused by the Agencies. Given the current economic climate, this proposed rule could be devastating for Florida's counties especially those in rural and fiscally constrained areas of the state. Unfortunately, these costs cannot be avoided as the CWA imposes criminal liability as well as civil fines on a broad range of ordinary activities. The cost to defend civil suits authorized by the Act would only add to this overwhelming burden. With this letter, we urge your kind consideration of the Association's concerns. (…)

As if the plain language of the proposed rule is not illustrative, accompanying this new language are new definitions and interpretative guidance certain to expand federal reach

US EPA ARCHIVE DOCUMENT

beyond reason. Under the proposed rule, the regulated community must not only concern itself with a water body at issue, but must also consider other waters that may be "similarly situated," identify what other waters might be in the "same region" (rather than simply adjacent), and understand whether there is a "significant nexus" to traditional waters of the US, Making matters worse, the proposed rule contemplates determinations to be made on case-by-case bases. (p. 1-3)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction.

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The

US EPA ARCHIVE DOCUMENT

agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

17.1.225 There is no way to overstate the burden this places upon landowners and farmers nationwide, this requirement that they must contact regulatory agencies for a case specific analysis of literally every place they wish to work for fear of CWA violations. (p. 8)

Agency Response: **This final rule interprets the Clean Water Act to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.**

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information.

Farris Law Group PLLC (Doc. #10199)

17.1.226 Any change in CW A regulations that would change the scope of federal jurisdiction will, in many cases, limit our clients' ability to finance and develop new projects or perform maintenance to existing properties. (p. 2)

US EPA ARCHIVE DOCUMENT

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

Rosebud County (Doc. #10309)

17.1.227 Rosebud County's main concern is in the definition of "waters": All tributaries of a navigable water, interstate water, the territorial seas or a tributary. A tributary could mean every road ditch or coulee that has a pond or potential pond. Would this mean that every time the County wants to pull a ditch, we would have to get a permit? We have 1167 miles of County roads, with 95% of them not paved. This could mean that whenever a rancher wants to develop water in the form of a stock pond he would need a permit. Over 75% of Rosebud County is privately owned. How long would it take to get a permit? And does the U.S Army Corps of Engineers have the staff to handle the permit process? Stock water is the life line for a cattle ranch. They can get by for a short period of time, but they cannot get by overnight without water. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

The rule covers, as tributaries, only those features that science tells us function as a tributary and that meet the significant nexus test articulated by Justice Kennedy. Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, and municipalities charged with maintaining the nation's roads.

Thompson Contractors (Doc. #10365)

17.1.228 The proposed rule has the potential to have a dramatic effect on our business from a cost standpoint and even the ability to stay in business. It is hard for this company to believe that congress intended this stringent intent when the clean water bill was passed. By implementing this rule the government will be in all practicable purposes removing any private land owner rights. The federal government will just have to say these are the waters of the United States and then no private decisions can be made without the permitting process. The proposed rule will give staff the ability to make decisions that

US EPA ARCHIVE DOCUMENT

affect us and our employee's livelihood based on very little study. They can look at a computer screen and determine what is "Waters of the United States" which will make any consistency very hard to achieve. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

Please see Section I.C. of the Technical Support Document regarding property rights.

Todd, C. (Doc. #10583)

17.1.229 We in Monroe County continue to recognize the connectivity and importance of "isolated" waters and wetlands and are keenly aware that these resources support the surface and groundwater that we rely on for our drinking water. I appreciate EPA's initiative in carrying out the intent of the Congress by clarifying and restoring the protections previously afforded under the Clean Water Act. (p. 2)

Agency Response: **The agencies agree. This final rule interprets the Clean Water Act 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Griffin, J. and D. (Doc. #10645)

17.1.230 We are land owners in Wyoming making our livelihood off the land. This proposal will greatly affect the way we conduct business. Your proposal will place an enormous burden on us and the agriculture community. The ditches we use to irrigate our crop should not be waters of the U.S, they are used to raise food for an ever growing population. The way these proposals are written with vague terms and phases will have far reaching effects on all waters. More regulation is not what we need; we are the steward of the land. This proposal will have a negative impact on my small business and hundreds of thousands like it across the country.

US EPA ARCHIVE DOCUMENT

If I chose not to enroll in a NRCS program the EPA or any other government agency should not force me to compile to their standards. To better manage my pasture I build a fence and it doesn't meet every specification of the NRCS requirements I could be fined. I am doing what is best for my private property and my ranch. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Brandt Consolidated (Doc. #10667)

17.1.231 This proposed rule will have an extreme impact on my business and the operations of my farmer customers with regard to the application of agricultural inputs(nutrient and crop protection products) which are absolutely necessary to produce crops in Illinois. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

Dimock Township, Susquehanna County, Pa. (Doc. #10737)

17.1.232 Because of the need to obtain federal approval and permits before we can begin these tasks, we see these changes as hindering our ability to perform routine maintenance on road ditches and impeding us from quickly resolving potential safety issues caused when these ditches get backed up.

You will also be negatively affecting our tax payers with the cost of additional permits, engineering fees and legal fees not to mention the added time needed for approvals. In

US EPA ARCHIVE DOCUMENT

addition, we are a small farming community that has no public water. By adding possible restrictions on ponds, you will be impacting public safety concerns and insurance rates creating even more hardships for our residents. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

The rule covers, as tributaries, only those features that science tells us function as a tributary and that meet the significant nexus test articulated by Justice Kennedy. Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches. This rule appropriately reduces regulatory burdens while minimizing costs for states, tribes, and municipalities charged with maintaining the nation's roads.

RiverStone Group, Inc. (Doc. #10742)

17.1.233 While we pride ourselves as being environmentally responsible, the broadened scope of the rule would directly impact our operations, with little environmental benefit. These impacts would increase costs on public works projects, so these increased costs are borne by the taxpayer. For example, many of our quarry sites are located in upland areas that are traversed by valleys, drainage ways, and swales that convey water only during rainfall events. During the course of mining operations, overlying soils in which these features are located must be removed to expose the rock for quarrying activities. If these areas were to become subject to Corps jurisdiction, it would increase production costs as a result of time and money spent on the permitting process and would significantly increase the time it takes to develop new mine areas, thereby reducing our ability to respond to market conditions. Further, it may become necessary to avoid certain areas of the site which could be subject to the permitting process causing unmined reserves to be left in place and reducing the overall profitability of the property. (p. 3)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

US EPA ARCHIVE DOCUMENT

The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

Anonymous (Doc. #10756)

17.1.234 The resources should be transferred to the States or terminated all together and therefore make it incumbent upon the States to fund compliance and management of their resources. This rule will not serve the same purpose in every State or the unique conditions found in each State. It is too broad and undefined. It requires legislative review and action and then compliance responsibility established upon and set upon the States. Again, the responsibility should be given back to the States and the capacity of the agency to develop and establish such rules terminated as it violates constitutional process. (p. 2)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction.**

Greater North Dakota Chamber (Doc. #10850)

17.1.235 North Dakota farms 39.3 million acres, nearly 90% of the total land of North Dakota. North Dakota is the top producer of a number of crops including spring wheat (50% of US total), durum (56% of US total), barley (35% of US total), Sunflowers (43% of US total), dry edible beans (34% of US total), pinto beans (56% of US total), flaxseed (95% of US total), canola (90% of US total), and honey (24% of US total). North Dakota also boasts 1.7 million head of cattle, 1.2 million turkeys, 160,000 pigs, and 88,000 sheep. This industry, making up a great deal of North Dakota's economy, will be negatively impacted by the expansion of the definition. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the**

US EPA ARCHIVE DOCUMENT

nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Sadsbury Township Board of Supervisors, Lancaster County, Pennsylvania (Doc. #10968)

17.1.236 Additionally, navigable waters are totally misrepresented as the new potential meaning could actually include roadside ditches and accompanying stormwater structures. This sets up a scenario that could result in the Township costs for control measures to exceed our entire stormwater budget for any given year. As written, the proposed rules could allow for water supply systems, a puddle or an insignificant and ephemeral ponding of water during and after a rain or snow event to be included in "other waters" and as such may add additional unnecessary and costly burdens. (p. 1)

Agency Response: **The rule responds to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that

US EPA ARCHIVE DOCUMENT

do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

Minnesota Association of County Agricultural Inspectors (Doc. #10970)

17.1.237 Broadening the WOUS definition would also adversely impact all local governments. These definitional changes will impact county and township owned and maintained ditches in many ways. (p. 2)

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

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather

US EPA ARCHIVE DOCUMENT

exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

Ducks Unlimited (Doc. #11014)

17.1.238 In addition, however, as day-to-day practitioners of on-the-ground wetland conservation in every state in the Nation, we have extensive, hands-on experience in complying with the CWA's regulatory components. Thus, DU not only sees the CWA through the lens of its importance to our organization's conservation mission, but we also view it through the lens of being a part of the CWA's "regulated community." This puts DU in a somewhat unique position relative to the Act.

DU has very limited landholdings, and the vast majority of our wetland and waterfowl conservation projects are conducted on lands owned and managed by others. While some of our projects are conducted on public lands, most of the lands on which we have worked in the U.S. are privately owned. Thus, an additional important perspective that Ducks Unlimited brings to this issue stems from our strong, longstanding, and ongoing partnership with the agricultural and ranching communities. Even more importantly, we have worked at a personal level with thousands of individual farmers and ranchers who contribute significantly to the conservation of wildlife and other natural resources on their lands, while at the same time earning their living from those lands. In addition, hundreds of thousands of DU members and volunteers are farmers or ranchers, members of their families, from farming/ranching communities, or are associated with the Nation's vital agricultural and livestock-based economy. Thus, while we do not purport to represent the farming and ranching communities' views on the Clean Water Act, we are sensitive to their perspectives and concerns.

Some farmers and ranchers with whom we have spoken about this issue have stated that they do not have a concern with conserving the remaining natural wetlands that store waters they use and, in a great many instances, from which they also derive pleasure as a direct result of the fish and wildlife that use those habitats and share their lands. Their primary concern is that CWA jurisdiction not be expanded beyond that which has long existed under the current regulations, and that a new rule should not subject them to new

US EPA ARCHIVE DOCUMENT

or additional restrictions or CWA permitting requirements that would affect their day-to-day ability to farm or raise livestock. (p. 1-2)

<u>Agency Response:</u> The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

In addition, the agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

Finally, 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.

17.1.239 B. Ducks Unlimited's review and comments regarding the proposed rule were developed with five primary criteria in mind, which we suggest would be useful for the agencies to expressly consider to help guide the numerous decisions that will be enshrined within the final rule:

a. Is it consistent with the preponderance of the available and emerging science?

b. Is it consistent with Justice Kennedy's language regarding the application of science to determining jurisdiction?

c. Will it promote increased clarity, certainty, and predictability?

d. Is it scientifically and administratively efficient and pragmatic?

e. Is it consistent with the agencies' public statements that the new rule would not be an expansion of jurisdiction relative to the existing regulations, and that the agricultural and ranching sectors, in particular, would not be subject to increased permitting requirements?

In light of DU's somewhat unique perspective as a wetland conservation organization that is also part of the regulated community and works in close partnership with thousands of farmers, ranchers, and other landowners, we developed these comments and assessed the individual elements of the proposed rule through the lens of five key criteria above. It is clear that the agencies also considered similar criteria to some degree. However, we believe that some of the preliminary decisions as expressed as elements of the proposed rule are not as consistent with the fulfillment of and balance among these criteria, taken together, as they could or should be. Our detailed comments will touch on those areas of divergent perspectives, and we will offer scientific evidence that we believe supports our position on those issues. (p. 5)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science.

17.1.240 Ducks Unlimited's review and comments on the proposed rule were developed with five primary criteria in mind, and we suggest that explicit consideration and balanced application of these five criteria would help guide the agencies toward an effective final rule. These key criteria are: (…)

- Will it promote increased clarity, certainty, and predictability?
    - We agree with the stated objective of the agencies, and the strongly expressed desire of most stakeholders, which is to have a final rule that provides as much clarity, certainty, and predictability as possible and that also addresses the other criteria listed here. (p. 74)

<u>Agency Response:</u> The agencies agree. This final rule interprets the Clean Water Act 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

US EPA ARCHIVE DOCUMENT

Krause, D. (Doc. #11117)

17.1.241 The proposed rule would have a profound and significant impact on small businesses providing pest, turf and lawn control solutions around the United States. The cost of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also have to be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Southwest Kansas Royalty Owners Association (Doc. #11346)

17.1.242 We believe the proposed rule which allows federal takeover of state waters would have devastating economic impacts and would substantially increase regulatory costs and increase permitting requirements which would create bureaucratic barriers to economic growth, mineral development, and impact mineral owners, farm and ranchers, small towns and counties, commercial development, energy production, to name a few. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of

US EPA ARCHIVE DOCUMENT

"waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA.

Cass County Electric Cooperative, Inc. (Doc. #11454)

17.1.243 Significant portions of our distribution system are located in areas that are subject to flooding, which in turn may flow into navigable waters. A straight-forward reading of the proposed rule clearly indicates these areas will now fall under EPA and Corp jurisdiction. Requiring permitting to construct or maintain our distribution system in these areas will severely compromise our ability to fulfill our mission and at a minimum will increase cost and create unnecessary delays for our members who rely heavily on our service. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. As

US EPA ARCHIVE DOCUMENT

recommended by the public and based on science, the agencies defining limits for "neighboring" are primarily based on the reliance of a 100-year floodplain. The agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain.

Anonymous (Doc. #11480)

17.1.244 The additional time to get a well permitted would increase and the cost in dollars and man hours required to comply with the changes, with little to no economic benefit. I believe that the proposed changes would decrease the drilling activity. It should be noted that the oil and gas industry has added over 2 million jobs since 2008. These jobs are not low paying jobs. The economy of the United States would not be where it is today were it not for the oil and gas industry. We do not need to impair the main driving force in the economy are we will be in another recession. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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. The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.

Scott County Development Corporation (Doc. #11542)

17.1.245 The proposed rule would significantly expand the scope of navigable waters subject to Clean Water Act jurisdiction by regulating small and remote waters- many of which are not even wet or considered waters under any common understanding of that word. This will subject businesses, property owners, farmers, and communities to new and different permitting requirements and use restrictions. Small businesses and small communities are likely to be among the hardest hit by the change.

As a representative of small business, we are concerned the proposed rule will create a significant expansion of federal jurisdiction of water that will have major impact on small business. Many ordinary activities undertaken by small businesses would now become subject to a wide variety of federal regulation, including permitting requirements, notifications and recordkeeping, modeling and monitoring and use approvals. These requirements would impose direct costs, delays, and uncertainty in planning.

The proposed rule does not provide clarity or certainty as EPA has stated. There is no clear line on what is "in" and what is "out", making it difficult for businesses to plan new projects and make hiring decisions. The only thing that is clear and certain is that under this rule, it will be more difficult for our members and our communities to do business and our economy to grow. Small businesses such as the members of the Scott County Development Corporation are extremely concerned about the proposed rule. The proposed rule will have a direct and costly impact on small businesses that are not recognized by the agencies. (p. 1-2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Anonymous (Doc. #11606)

17.1.246 As the economic effects of this type of regulatory activity is being adjusted to, American agricultural products will be less competitive, economic harm will come to the US ag sector and our food supply will be substituted with cheaper foreign products. These foreign products are not subject to similar rules and regulations and the vast majority of American consumers will still gravitate to these less expensive alternatives. Land use and good environmental stewardship in the US has continued to improve decade after decade without this type of regulation and will continue. This type of additional regulation is akin to so many that have been past in the last decade or so. They regulate non problems in that the underlying concern is already adequately addressed and appropriate action was taken or the enforcing bodies failed in their responsibilities. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

In addition, 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.

Nelson County Farm Bureau (Doc. #11687)

17.1.247 If imposed, this would impact the way I farm, and because of the lack of clarity contained in the proposed rule it could also create a huge economic burden for me and my family. I feel this rule has the potential to expand your jurisdiction to virtually any area of my farm including my ponds, ditches and occasionally wet areas, even if they are isolated and protected. (p.1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

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

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

John Wood Community College (Doc. #11770)

17.1.248 Expanding the current definition of waters of the U.S. to include ephemeral streams, isolated wetlands, and non-connected waters will subject vast areas to regulation under the Clean Water Act. The proposed rule would subject local governments, landowners, businesses, and communities to stringent new permitting requirements and use restrictions they have never had to bear.

One goal of community colleges is to support programs that recognize the critical role community colleges play in fostering rural economic development. Economic development efforts in our rural district may be curtailed or hampered by the expansion of federal jurisdiction and the lack of clarity and certainty from application of the proposed rule. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A

US EPA ARCHIVE DOCUMENT

Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

County of Kane (Doc. #11788)

17.1.249 Contrary to the intent of the proposed rule change, the proposed rule does not provide certainty for our agricultural land owners and producers, and we are concerned about how an increase in potential financial and regulatory burdens will impact their ability to effectively and efficiently manage their soil and water resources while running economically sustainable farms. We request that the Administration remands the rule until our concerns are addressed and re-release a revised rule based on the concerns raised by state and local government stakeholders, agricultural organizations and farm landowners and farm operators. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate.**

Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders,

US EPA ARCHIVE DOCUMENT

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

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

Carpenter, H. (Doc. #11793)

17.1.250 I am an outdoorsman and clean water is very important to me. Your proposed rule is a significant expansion of the Clean Water Act that will affect every American, and have a significant impact on my business and community due to the proposed increased jurisdiction over all waters. The definitions provided in the proposed rule are very broad and do not provide clarity to which waters could be considered "waters of the U.S." under CWA jurisdiction. Due to the proposed rule's complexity and lack of clarity, I request the proposed rule is withdrawn. This rule would make it more difficult to control harmful pests on public and private hunting land if any water is near the area. Professional applicators and landowners would have to obtain permits to protect properties from pests like ticks, which carry harmful diseases like Lyme Disease. The rule will have little to no impact on water quality while definitions and other aspects of the rule will be defined by the courts in citizen action lawsuits. Thank you for this opportunity to submit these comments. EPA and the Corps should withdraw its proposed rule and keep "navigable" as the defining term for "waters of the U.S." under CWA jurisdiction. (p. 1-2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs**

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more

US EPA ARCHIVE DOCUMENT

consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of CWA jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Anonymous (Doc. #11815)

17.1.251 I am a member of the Minnesota Farm Bureau and I support this rule. As a farmer and resident of Minnesota, we need to do more to protect our water resources. Bodies of water are so important to our neighbors and customers in the fishing and tourism industry. Additionally, what we do at the top of the Mississippi watershed affects so many other states, so this is definitely a matter of national interest. This rule is a great step towards controlling non-point runoff sources.

Please make sure that when you roll the program out you offer workshops for us farmers to learn about this new method and please prioritize holding the workshops during our off season so that we don't have to choose between field work and learning how to comply with the new rule. Also, a cost-share program would be great as we build this new rule

US EPA ARCHIVE DOCUMENT

into our existing farming systems as any new practice requires time and time is money and there's not a lot of extra money in the farming business. (p. 1)

Agency Response: **The agencies agree. This final rule interprets the Clean Water Act 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The agencies intend to release fact sheets and conduct training following the promulgation of the rule. Any cost-share program is outside the scope of this rulemaking.

Professional Landcare Network (Doc. #11831)

17.1.252 The rule could also restrict the ability of landscape professionals to install trees, grass, and other plants that play a vital role in reducing runoff and erosion, filtering groundwater, and sequestering carbon dioxide. (p. 1)

Agency Response: **This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent.**

The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act.

National Wild Turkey Federation (Doc. #11833)

17.1.253 The National Wild Turkey Federation is encouraged by the Environmental Protection Agency's efforts to clarify definitions pertaining to the Waters of the United States in order to provide clarity regarding which waters fall under the jurisdiction of the Clean Water Act and to reduce confusion regarding the types of activities that are considered exempt from permitting requirements. Like many others, we support efforts aimed at reducing confusion from past and future lawsuits. (…)

As the Environmental Protection Agency continues to modify and clarify the final rule, we ask that you support and recognize state-level Best Management Practices as the primary means for protecting water quality during forestry related activities. A prescriptive, national, one-size-fits-all approach to protecting the Waters of the United States will not be as effective or clear for forest owners, the industry, or for state agencies that enforce and monitor the continued implementation of Best Management Practices. (p. 1-2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies agree. This final rule interprets the Clean Water Act 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The agencies intend to release fact sheets and conduct training following the promulgation of the rule, and will continue to work with our other federal and state partners. BMPs are outside the scope of this rulemaking.

Abell, B. (Doc. #11837)

17.1.254 The rule change clarifies existing law and does not offer any substantive change or additional regulatory burden for the overwhelming majority of American farmers and ranchers. As a commercial-scale produce grower a consistent supply of clean freshwater for crop production is an absolutely necessity for our farm business to operate. We rely on well water for drinking, washing and handling of produce, and irrigation and we additionally utilize an artificial impoundment (pond) for crop irrigation. The rule change clearly states that these water sources will not be subject to additional scrutiny. (p. 1)

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

Fuller, K. (Doc. #11862)

17.1.255 This proposed rule will have an extreme impact on my business and the operations of my farmer customers with regard to the application of agricultural inputs (nutrients and crop protection products) which are absolutely necessary to produce crops in Illinois. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and**

US EPA ARCHIVE DOCUMENT

manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

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.

Rosborough, M. (Doc. #11892)

17.1.256 I cringe when I think about how this may affect my ability to farm. Will I be allowed to continue improving my land, or will I have to consult with some bureaucrat miles away who is six months behind, before I lift a shovel?

In closing, I would like to remind you that as farmers this land is our livelihood. We cherish what we do and everyone I know does the best they can to improve the land they control. After all, it not only provides our income, we raise our families on it, we hunt, we fish, we take our kids on hay rides and in the end, we hand it to our kids with the same expectations.

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

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

17.1.257 While we are supportive of water quality protection, we are gravely concerned with the financial and developmental impacts the proposed rule will have on our State and local communities. Especially when we already have strong environmental standards at the state level to protect our state waters. (…)

The proposed rule increases regulatory uncertainty and imposes significant regulatory burdens on all our constituencies, including private landowners; large industry; small family and community businesses; and local and state governments. As a result, all New York taxpayers will be forced to pick up the costs for significantly more federal regulation, permitting burdens and compliance costs. It will also lead to project delays, in both public and private sectors, and would restrict the use of economically productive land that benefits every aspect of a local economy without any assurance of additional clean water protection or real water quality improvement. (…)

US EPA ARCHIVE DOCUMENT

These and other definition changes made by the proposed rule are incredibly vague and present confusing criteria under which to determine federal jurisdiction. Without a process for verifying whether or not a water body does in fact meet these qualifiers and without any additional resources to back up what are the new requirements, the result will be additional permitting requirements at a tremendous cost, unnecessary administrative requirements and years of delay to ongoing, existing and new projects without any associated benefit to water quality or natural resource protection. (p. 1-2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Iowa Drainage District Association (Doc. #11924)

17.1.258 The rule assumes you are guilty. The burden of proof for asserting that the CWA does not cover a particular practice or activity falls back to the public. This is exactly opposite of what the situation should be. EPA should have to demonstrate that they have the clear ability to enforce the act in specific circumstances. Iowa farmers need the continued ability to meet the increased demand for food and fuel due to the growing global population. The impact of this rule is to regulate those whom we most need to be productive. (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.

Hancock County, Indiana (Doc. #11980)

17.1.259 As written, this rule has the potential to have great cost in implementation. First, it appears that numerous features will be regulated which have not historically required permits. We understand that the agencies have asserted that the current rule is more encompassing. It may be that some of the language in the current rule is broader than that within the proposed rule. That does not change the fact that the agencies have only recently implemented the more broad interpretations of the existing rule. By adding more features under the regulations, farmers, units of government, builders, and other businesses will be required to hire more staff to handle permitting and compliance issues or to contract with other businesses. Those requirements have significant costs, especially to local government in times when the economy is down and tax revenue is limited. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. Please see the economic analysis for further discussion of the costs and benefits the agencies evaluated.**

US EPA ARCHIVE DOCUMENT

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

Indiana Association of County Commissioners (Doc. #11983)

17.1.260 If the proposed rule is adopted it will cause significant harm to local farmers, stall the development of businesses, take control of land use out of local hands, and negatively impact County-owned and maintained infrastructure such as roadside ditches and flood-control channels. We believe the proposed change would substantially increase cost to our businesses, farms, municipalities, and taxpayers. Additionally the EPA and the Army Corps will exceed their applicable regulatory, statutory, and constitutional limits. (p. 1)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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-

US EPA ARCHIVE DOCUMENT

reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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. The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for waste treatment systems designed consistent with the requirements of the CWA has been moved to (b)(1) and remains substantively and operationally unchanged.

Bourbon County Farm Bureau (Doc. #11986)

17.1.261 If implemented, this proposed rule would force many of the farmers I represent to exit the livestock industry, or significantly change the current environmentally sound production practices they utilize at a significant economic burden. This rule will impact many farm families in a negative way, but it also has the potential of hurting our urban residents and local economy. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture

US EPA ARCHIVE DOCUMENT

community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Davidson Soil and Water Conservation District Board of Supervisors, North Carolina (Doc. #11997)

17.1.262 The proposed rule does not clearly define the areas that will be regulated and has the potential to greatly expand what will be regulated. The proposed rule could severely infringe on how landowners utilize their land without ensuring that our Nation's water will be protected or improved. (p. 1)

Agency Response: The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Watson, V. (Doc. #12081)

17.1.263 Wetlands and "other waters" within ecological floodplains, have always been a rare part of the landscape and are increasingly rare thanks to development. Wetlands provide key ecological services like: water purification. In Montana, 54% of our citizens rely on clean surface water as drinking water—making protection of our surface water particularly important. (p. 1)

Agency Response: The agencies agree. 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

US EPA ARCHIVE DOCUMENT

four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Krause, T. (Doc. #12137)

17.1.264 New rules and regulations would definitely affect us as small operators who work hard to make a profit and remain viable. We are not wealthy. We do not need more and more red-tape added to the way we do business. We should not need a permit to drive a tractor across a field or put up a fence. This WOTUS ruling will have negative impacts on farmers and ranchers all over the country. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

US EPA ARCHIVE DOCUMENT

Brock, L. and P. (Doc. #12189)

17.1.265 Such regulation would result in roadblocks to our ordinary land use activities. The need to get permits or licenses, or to establish buffer zones around grassed waterways, washes and farm ditches would create a maze of no-farm zones and increase complexity. Our farming operation would become extremely difficult. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Bona Fide Ditch Company (Doc. #12258)

17.1.266 The regulations as presented seriously curtail water users' ability to enjoy their water rights. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Chartwell Golf and Country Club (Doc. #12346)

17.1.267 The rule as presently published, could have a devastating economic impact on the golf course industry, potentially threatening to economically weaken, if not eliminate, golf facilities which are 95% small businesses. It would include almost every river, stream, creek, wetland, pond, and ditch in the United States under the jurisdiction of the CWA. Golf courses that have these waters on or near them would now be required to obtain costly, federal permits for any land management activities or land use decisions made.

Further, we would face an uncertain business environment where many of our now routine activities (such as fertilizer and pesticide applications) would require a permit before we would be able to proceed. Most important, there is no legal right for a permit for either of these activities nor any deadline on EPA's process to issue a permit. Permitting could take months or even years, or permits may simply be unavailable. This could halt operations on golf courses or even cause them to shut down altogether.

US EPA ARCHIVE DOCUMENT

Golf facilities could be required to get permits for all activities in or near WOTUS and that will mean a substantial increase in costs to our small businesses for permits, mitigation, monitoring and assessments as well as increased costs for permit review and issuance to be borne by state governments. It also increases our liability to manage the property due to the threat of citizen action lawsuits. (p. 1-2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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. As explained in the record, this rule will not cause a "significant increase" in the scope of Clean Water Act jurisdiction, and the agencies disagree that there will be a proliferation of litigation.

A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Ernst Concrete (Doc. #12347)

17.1.268 In order to have an effective rule, everyone must understand how to comply with it. The proposed rule's vague and confusing definitions make it nearly impossible for ready mixed concrete producers to determine what they will need to do to meet federal requirements for doing every day, routine tasks around their facility and 2 on a construction site. Furthermore, Ernst Concrete Inc. already has to, and does, comply with numerous requirements to ensure that all waters on and around ready mixed concrete facilities are not subject to harmful pollutants and discharges; begging the question of why such a confusing "clarification" would then be needed at all? (…)

Finally Ernst Concrete Inc. is greatly concerned about how the broad, vague language in the rule is being interpreted. If the regulated community can read the rule to mean nearly every place where water falls on the ground after it rains, could be subject to federal jurisdiction and that is not the agencies intent, as representatives for the EPA and Corps

US EPA ARCHIVE DOCUMENT

have repeatedly asserted in stakeholder meetings and hearings, then this rule needs to be pulled back and the agencies need to try again.

Ernst Concrete Inc. requests that the agencies withdraw the rule and work with their state and local co-regulators, and stakeholders, like the national Ready Mixed Concrete Association (NRMCA), to come up with a clearer definition of waters of the United States. The agencies are under no legal or statutory deadline for completing this rule, so there is ample time to work to get it right. (p. 2-3)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that

US EPA ARCHIVE DOCUMENT

under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

The EPA and the Corps have used the feedback we received from public outreach during the comment period efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

National Association of Conservation Districts (Doc. #12349)

17.1.269 An expansion of CWA jurisdiction would take away from the current voluntary approach to conservation, which promotes collaboration in a large-scale manner. 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. (p. 8)

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

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Georgia Department of Agriculture (Doc. #12351)

17.1.270 The economic analysis provided by the EPA and the Corps assesses that only 3% of additional U.S. waters will be jurisdictional under the revision with 17% of those being classified as "other waters." This can only be described as a gross understatement of impending, sweeping authority. Using the map estimates provided by American Farm Bureau (AFB), approximately 261,409 additional stream miles could be regulated in the states of Arkansas, Florida, Louisiana, North Carolina, and Virginia alone. Increasing the scope of the CWA will undoubtedly leave our farms and small businesses at the mercy of EPA and open the door for environmental activists to pursue civil lawsuits under new interpretations of the rule change. (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Cieslewicz, P. (Doc. #12691)

17.1.271 We are opposed to the extension of powers to "waters of the U S" the EPA is seeking. Such changes would be devastating to ranchers and farmers. This change could also lead to a significant decrease in the number of cattle produced here bringing in more of the lesser quality beef from outside of the U S. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that

US EPA ARCHIVE DOCUMENT

under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

Dailey, Jr., J. L. (Doc. #12692)

17.1.272 After attending one of EPA's meetings I became alarmed at the overreach of the proposed rules. An example is the expansion of the definition of Waters of the United States. In one of our cattle pastures there is a 2 ½ acre pond that was constructed under an earlier program in 1953. It serves as a water source for cattle and has a history of good fishing. Under the strict interpretation it would be declared Waters of the U.S. since it overflows into a nearby creek which eventually runs into a river. This is a classic example whereby a well meaning program such as EPA is continually expanded to destroy the rights to operate private property in a reasonable manner. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

Elrod, H. M. (Doc. #12696)

17.1.273 It will affect maintaining farm drainage, constructing fences, tillage, brush removal, building shed or livestock barns, leveling [sp] soil surface, applying nutrients

US EPA ARCHIVE DOCUMENT

and pesticides. All this could cause us to have to get more permits and legal action in order to farm.

Can't afford time and money to do this. It just means more control by the federal government that do not know much about agriculture. (p. 1-2)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

Cowley, P. H. and J. R. (Doc. #12701)

17.1.274 Some of the stated changes, they refer to them as clarifications, will make it extremely difficult for us to remain in business. Everyone involved with farming and ranching know that timing is of the utmost importance in producing a profitable product whether it is grain or animal related. Requiring a permit to perform common operations that may have an effect on water, be it in a stream or in a pond, or wetland may not be possible to predict and consequently eliminating the time to get a permit. There will not be enough manpower to oversee all of the infractions possible and evaluate the applications. This will require some form of information gathering system, possibly drones, or someone driving by and notifying the COE, pitting neighbors against neighbors. Extremely high fines are being recommended for violations. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

Orlet, T. J. (Doc. #12702)

17.1.275 The farm is located in Dyers Pond Watershed west of the Kaskaskia River. Our home farm is transitional. It starts as high ground and eventually slopes into the Kaskaskia River bottoms. Some water that runs off the flat area drains into the road ditch. I have absolutely no idea how far the ditch system extends before it even reaches a stream. We also have a ditch that comes from a neighbor's property and runs through our property. Like the road ditch, it is dry until it rains. After leaving our property, that ditch then meanders through other neighbors' farms, goes into the bottoms and eventually into a large stand of timber that borders the Kaskaskia River. Because the land in between our farm and the river belongs to other landowners, I don't know if that ditch empties into the river or if it just ponds and evaporates in the timber.

Nothing on our farm would fit any common sense definition of navigable waters. We don't even know how much of the rainwater runoff from our farm eventually reaches a navigable waterway. Nevertheless, the proposed rule appears likely to impact our entire farm. This land grab will cause extra financial burdens. It will take time away from work

US EPA ARCHIVE DOCUMENT

that supports our family. It will delay improvements to our farm and day to day operations. And, it will expose us to new potential civil lawsuits. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).**

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Please see Section I.C. of the Technical Support Document for further discussion of property rights.

Montana Farm Bureau Federation (Doc. #12715)

17.1.276 Montana is a very large, rural state and the landscapes, watersheds, and topography here are incredibly complex. Agriculture is by far, our largest industry. Without a thriving agricultural industry, our state's economy will suffer greatly. Many areas in the state receive more than 20 inches of precipitation annually, while others receive less than 10 inches of precipitation. This rule will affect every area of Montana in very negative ways, directly harming individual farmers and ranchers and indirectly hurting small and large communities in Montana, as well as consumers of agricultural products everywhere. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Musselshell County, Montana (Doc. #12719)

17.1.277 Musselshell County's concern is over the definition of "waters". All tributaries of a navigable water, interstate water, the territorial seas or a tributary. A tributary could mean anything from road ditches or coulee's that hold water. Does this mean that every time the County pulls up a road ditch we would have to get a permit? We have 600 miles of roads in the County which means a lot of permits. Ranchers would have to get a permit for every pond or dam. What is the time frame for a permit? This means a lot of red tape for our constituents and the County. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

US EPA ARCHIVE DOCUMENT

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

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

Uintah County, Utah (Doc. #12720)

17.1.278 Because the definition proposed for tributary is so broad, the Agencies could insert themselves into local building and zoning processes. In a rural setting like the majority of the western United States, individual homes could be subject to EPA or COE approval for any aspect of design and construction where natural run-off would not be captured by a waste water system. Purely from the standpoint of the affect of gravity upon water, the case makes itself that water flows downhill. The notion that any flow in any physical feature, dry or wet, qualifies it as a water of the US is nonsense. (p. 4)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be**

US EPA ARCHIVE DOCUMENT

defined as "waters of the United States" under the rule than under the existing regulations.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule

US EPA ARCHIVE DOCUMENT

includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

17.1.279 The affect of the proposed rule will be to broadly expand the amount of land area the Agencies can assert control over. In the western US, there are large amounts of land where the Federal government already has a significant presence. Land management agencies in the west have resources and expertise in NEPA and resource management which easily matches or exceeds that of the COE and the EPA. What steps have the Agencies taken to simplify processes by making use of existing resources, like the BLM, USFS, NPS, DOD, etc.? (p. 7)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Please see Section I.C. of the Technical Support Document for further discussion of property rights.

Owyhee County Board of Commissioners (Doc. #12725)

17.1.280 The proposed rule will have significant impacts on the agricultural economy that is the basis of the Owyhee County Economy.

The proposed rule will have significant impacts on the ability of the County to manage land uses under the Idaho Local Land Use Planning Act. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the**

US EPA ARCHIVE DOCUMENT

nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.

Sierra Alta Ranch LLC (Doc. #12730)

17.1.281 I am especially concerned about the probability of requirements for 404 permits and the prohibitive cost of acquiring a permit. Every arroyo that runs through my ranch has a fence that must be repaired or replaced after every high rainfall event. I am equally concerned about the probability of a requirement for an EPA approved grazing plan because of cattle grazing within a drainage area. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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.**

The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

<u>Communities for Clean Water (Doc. #12739)</u>

17.1.282 Water is precious in New Mexico. Every drop is used to nourish our communities, wildlife, and landscape. Preserving our sources of clean water is essential for protecting our way of life. CCW urges you to further strengthen the final rule to fully protect wetlands and other waters found outside of the floodplain of covered waterways. Science shows that the health of these waters influences stream flow, water quality and wildlife in waters downstream. We are especially concerned about ensuring that waters in closed basins and playa lakes are once again protected as they once were. We urge you to explore avenues for strengthening the rule and restoring these protections. (p. 1)

<u>Agency Response:</u> Protecting the long-term health of our nation's waters is essential. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The

US EPA ARCHIVE DOCUMENT

Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.
The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, and more consistent, and easily implementable standards to govern administration of the Act, including brighter lines where feasible and appropriate.

Montezuma Township, Pike County, Illinois (Doc. #12743)

17.1.283 We 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.

I believe the "waters of the U.S." definitional change will have a substantial direct effect on Montezuma Township.

Key terms used by the Waters of the U.S." definition-tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed-are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays.

Montezuma Township has many miles of public infrastructure ditches--roadside, flood control channels, drainage and stormwater conveyances; these ditches are used to safely funnel water away from homes, properties, and roads to keep our citizens protected and our roads safely maintained. The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on my township by potentially increasing or maintaining the number of ditches that fall under federal jurisdiction. (p. 1)

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. As explained in the record, this rule will not cause a "significant increase" in the scope of Clean Water Act jurisdiction, and the agencies disagree that there will be a proliferation of litigation. During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments**

US EPA ARCHIVE DOCUMENT

for the Revised Definition of Waters of the United States is available in the docket for this rule.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

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

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

17.1.284 This latest example of over-regulation is not logical, and creates more confusion than it seeks to address. Local private and public water conveyances, such as irrigation, stock water and flood control ditches, may fall under federal regulation in this unworkable proposal. It is unclear exactly how far it would extend into jurisdiction or what the exemptions are to any drainage systems. As written this would mean that private entities as well as Elko County would be required to obtain federal permits to do routine maintenance work on an irrigation, stock water and flood control ditches / channels including roadside ditch or storm-water drain essential components of effective water management.

In many cases, Elko County is responsible for maintaining storm drains and other water conveyance systems. An irrigation, stock water and flood control ditch and roadside ditch under federal jurisdiction would be subject to the CWA Section 404 permit process, which can be extremely complex, time-consuming and expensive, leaving general public, local governments and public agencies charged with public safety vulnerable to citizen suits. We often pay a high price to wait for the federal government to issue permits for ambiguous 404 permits required by the Corp of Engineers. This new proposed rule would serve to further slow the process and potentially put more people in harm's way by inhibiting projects that keep water off of roads, bridges in many cases that provide the sole point of access and away from homes. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

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

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

Water ReUse Association (Doc. #12758)

17.1.285 The new definitions of "tributary", "significant nexus", and "neighboring" proposed in the rule, will unequivocally broaden the scope and jurisdiction of the CWA. Even if the EPA and the Corps do not intend to expand the jurisdiction of the CWA in the proposed rule (as they have suggested in recent reports and collateral material), we are concerned that the proposed rule will compel inappropriately broad judicial review (through citizen lawsuits) in areas where the rule has broadened the agencies' discretion to make a determination of expanded jurisdiction over manmade ditches and drains, storage and percolation ponds, constructed wetlands, or other water management infrastructure that is, in their view, "waters of the U.S." and subject to federal CWA jurisdiction and permitting requirements. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that**

US EPA ARCHIVE DOCUMENT

under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for waste treatment systems designed consistent with the requirements of the CWA has been moved to (b)(1) and remains substantively and operationally unchanged. It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land." The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States."

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Texas Conservation Alliance (Doc. #12777)

17.1.286 Reasons to Adopt the Proposed Rule

US EPA ARCHIVE DOCUMENT

The proposed rule, EPA-HQ-OW-2011-0880 / Clean Water Act - Waters of the United States, would follow the Congressional intent of the Clean Water Act and restore protections to wetlands crucial both as wildlife habitat and as an economic engine for Texas and other states.

It would eliminate confusion that will help landowners, industries, and others know what they can and cannot do.

Protecting these wetlands now will help avoid impacts to them as Texas and other western states face continuing droughts and other effects of climate change.

TCA appreciates the EPA for excluding man-made ditches and ponds, irrigation systems, and other wet areas associated with farming, ranching, and forestry activities. (p. 1)

Agency Response: **Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams andwetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

Friona Industries, L.P. (Doc. #12831)

17.1.287 We are very concerned about the Proposed Definition of "Waters of the United States" published in the Federal Register on April 21, 2014. The proposed rule will have an enormous detrimental impact on all of the segments involved in ours and other vertically aligned productions systems. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate.

Streams and wetlands are economic drivers because they support fishing, hunting, agriculture,recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

US EPA ARCHIVE DOCUMENT

17.1.288 We believe that the proposed rule violates our private property rights as well as those of our livestock and commodity suppliers. This rule goes so far as to cover virtually every piece of dry and wet depression across the country, potentially depriving us of our production capabilities and impacting our future sustainability. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

AEP Ohio (Doc. #12847)

17.1.289 The proposed rule would have a profound and significant impact on small businesses providing pest, turf and lawn control solutions around the United States. The cost of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also have to be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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.**

Yosemite Farm Credit, ACA (Doc. #12851)

17.1.290 Because the proposed rule has broad and poorly defined categories of features that are WOTUS, this will result in large numbers of features on or near farms everywhere in the U.S., potentially coming within the definition of WOTUS. This will leave farmers and ranchers unable to determine with certainty just how much of their farms or ranches are directly subject to the CWA. (p. 3)

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

US EPA ARCHIVE DOCUMENT

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Aust, E. (Doc. #12861)

17.1.291 Many conservation works are accomplished voluntarily without restriction by required permitting regulation. This progress will be compromised and in many cases killed by required permitting. Many conservation practices are accomplished with normal business operations and in conjunction with normal operations of business and construction especially in agriculture farming and cropping operations. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Bayless and Berkalew Co. (Doc. #12967)

17.1.292 The average age of an agricultural producer in the U.S. is 55 years old. We are already producing food and fiber on less land with less water than ever in history, with the expectation that we need to accomplish even more to meet future population growth.

US EPA ARCHIVE DOCUMENT

The proposed rule suffocates the ingenuity and desire of the next farming generation to meet this challenge. (p. 3)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Duke Energy (Doc. #13029)

17.1.293 The broad expansion to this category of waters will inevitably result in additional permitting and mitigation costs and potential project delays as more and more water features are determined to be "tributaries" and therefore, automatically deemed "waters of the United States." (p. 24)

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

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such

US EPA ARCHIVE DOCUMENT

characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

17.1.294 Under the proposed rule, Duke Energy could face significant challenges in its efforts to expand and revitalize infrastructure to achieve these initiatives. The expansive approach to defining jurisdiction for "waters of the United States" will subject more utility projects and activities to CWA jurisdiction. The scope of the proposed rule is such that far more features would be regulated under the rule than are currently regulated today. A variety of projects that otherwise would have qualified for streamlined permitting processes under nationwide or regional general permits may be required to undergo more lengthy and costly individual permit procedures due to the increase in the number of newly jurisdictional water features causing a project to exceed the qualification thresholds. As a result, these projects would then face more complex permitting issues (including additional project planning time spent determining whether and how to avoid jurisdictional waters), higher costs, site layout constraints, permitting delays and increased requirements for compensatory mitigation, all without a comparable environmental benefit. (p. 59)

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

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

17.1.295 Duke Energy is moving forward with the permitting required for a potential 750-MW combined cycle plant in Anderson County, South Carolina and 1,640 MW of generation in Citrus County, Florida, which will allow the retirement older coal units

US EPA ARCHIVE DOCUMENT

nearby. The proposed definition for "waters of the United States" may add incremental impacts to these projects through additional permitting costs and increased mitigation costs due to a higher number of waters that could be deemed jurisdictional on these sites. (p. 60)

Agency Response: **This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

17.1.296 In addition to siting considerations, Duke Energy seeks to avoid and/or minimize impacts to "waters of the United States," to the extent practicable, through the use of certain techniques, such as using expensive commercially made matting and labor intensive hand-cut clearing. This matting (typically made from wood or composite material) is used to allow heavy vehicles and equipment to traverse soft ground without creating ruts and is required to protect wetland vegetation. The use of these tools and processes help to minimize any permanent impacts from these types of activities. However, Duke Energy's overall costs in this area would naturally increase with more water features and areas deemed jurisdictional.

Duke Energy also relies heavily on the use of the Corps NWP-12 and regional general permits for expedited permitting for utility lines. The proposed rule raises concerns about projects qualifying for this streamlined permitting process. In most cases, Duke Energy can begin construction in as little as 45 days following submittal of a preconstruction notification for activities covered under a NWP-12. However, once ditches that don't meet the narrow exclusions, small ponds and other isolated features, which are often found on rural land spanned by transmission lines, are also included as "waters of the United States," staying within the threshold limits for these permits will become uncertain. If these limits cannot be met, then these projects will be required to undertake more time-consuming and costly individual § 404 permits. This applies to underground linear projects as well as overhead lines. It typically takes over two years to obtain an individual permit. Individual permit applications are also much costlier to prepare than nationwide applications, both in terms of internal staff time and outside experts, which usually consist of biological consultants and specialized engineers. The costs to prepare an individual permit can be as high as ten times more than for a nationwide permit,[9] not including the costs for mitigation, design changes, or costs for carrying capital for several extra months. Duke Energy believes that the proposed rule could result in the unintended consequence of limiting this valuable streamlined permitting process with no commensurate environmental benefit. (p. 60-61)

Agency Response: **As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch**

[9] 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 (2002) From the study, the average range of NWP costs was between $2000 and $104,076; the median cost was $11,800. The range of costs for individual permits was between $7000 and $1,530,000; the median was $155,000.

US EPA ARCHIVE DOCUMENT

exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

17.1.297 In September 2014, Duke Energy announced a joint venture with Dominion to build the $5 billion, 550-mile Atlantic Coast Pipeline to transport natural gas from West Virginia to eastern North Carolina. This infrastructure is needed to meet the increased demand resulting from Duke Energy's fleet modernization efforts and the development of new gas-fired combine-cycle generation sites and is expected to be in service by late 2018. The project is required to undergo a National Environmental Policy Act (NEPA) analysis and receive approval from the Federal Energy Regulatory Commission (FERC) prior to commencing construction. The expanded jurisdiction stemming from this rule to isolated and smaller waters, along with ditches, could vastly increase the number of jurisdictional waters that this project could encounter. This will make it even more challenging to site the pipeline in areas to avoid and minimize impacts to newly jurisdictional "waters of the United States," resulting in increased permitting requirements, costs and potentially project delays without commensurate environmental benefit. (p. 62)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule. The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

17.1.298 The construction of industry-scale wind or solar farms usually involve several and, in some cases, hundreds of acres of land. While the proposed rule intends not to regulate land, there could be numerous water features on that land that may not have previously been deemed jurisdictional, including ephemeral drainages or tributaries, or small and isolated waters that could now be classified as jurisdictional "adjacent" or "other waters." The effects of the proposed rule will be most apparent in the arid west where thousands of miles of ephemeral streams could be swept into federal jurisdiction. This will result in additional siting and construction challenges for the renewable energy sector, as this area is considered by some as the new frontier for this type of development. (p. 63-64)

<u>Agency Response:</u> 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 agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general

US EPA ARCHIVE DOCUMENT

permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.299 As mentioned previously, Duke Energy actively works to avoid or minimize impacts to "waters of the United States" during transmission and distribution line maintenance activities through the use of certain techniques, such as using expensive commercially made matting and labor-intensive hand-cut clearing. Since it will become increasingly difficult to minimize or avoid impacts due to the sheer increase in the number of water features that would be deemed "waters of the United States", this could result in project cost increases for additional matting and increases in number of areas that could require expensive and labor-intensive hand-cut clearing. Additionally, if more waters are deemed jurisdictional, there could be an increase in permitting required for maintaining the right-of-way (i.e. clearing vegetation and herbicide application).Therefore, Duke Energy expects incremental increases in its overall costs for these activities as a result of an increase in the number of water features and areas deemed jurisdictional. Similar challenges with meeting the threshold limits to qualify for streamlined nationwide permits also exist for maintenance projects. (p. 66-67)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. See the Economic Analysis for further discussion of the costs and benefits assessment.

Monterey County Farm Bureau (Doc. #13045)

17.1.300 We see the proposed rule change as creating additional confusion, risk and liability to farmers and ranchers by providing EPA and ACOE with an almost unlimited

US EPA ARCHIVE DOCUMENT

authority to regulate any low spot where water may collect. This includes the many miles of farm ditches and ephemeral drainages, tailwater catch basins and agricultural ponds, and various wetland areas found in and near local farming and ranching operations. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Charlotte County Government (Doc. #13061)

17.1.301 [W]e want to highlight a number of examples which demonstrate problems with the WOTUS proposed rule. It is our understanding, that under the proposed rules, our routine maintenance practices would become subject to Section 404 dredge and fill permits and Clean Water Act water quality standards. Charlotte County has over 192 miles of Primary drainage ditches and 365 miles of canals, categorizing the requirement to obtain a Section 404 permit every time we're conducting maintenance duties, as inefficient and financially unfeasible. Unlike the State of Florida's environmental permitting process, which is subject to specific time frames per Chapter 120, F.S., the current Section 404 permitting process can be slow and flood control maintenance cannot wait. The process must be timely and cannot be complicated or costly. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land.**

US EPA ARCHIVE DOCUMENT

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary. As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

New-Mac Electric Cooperative (Doc. #13068)

17.1.302 This proposed rule has the potential to "undo" all the RRTI efforts. New-Mac Electric Cooperative is especially concerned about the potential impact of the proposed rule on our operations. Specifically:

- Our ability to maintain - including repair - our existing power lines
- Our ability to construct new power line - especially lines related to newer generation
- Our ability to manage small, de minimis, spills along our rights of way

New-Mac Electric Cooperative is concerned by the broad categories and ambiguous definitions in the proposed rule will vastly expand the reach of the Clean Water Act while increasing ambiguity and uncertainty. We agree with our industry brethren and call on the agencies to withdraw the current proposed rule and engage in meaningful dialogue with potentially affected stakeholders, including the regulated community. (p. 1-2)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and

US EPA ARCHIVE DOCUMENT

standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Pennsylvania Coal Alliance (Doc. #13074)

17.1.303 Although the agencies have asserted that the Proposed Rule would not expand the types of waters that would be jurisdictional under the CWA, the private sector (including the coal industry) has overwhelmingly disagreed with this assertion. Rather, the Proposed Rule would have serious repercussions on the siting of coal mines and processing plants, the magnitude of stream/wetland permitting, spill reporting, and the overall operation, modification, maintenance and restoration of coal sites. (p. 3)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

Vermont League of Cities and Towns (Doc. #13075)

17.1.304 It is tremendously disruptive and expensive for a municipality to comply with state rules and then find that it may also need to comply with EPA and Army Corps of Engineers rules. We also suggest that where a state has a law or rule defining waters of the state that essentially encompasses the EPA or Army Corps of Engineers rule, that state law or rule should be the sole jurisdictional determination in that state. (p. 2)

Agency Response: States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect

US EPA ARCHIVE DOCUMENT

the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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 will continue to work closely with the states to implement the final rule.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule. The agencies will continue to work closely with the states to implement the final rule.

International Erosion Control Association, Region 1 (Doc. #13174)

17.1.305 IECA believes the state and federal regulatory agencies already have clear guidance in place to identify regulated streams. (p. 2)

Agency Response: Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

South Dakota Grain & Feed Association (Doc. #13201)

17.1.306 The proposed rule would have a profound and significant impact on small businesses around the United States. The cost of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also have to be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate.

Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States,* 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

Spencer Brook Township, Princeton, MN (Doc. #13222)

17.1.307 This task proves difficult and expensive enough for small local governments to achieve without compounding them with the additional steps and possible fees that the proposed changes will bring. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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**

US EPA ARCHIVE DOCUMENT

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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule. The agencies will continue to work closely with the states to implement the final rule.

Rio Grande County, Colorado (Doc. #13266)

17.1.308 Rio Grande County, Colorado is very dependent upon agriculture. Water is our life blood for our area. The rule will make it more difficult to farm/ranch or change a farming/ranching operation to remain competitive and profitable. We feel the proposed rule will give EPA veto authority over a farmer or rancher's ability to operate. This could have the unintended consequences of putting farmer and ranchers out of business. Our area is already over-burdened with unneeded and necessary government regulations. This proposed rule will only add to them.

It is our firm belief that EPA does not seem to understand the real world effects these regulations will have on farmers and ranchers across the country.

We feel this is an over-reach of governmental authority and a burdensome rule making authority. (p. 1-2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The

US EPA ARCHIVE DOCUMENT

agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Iowa Corn Growers Association (Doc. #13269)

17.1.309 Also this past year, Iowa Corn partnered with the Iowa Pork Producers Association and Iowa Soybean Association to establish the Iowa Agriculture Water Alliance. All three organizations have committed significant, long-term funding to sustain this farmer-led nonprofit initiative. The Alliance will leverage our internal funding together with external resources to enhance water quality research, foster better relationships with government agencies that deal with water quality, and provide intensive communications efforts to ultimately accelerate adoption of water quality improvement practices in support of Iowa's Nutrient Reduction Strategy.

In light of this commitment, Iowa Corn is concerned that our investments in water quality will be overrun by efforts that expand the CWA's jurisdiction. We (…) strongly encourage the Agencies to consider (…) agricultural stakeholder concerns before taking any further action on this rule. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.**

This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. EPA and the Corps have

US EPA ARCHIVE DOCUMENT

used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Portland Cement Association (Doc. #13271)

17.1.310 The state of wetlands jurisdiction has been in disarray for over a dozen years. Determining jurisdiction has become so obtuse that there is little innate correlation between downstream traditionally navigable waters and upstream jurisdictional ones. Case-by-case analyses and procedural morass has been the norm. As a result, PCA was one of the many entities that initially favored this rulemaking, believing it would bring clarity and efficiency to an opaque, inefficient process. Unfortunately, the proposed rule offers neither. To the contrary, it would merely expand the scope of the Agencies' jurisdiction beyond their statutory authority while retaining one case- by-case test and adding several more. It would continue to require the involvement of specialized experts and simply move the disputes from one set of undefined terms to another. PCA believes the Agencies have failed to explain why the rulemaking is legal, how it will be applied uniformly and why it should be adopted at all. The scientific basis upon which the Agencies rely simply states that almost all water everywhere can or may be connected, which cannot be a basis for a rulemaking since the CWA by its own terms is limited. The rulemaking should be abandoned and the Agencies should re-propose a new rule which is clear, simple to implement, and within their statutory authority. (p. 31-32)

Agency Response: **The rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

US EPA ARCHIVE DOCUMENT

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

S. Barnes (Doc. #13329.1)

17.1.311 Farmers like me will be severely impacted. This proposed rule would affect the way I build fences, fertilize my crops or control weeds on my farm. This rule could put many small farmers out of business with no better way to provide for their families. Therefore, I ask you to withdraw the proposed rule. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and

US EPA ARCHIVE DOCUMENT

conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

Maumee River Basin Commissioner (Doc. #13461)

17.1.312 Any additional cost burdens are challenging to our member counties and population, especially since our rural counties have the most road miles and corresponding ditches. It is imperative that the EPA and Corps work closely with states and local governments to develop a "waters of the U.S." rule, especially since we are partners with the federal government in implementing and enforcing Clean Water Act programs. (p. 1)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. 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.**

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule. The agencies will continue to work closely with the states to implement the final rule.

American Association of Port Authorities (Doc. #13559)

17.1.313 AAPA urges the agencies not to finalize the rule as proposed. AAPA recommends the agencies provide additional clarification on these definitions and also provide an evaluation on permit delays if additional resources are not provided. The revised proposed rule should then be reissued for public review and comment. (p. 2)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the**

US EPA ARCHIVE DOCUMENT

CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

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.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

TriBasin Natural Resources District (Doc. #13564)

17.1.314 The cost and time frame for the CWA permitting process, whether administered by the Corps, or the Nebraska Department of environmental Quality ("NDEQ") with oversight from the EPA, will directly impact local landowners and the decisions that they make to locate in the TBNRD's jurisdiction and contribute to the local economy. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. 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.

Kennewick Irrigation District, Kennewick, WA (Doc. #13571)

17.1.315 Such an expansion of the definition of what is "waters of the United States", as proposed by the new rule, would be unwise and would likely result in higher regulatory burdens to KID. The cost of compliance with these expanded regulations would be carried by the ratepayers and farmers of the KID, while yielding negligible ecological benefits. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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

US EPA ARCHIVE DOCUMENT

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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Roads and Drainage Department, DeKalb County, Georgia (Doc. #13572)

17.1.316 We understand that the EPA and Corps of Engineers contend that this rule does not expand the reach of the Clean Water Act (CWA) to include any new types of waters that have not historically been covered under the CWA, and is consistent with the U.S. Supreme Court's more narrow reading of CWA jurisdiction. However, there is great uncertainty among many entities that this is indeed the case. The proposed rule, whether it is EPA's intention or not, could possibly:

- Subject local governments to substantial regulatory costs due to greatly expanded federal permitting requirements;
- Expose local governments to costly lawsuits and penalties for alleged non-compliance with the CWA;
- Create unnecessary delays in our ability to construct and maintain critical infrastructure to protect the public health, safety and welfare. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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. As explained in the record, this rule will not cause a "significant increase" in the scope of Clean Water Act jurisdiction, and the agencies disagree that there will be a proliferation of litigation.**

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule. The agencies will continue to work closely with the states to implement the final rule.

US EPA ARCHIVE DOCUMENT

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

17.1.317 In summary, we again thank the EPA and Corps for seeking to clarify what exactly constitutes "waters of the U.S." However, the confusion around this proposal suggests that perhaps we take a step back and spend more time drafting a more clearly understood rule--one that specifies that local governments' ditches and stormwater infrastructure are exempted. Otherwise, we feel that this rule has great potential to increase local governments' risk of litigation, create unnecessary delays and confusion, and cause a disincentive for adequately constructed and maintained drainage ditches and stormwater management infrastructure. It will also divert crucial resources from other critical local government services and federally-mandated Clean Water Act responsibilities at a time when our budgets are already under great duress. (p. 2)

<u>Agency Response:</u> The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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

US EPA ARCHIVE DOCUMENT

water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

Walnut West Creek Watershed District No. 72, Toronto, KS (Doc. #13574)

17.1.318 The Corps' and the EPA's attempts to inappropriately expand their authority under the Clean Water Act have had a very adverse affect on the watershed program. Delays in these critical watershed programs caused by the Corp and EPA will, undoubtedly, result in unnecessary property damage and potentially loss of life. Damage to the environment due to flooding, erosion, and adverse stream sediment loads is also occurring due to delayed projects. (p. 1)

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

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant benefits can proceed with the necessary environmental safeguards while minimizing permitting delays. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

Edmonson County Courthouse, Brownsville, KY (Doc. #13575)

17.1.319 As proposed, the new expanded definition of "waters of the U.S." would have costly impact on counties, by requiring that nearly all routine clearing and cleaning of road ditches, drain tiles and drain pipes be subjected to the 404 permitting process. This would result in maintenance delays additional costs and could ultimately affect public safety by unnecessarily endangering pedestrians and vehicular traffic, as well as increased administrative time and related expenses. (p. 1)

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

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term

US EPA ARCHIVE DOCUMENT

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

City-County Health Department, Water Quality Advisory Council, Missoula, MT (Doc. #13576)

17.1.320 Healthy rivers, streams, wetlands and riparian areas are valuable resources in Missoula County. Clean water affects fisheries, streamside wildlife habitat, and drinking water. For these reasons we support the efforts to restore and clarify Clean Water Act protection of water resources in Missoula County. (p. 1)

Agency Response: **Protecting the long-term health of our nation's waters is essential. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Lafourche-Terrebonne Soil and Water Conservation District, Thibodaux, LA (Doc. #13582)

17.1.321 If adopted in its present condition, this Definition would (…) prevent many landowners and producers from engaging in operations that we have worked with them on for generations. This regulation would do far more to undermine private property rights and have detrimental economic consequences than it would do for providing cleaner water. In fact, this regulation does nothing to advance the overall intent of the Clean Water Act as Congress originally intended it to be. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and**

US EPA ARCHIVE DOCUMENT

science. 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 Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. Please see Section I.C. of the Technical Support Document.

Newmont Mining Corporation (Doc. #13596)

17.1.322 While EPA and Corps officials with whom we have met to discuss the Proposal have stated that the Proposal was never intended to bring mining artificial ponds and associated channels and culverts within the scope of jurisdictional waters, the Proposal is sufficiently vague that an overzealous regulator could conclude otherwise. Similarly unclear is the extent to which the Proposal would encompass as jurisdictional the types of ephemeral and intermittent drainages described above. The EPA and Corps officials with whom we have met since the Proposal was issued insist that only drainages that themselves connect via surface channel to a TNW (or a tributary thereof) are jurisdictional – but, again, the Proposal is sufficiently ambiguous that a regulator in the field might interpret the language of the Proposal differently. (p. 4)

Agency Response: **The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

17.1.323 For decades, Newmont has operated several integrated precious metals mining, beneficiation and mineral processing facilities in northern Nevada. Newmont extracts precious metal-bearing ores from the ground, and then beneficiates and smelts the ores in order to produce gold and silver, and at times copper. As part of its typical operations, Newmont has designed and constructed, and operates, several types of artificial ponds that are used to manage wastewaters, process waters, stormwater, and other waters and solutions. These include tailings storage facilities ("TSFs"), heap leach pregnant and barren solutions ponds, event ponds, quench ponds, and stormwater collection ponds. In the decades that Newmont has operated – even prior to the SWANCC and Rapanos decisions – no regulator (whether from EPA, the Corps, or the State of Nevada) has ever claimed that the waters and solutions in the artificial ponds constitute "jurisdictional waters" for purposes of the CWA. Nor has any regulator ever claimed that the ditches and other constructed channels used to convey waters or solutions to the artificial ponds, or from these artificial ponds back into production operations, might constitute waters of the United States. And, importantly, based upon meetings that Newmont has had with Corps and EPA officials since the Agencies' Proposal on April 21, 2014, those officials have stated that the Proposal was never intended to encompass such ponds and channels as jurisdictional waters. (p. 12)

US EPA ARCHIVE DOCUMENT

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for waste treatment systems designed consistent with the requirements of the CWA has been moved to (b)(1) and remains substantively and operationally unchanged.

Ameren Corporation (Doc. #13608)

17.1.324 Based on the changes from this proposed rule, a substantial number of additional permits, consultations, jurisdictional determinations, and evaluations will be required to conduct business as usual. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

For purposes of economic analysis supporting the rule, 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.

National Young Farmers Coalition (Doc. #13618)

17.1.325 We are particularly concerned about outreach to young, beginning farmers. Many of our members are first-generation farmers that are just beginning their careers. These individuals have not been a part of a regulated community before and have not dealt with either of the agencies. Without clear outreach, these individuals do not understand their responsibilities under the Clean Water Act. We are glad to see the agencies beginning to

US EPA ARCHIVE DOCUMENT

develop a relationship with the USDA, as demonstrated by the recently released Memorandum of Understanding.[10] However, this relationship needs to be deepened and strengthened so that the USDA can help young farmers understand the reach of the Clean Water Act. The USDA is the agency that young farmers work with and trust; the agencies should leverage that relationship for outreach and communication. (p. 1-2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. The agencies will continue to work closely with the USDA to implement the final rule.

N. W. Electric Power Cooperative, Inc. (Doc. #13623)

17.1.326 Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect N.W. Electric Power Cooperative, Inc. by delaying and increasing the costs for (1) constructing and maintaining power lines; (2) operating and maintaining existing and new generation, including generation from both traditional fuels like natural gas and renewables; and (3) decommissioning existing generating facilities. As coops across the nation increase generating capacity to meet growing demands of our members and to invest in generation from other fuels (including renewables), we will need to build new transmission and distribution infrastructure.

A reliable and resilient electric grid is part of our nation's essential critical infrastructure. The White House Rapid Response Team for Transmission (RRTT) was, in fact, created to identify mechanisms to streamline electric transmission projects and cut permitting timelines, reduce red tape, and promote federal/state/local cooperation. This proposed rule has the potential to "undo" all the RRTT efforts. N.W. Electric Power Cooperative, Inc. is especially concerned about the potential impact of the proposed rule on our operations. Specifically:

- Our ability to maintain - including repair - our existing power lines

[10] (2014). *Memorandum of Understanding Among the U.S. Department of Agriculture, The U.S. Environmental Protection Agency, and the U.S. Department of the Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards.* http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf

US EPA ARCHIVE DOCUMENT

- Our ability to construct new power line - especially lines related to newer generation
- Our ability to manage small, de minimis, spills along our rights of way (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Little Sioux Inter-County Drainage District (Doc. #13629)

17.1.327 The proposed rule creates the demand for more permits which will jeopardize the Iowa Nutrient Reduction Strategy already underway. The cumbersome permit process will discourage conservation practices due to the cost of paperwork and loss of time. It takes control of local land use decisions out of the hands of the landowners. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. Please see Section I.C. of the Technical Support Document.**

Campbell County Conservation District (Doc. #13630)

17.1.328 The District believes that expanding the definition of the "waters of the united states" will negatively impact the local economy and create needless additional work for ranchers, farmers, construction companies, local municipalities, other landowners and small businesses. The net impact of this change in definition will be an enormous burden that will be placed on landowners and other constituents of the CCCD. The proposed rule change is incredibly vague and applies very unclear terms and phrases to a variety of dry ditches, farm ponds and ephemeral streams that are much better managed locally and left out of the CWA. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Wilson, J. (Doc. #13657)

17.1.329 There are over 80 playa lakes on the ranch. The WOTUS ruling would mean that they would be under EPA jurisdiction. It's mindboggling to me that someone that doesn't understand our operation, our livelihood, our environment, or anything about us wants to "control" how we oversee those lakes. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.**

The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial. The agencies have also determined that the single point of entry watershed is a more reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard than ecoregions. Additionally, the agencies may amend the rule as part of the rule-making process if evolving science and the agencies' experience lead to a need for action to alter the jurisdictional categories.

Under paragraph (a)(7), prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are

US EPA ARCHIVE DOCUMENT

jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters in these subcategories are not jurisdictional as a class under the rule. However, because the agencies determined that these subcategories of waters are "similarly situated," the waters within the specified subcategories that are not otherwise jurisdictional under (a)(6) of the rule must be assessed in combination with all waters of a subcategory in the region identified by the watershed that drains to the nearest point of entry of a traditional navigable water, interstate water, or the territorial seas (point of entry watershed). The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

River des Peres Watershed Coalition (Doc. #13950)

17.1.330 The River des Peres Watershed Coalition fully supports the proposed rule to further clarify the Clean Water Act and urge you to continue efforts to implement consistent protection for those thousands of miles of rivers and streams that do not have adequate water quality protections. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Murray Energy Corporation (Doc. #13954)

17.1.331 For Murray, the revised definition of tributary is particularly troubling. Many of the Company's mine sites have been in active use for decades, during which time operators have relied on drainage ditches and culvert conveyances to manage stormwater flow and maintain compliance with the Company's section 402 and 404 authorizations. These features are common across Murray's mines and, and in many cases, would likely have once been part of a natural drainage or tributary. Because the locus of activities at surface mine sites is constantly in flux, mine operators frequently come into contact with these types of features and completion of routine operations and regular expansions will often necessitate some alteration or impact. This has posed few regulatory challenges for Murray as most of these features have historically been considered outside the realm of CWA jurisdiction. Suddenly bringing these historically exempt and non-jurisdictional features under the lens of CWA sections 402 and 404 would now translate into a significant added regulatory burden and cost for the Company without any corresponding justification. (p. 11)

US EPA ARCHIVE DOCUMENT

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

Niobrara Conservation District, Wyoming (Doc. #13955)

17.1.332 The definitions allowing expansive jurisdiction over waters without fact-specific analysis, as required in the past, is of great concern. The contradictory statements dealing with definitions, inclusion or not of groundwater, the extent of jurisdictional expansion and lack of understanding of the effects of the proposed rule on producers all need addressed. We would request the rule be rewritten to clearly state the extent and reach, with consultation at the state level to address these issues. (p. 1)

Agency Response: **The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

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

US EPA ARCHIVE DOCUMENT

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

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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.

National Ready Mixed Concrete Association (Doc. #13956)

17.1.333 NRMCA is greatly concerned about how the rule is being interpreted. If the regulated community can read the rule to mean nearly every place where water falls on the ground after it rains, could be subject to federal jurisdiction and that is not the agencies' intent, as representatives for the EPA and Corps have repeatedly asserted in stakeholder meetings and hearings, then this rule needs to be pulled back and the agencies need to try again. While it may not be the agencies' intent to regulate so expansively, they are ultimately not in control of what they regulate. §505 of the Clean Water Act provides that "any citizen may commence civil action on his own behalf - against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this I Act which is not discretionary with the Administrator." [11] Failing to properly regulate discharges of pollutants into a feature that any third party can, using the imprecise, broad, new terms in this rule, show is a water of the Unit1 States will force the agencies reach to be as broad as the courts will uphold.

NRMCA appreciates the opportunity to comment on this proposed rule. While we understand the agencies attempt to better clarify CWA jurisdiction, we remain concerned that the proposed rulemaking as currently written will further confuse and add additional legal and regulatory uncertainty to the ready mixed concrete industry and other businesses and regulated entities. Simply put, the proposed rule is too broad, imprecise, and leaves too much up to agency and third party interpretation to provide the regulated community with the certainty the agencies are seeking to give them. NRMCA requests that the agencies withdraw the rule and work with their state and local co-regulators, and stakeholders like NRMCA, to come up with a clearer definition of waters of the United States. (p. 1-2)

Agency Response: **The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public**

[11] Federal Water Pollution Control Act §505(a)(2)

US EPA ARCHIVE DOCUMENT

outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." Keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Pascua, J. (Doc. #13970)

17.1.334 That means local governments would be required to obtain federal permits to perform routine maintenance work on a roadside ditch or stormwater drain essential components of effective water management.

In many cases, local governments are responsible for maintaining storm drains and other water-conveyance systems. They often pay a high price to wait for the federal government to issue permits. This new red tape would slow down the process even more and potentially put more people in harm's way by inhibiting projects that keep water off of roads and away from homes.

The costs and delays of this federal over-regulation would have a significant impact on public safety and economic prosperity. For example, maintaining drainage is critical to keeping our roads safe and open for use and requires daily attention. This adds to the fact that our road and bridge budget is already inadequate in currently maintaining the rural road system.

Increasing fees due to additional regulatory permitting for all runoff, as anticipated by the proposal, could bring maintenance efforts to a halt. How this regulation would be

US EPA ARCHIVE DOCUMENT

administered is unclear, and it would be especially cumbersome if it went directly through federal offices not adequately equipped to accommodate heavier permitting. (…)

The expense for plan preparation would add costs not in our existing budgets. If fully exercised, every basic culvert maintenance or repair could be held up, not only placing a burden on counties financially, but also putting citizens at risk due to delays in permitting, as all these would have to first be reviewed and approved by a federal agency. The approach taken by this proposal would drain local budgets and create delays in critical repairs that are often time-crucial with no demonstrated long-term environmental benefit.

Federal over-regulation and unfunded mandates unnecessarily hinder counties ability to get things done for local citizens. All of us want to protect the environment, but we cannot allow over-regulation to do more harm than good. That's why I am against this proposal. (p. 1-2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

US EPA ARCHIVE DOCUMENT

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule. The agencies will continue to work closely with the states and local governments to implement the final rule.

<u>The Florida Electric Power Coordinating Group (Doc. #13993)</u>

17.1.335 [T]he FCG is concerned that the proposed rule revisions may adversely affect the status of some existing steam electric plant waste treatment systems.

FCG-EC members also are concerned that the proposed rule revisions would expand the breadth of CW A jurisdiction over Florida wetlands, manmade impoundments and canals, tributaries, and other waters, in a manner that would adversely affect, without corresponding environmental benefits, members' ability to meet CWA section 404 permitting requirements for new plants, substations, transmission lines, and other linear facilities. The topography in much of Florida is that of relatively flat coastal region ("low gradient areas," as described in the Federal Register preamble statement}, which means that vast areas in Florida are particularly vulnerable to periodic inundation and therefore at risk of being deemed as jurisdictional under the proposed rule revisions. (p. 2)

<u>Agency Response:</u> 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.

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only

US EPA ARCHIVE DOCUMENT

floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

NRG Energy (Doc. #13995)

17.1.336 NRG has significant concerns that this proposed rulemaking will make solar and wind energy development more time consuming and expensive. The effect of this proposed rule would be to hinder the growth of renewable energy and thereby, slow the reduction of GHG emissions. (p. 2)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

17.1.337 Some examples of specific activities which NRG is engaged in that would be impacted under the revised definition are:

- Operation and maintenance at existing and new generating facilities (all fuels, including wind and solar)
- Construction of new building sites, roads or rail extensions on station property
- Installation of new gas or oil infrastructure (pipelines)
- Permitting of waste disposal areas (new or expanded)
- Spill prevention control and countermeasure (SPCC) planning and implementation requirements
- Future facility decommissioning activities

US EPA ARCHIVE DOCUMENT

- Activities involving grading, material laydown, and/or fencing

Strictly interpreted, a WOTUS determination based on the proposed Definition could be applicable to any water storage pond or conveyance located on or adjacent to station property. If finalized as proposed, the rule could greatly increase the number of individual ACE permits required, which were formerly covered by Nationwide authorization, significantly increasing the length of time needed prior to obtaining all necessary approvals for future projects requiring such permits. (p. 7)

Agency Response: **The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.**

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52.

Berkshire Hathaway Home Services GA Properties (Doc. #14028)

17.1.338 I urge you to withdraw your proposed rule that would expand jurisdiction over more waters of the U.S. If finalized, this rule will not have a measurable impact on water quality and will severely hamper future development and growth. An expanded scope over more waters will mean loss of private property rights. While the water quality protections provided by the CWA are vital, so too is the ability of private owners to utilize their property. I urge you to withdraw the proposed rule until Congress decides that a change should be made. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses.**

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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

US EPA ARCHIVE DOCUMENT

qualifiers on some existing categories such as tributaries. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. Please see Section I.C. of the Technical Support Document.

Hampden Township Board of Commissioners (Doc. #14035)

17.1.339 The draft language is so loose that it would enable unelected federal staff, who know little or nothing about local issues, to interpret definitions and regulations affecting Hampden's approximately 30,000 residents as well as businesses and other entities. The proposed Rules and definitions would even enable EPA to claim that puddles and ditches on private property come under its jurisdiction. Contesting such determinations would be costly, time-consuming and could cause long delays in property owners being able to use what is rightfully theirs. Property rights are so important that our Founders considered it necessary to protect them in our Constitution. Affected parties usually do not have the economic resources to effectively contest a federal agency that might use the taxpayers' own dollars against them, so EPA would be, essentially, usurping constitutional protections. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

US EPA ARCHIVE DOCUMENT

This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights. Please see Section I.C. of the Technical Support Document.

Wiedower, R. (Doc. #14037)

17.1.340 As a cattle rancher I am proud to be the primary steward of the natural resources on my property. I strive to care for the air and the water because the well-being of my cattle, and my family, depend upon it. That care does NOT and should NOT require a federal permit each time my cattle walk through a damp spot, or I drive my tractor across the pasture. The net effect of such a regulation will not be an improvement to the environment, but will place an enormous burden on landowners like myself. Please consider the following comments in evaluating the need for rule.

I also would like to know how this will impact my ability to produce beef and hay economically. I also am concerned with the added cost to my daily operations. I need some cost estimates on building a ¼ mile of 5 strained barbed wire fence under these proposed rules. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Lewis & Clark County Board of Commissioners (Doc. #14065)

17.1.341 The unintended consequence of increasing the scope and jurisdiction of the EPA may cripple simple County public works projects and leave us all wondering what

US EPA ARCHIVE DOCUMENT

depression in the landscape qualifies for special permitting and overarching scrutiny from the EPA. (p. 1)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Thomas, R. B., Jr. (Doc. #14067)

17.1.342 From excerpts that I have read from this document, you would be attempting to place fees on just about any farming that comes close to a stream or drainage area. These fees will put another financial strain on us farmers to be able to continue our operations and livelihood. Let's take a look at every fee you are attempting to place as a burden on us farmers; Fees for environmental assessments and permits to till soil near gullies, ditches or dry stream beds; a permit would be required for any activity for farming that creates a discharge into a body of water, and finally, a permit to spray, build fences, digging ditches or even planting crops. What you are now doing is placing fees on farmers that are struggling to stay in business and won't be able to afford if all these fees are eventually put in place. Not only that, but all the red tape that a farmer must go through in order to get the proper permits and the amount of time it would take to get a one. By the time a farmer applies for a permit, it could be too late to plant our crops . (…)

With your proposal this would put a lot of livestock farmers out of business. How will we water our livestock if we can't use the streams on our property? If we are forced to place wells on every section of land we own we wouldn't be able to maintain them nor pay the electric bills to run the pumps for the amount of water that might be needed for the type of livestock we raise. Not only that, what happens if that well goes dry? Is the government going to support the drilling of new wells and the electrical hookups to operate them. You won't. You place restrictions and expect us to pay for all the costs that go along with it, with no compensation. What you are proposing would force me out of farming and that would mean once less steak or hamburger for you and anyone else to eat. (p. 1-2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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"**

US EPA ARCHIVE DOCUMENT

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Illinois Farm Bureau (Doc. #14070)

17.1.343 Illinois Farmers Have Spoken Out in Opposition to the Proposed WOTUS Rule

Throughout the rulemaking process, hundreds of IFB members have filed individual comment letters with EPA voicing, not only their opposition to the proposed rule, but also telling powerful stories of the work they do, on their own accord and through voluntary state, local and federal programs, to benefit the environment. Below are excerpts from three letters written by IFB members and submitted to EPA. Comments such as these are proof that Illinois farmers, and farmers across our country, take great pride in the quality of the soil and water on their farms. No federal rule can replace that sense of pride and stewardship. Such environmental protection is best driven at the local level.

Letter #1:

I was born and raised on a small river that feeds the second largest lake in Illinois, and farm nearly 1,300 acres that surround the lake along with all small creeks and drainage ditches that feed it. I can assure you local farmers such as myself go to great lengths to make sure our practices don't have a negative impact on the environment.

To claim that areas of land that have water in them for less than a handful of days or hours in any given year (qualify as "waters of the U.S.") is simply ridiculous, and a huge overreach and abuse of power.

Even though I have always taken great care in farming my land, I am truly worried that this abuse of power could make most of the highly productive land that I farm a "no farming zone."

Because I live near a large body of water, I fully appreciate the necessity to maintain a quality water system. However, I am supremely confident that we have the intelligence, technology and, most importantly, the desire to meet this great task without any

US EPA ARCHIVE DOCUMENT

bureaucrat who has never even been on my land or in my water system making rules and regulations to govern how I operate.

Furthermore, as a small, local farmer, I fear that this rule could have even greater consequences that have not been considered. For example, if every farmer is required to have licenses and permits to operate on their land, there will no doubt be costs associated with those licenses and permits. If a farmer fails to comply with those licenses and permits, that farmer will be fined. It seems to me that any small farmer that is forced into these permits, license and fines will have a much harder time paying for them because of the reduced number of acres they operate. While this may seem trivial on the surface, it is quite clear to me that this will reduce the number of small, local farmers across the nation.

Letter #2:

I'm 54 and a fourth generation farmer along with my two brothers. I serve as a drainage commissioner and on the county Soil and Water Conservation District Board. Our farm is located in the Illinois River Basin, and some of the land we own and farm is within two miles of the Illinois River.

Most of our farm is irrigated with center pivot systems since it is sandy. Many of the crops grown along the Illinois River are what we refer to as specialty crops. These include seed corn, sweet corn, popcorn, green beans, potatoes and many more. Canneries and other companies have a substantial amount of money invested in these crops each year. Therefore, they need acres that are well drained and irrigated. This, in the end, provides the consumer with a consistent supply of food in the grocery store. For me, as a farmer and steward of the land, maintaining a clean and reliable source of water is very important. This is why we have incorporated several conservation practices on our farm.

We have very few fields that are tiled and are not able to be tiled, so we rely on surface drainage by using waterways, shallow ditches and filter strips. Most of the shallow ditches are along roads, less than 3 feet deep and dry 90 percent of the year. It is ridiculous and laughable to consider any of these as navigable waters.

My forefathers immigrated to this country to escape oppressive governments. Now we find ourselves in America, the land of the free, being oppressed and overregulated because people in Washington, D.C., think they know everything and can do it better than the private sector. You are wrong!!

Voluntary practices work, and they work very well. They were never intended to be turned into regulations. This is an overstepping of the EPA's legal authority granted under the Clean Water Act and an intrusion of our private property rights.

Letter #3:

I have farmed in Edwards County, Illinois, my entire life. I am heavily involved in conservation practices on my farm. Without these practices, I would not be able to produce food to feed livestock or the world. I have learned about the conservation projects I use through various seminars and classes. They are voluntary, and were never intended to be regulated. I use them, so I can produce the best crop that I can on the land that I farm.

US EPA ARCHIVE DOCUMENT

It is ridiculous to consider the water that moves across my fields as "waters of the United States." This water comes from the Lord above and has the potential to land anywhere in the world. I do not know when, where and how much it will rain, and neither do you. To say that this water is navigable and belongs to the United States is far from the truth.

If your proposed new rules go into effect, I will be severely impacted. On the average year, the majority of my ground floods in the spring. I plant my crops as soon as the ground allows me. If I have to get a permit to do my pre-plant work, I will not be able to get my crops planted in a timely manner when Mother Nature allows. I also believe 90 percent of my ground will not be able to be farmed because it is too near to conservation projects or ditches that will now fall under your jurisdiction and "no farm zones." (p. 4-6)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

US EPA ARCHIVE DOCUMENT

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

Pluma County Board of Supervisors (Doc. #14071)

17.1.344 As presently proposed, it is unclear how typical roadside ditch systems will be classified under the rule. The new regulation will likely result in dramatic interference with schedules and the ability of counties to properly maintain roadways to keep them safe and accessible to rural residents.

It is also noted that the U.S. Army Corps of Engineers (Corps) is already significantly backlogged in evaluating and processing of 404 permits and there is no strategy stated by the Corps to successfully accommodate additional workload.

Moreover, water conveyance systems for flood control purposes may also fall under the new definitions, which could ultimately hinder counties from ensuring public safety in extreme storm events. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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. Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in

US EPA ARCHIVE DOCUMENT

combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072)

17.1.345 In general, we find significant issues with the proposed rule. After numerous discussions with EPA, we have a better understanding of the intent of the rule however the current language does not reflect the intent we have heard. These proposed rules are vague and will result in significant inconsistent interpretation by regulators. By definition, rules must be clear and concise and unfortunately the proposed rules fail at this requirement. In addition, contrary to what has been reported, the proposed rule will greatly expand the number of jurisdictional waters and will result in huge increases in time and costs for compliance. These increased costs will not result in improved water quality. (p. 2)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.346 In closing and contrary to the agencies' assertions, the proposed rule does not provide certainty for Elmore County. I urge the Administration to remand the rule until our concerns are addressed and re-release a revised rule based on the concerns raised by state and local government stakeholders. (p. 6)

US EPA ARCHIVE DOCUMENT

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

American Sugarbeet Growers Association (Doc. #14086.1)

17.1.347 We believe that the rule would radically impact the general farming practices of our members in both irrigated and non-irrigated sugar beet-producing areas. There are many features in the fields that contain or carry water only when it rains and that may be miles from the nearest truly "navigable" water. Our growers regard these landscape features as simply low spots on their fields. (…)

This jurisdictional expansion will be disastrous for our growers. They need to apply weed, insect, and disease control products to protect their crops. On much of their land, it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying such products. If low spots in farm fields are defined as jurisdictional waters, a federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these "jurisdictional" features (even at times when the features are completely dry) would be unlawful discharges.

The same goes for the application of fertilizer-including organic fertilizer-another necessary and beneficial aspect of all of our members farming operations. It is simply not feasible for growers to avoid the addition of fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 discharge permit to fertilize their fields-and put EPA into the business of regulating whether, when, and how their crops may be fertilized. Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits if such activities cause fertilizer, dirt, or other pollutants to fall into low spots on the field, even if they are dry at that time. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Palo Alto County Board of Supervisors (Doc. #14095)

17.1.348 Concern for private drainage rights. This Board of Supervisors is also concerned that the rights of farmers across the county to continue improvements to private drainage systems on the long-cropped lands of the county not be materially impaired. Those private drains are essential to the successful farming of most of the soils in the county and are essential to maintaining the tax base of the county. These private drains and their outlet drainage district mains are not static and must be periodically repaired, replaced and improved. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The

US EPA ARCHIVE DOCUMENT

agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

17.1.349 Concern that jurisdictional expansion is grossly underestimated. Although the many USEPA spokespersons all claim a very small expansion in jurisdictional waters, the written language of the proposed rule reveals that a marked increase in jurisdiction is planned. Our county is in one of the 25 Level III Ecoregions wherein the USEPA has proposed to categorically claim all waters to have a significant nexus. Our county is also in the prairie pothole region wherein the USEPA has also proposed to categorically claim all waters to have a significant nexus. We object to both proposed categorical claims of jurisdiction. Choosing either will place huge economic burdens upon the owners of agricultural land in Palo Alto County. (p. 2)

<u>Agency Response:</u> The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with

US EPA ARCHIVE DOCUMENT

interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

Under paragraph (a)(7), prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters in these subcategories are not jurisdictional as a class under the rule. However, because the agencies determined that these subcategories of waters are "similarly situated," the waters within the specified subcategories that are not otherwise jurisdictional under (a)(6) of the rule must be assessed in combination with all waters of a subcategory in the region identified by the watershed that drains to the nearest point of entry of a traditional navigable water, interstate water, or the territorial seas (point of entry watershed).

Swift County Farm Bureau (Doc. #14098)

17.1.350 The scope of CWA jurisdiction is of fundamental importance to Swift County Farm Bureau members as they engage in activities on land and water that often require a jurisdictional determination from the Corps before proceeding. Any changes in CWA regulations that would change the scope of federal jurisdiction will have a substantial effect on our members' ability to complete normal farming activities and ordinary land improvement projects. The agencies' proposed expansion of jurisdiction will result in additional permit obligations for the daily tasks of farmers, ranchers, and landowners, especially for Section 404 dredge and fill permitting, Section 402 NPDES permitting, Section 401 water quality certification, and Section 311 oil spill prevention. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The

US EPA ARCHIVE DOCUMENT

agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule. This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

Nebraska Farmer and Cattlewoman (Doc. #14113)

17.1.351 The rule effectively allows for federal jurisdiction over any and all water as the word navigable will be eliminated from the Clean Water Act. This means that ditches, ephemeral streams, rain water puddles or low areas of pasture or farm ground, as well as storm water conveyances in urban/municipal areas are now able to be regulated by the EPA. As such, federal permits may be required for normal practices both on farms and in the cities. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule**

US EPA ARCHIVE DOCUMENT

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Biopesticide Industry Alliance (Doc. #14117)

17.1.352 The lack of clear definitions will make it more difficult for biopesticide users to determine if Clean Water Act (CWA) permits will be needed to apply beneficial biopesticide products. The vague definitions and concepts will cause confusion among product users and will likely result in litigation over their proper meaning. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

US EPA ARCHIVE DOCUMENT

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

17.1.353 The proposed rule would expand current NPDES permit requirements for mosquito and aquatic weed control to roadside ditches, rights-of-ways, small stormwater retention ponds, and man-made water features. The costs and legal liabilities associated with these permits could slow down or reduce efforts to protect the public health and infrastructure from invasive species and other destructive pests. (…)

Many biopesticide manufacturers are small businesses. Further many biopesticide product users are small businesses that do not have in-house attorneys or hydrology professionals on staff to help them make the very complicated assessment about whether their land or a customers' property includes a "Water of the US." There are also significant costs associated with expanded permit requirements including the assessments that need to be conducted and the staff time associated with planning, monitoring and reporting. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

US EPA ARCHIVE DOCUMENT

Iowa Waters Advocacy Coalition (Doc. #14120)

17.1.354 We believe that this rule will be extremely harmful to conservation efforts and could impede growth within the State of Iowa. It has ramifications for virtually anyone who owns land and has broad reaching impacts on numerous Iowa interests. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

North Carolina Forestry Advisory Council (Doc. #14123)

17.1.355 The proposed WOTUS rule is confusing, vague and does anything but clarify the existing Clean Water Act. It is too broad in scope and attempts to fix items that are not broken. (p. 1)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing

US EPA ARCHIVE DOCUMENT

regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

City of Rockville, Maryland (Doc. #14126)

17.1.356 The City recognizes that the Clean Water Act provides essential safeguards for maintaining clean and healthy rivers and streams, as well as protections for people and wildlife that can these watersheds home.

Rockville applauds the agencies for proposing to revise the existing definition to conform to recent Supreme Court cases. The City understands that for the last several years, EPA and the Corps of Engineers have been filling this gap with program guidance to field staff. Rockville supports the agencies' efforts to bring increased certainty and predictability to this fundamental Clean Water Act definition and the City believes the proposed rule goes a long way toward that end. (p. 1)

Agency Response: **Protecting the long-term health of our nation's waters is essential. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

Association of Oregon Counties (Doc. #14127)

17.1.357 Oregon counties have long opposed the potential expansion of federal jurisdiction of waters through the Clean Water Act (CWA). Since 2011 AOC endorsed limiting those waters under WOTUS jurisdiction. County road departments across the state of Oregon already utilize best management practices recognized by state and federal agencies for

US EPA ARCHIVE DOCUMENT

road construction and maintenance activities that protect water quality, fish, and wildlife. Expanding regulatory jurisdiction and requiring permits to work in small water bodies will be an unnecessary requirement that will be burdensome to counties and ultimately not do much more to serve the environment. Additionally, by requiring more permits through the Corps will likely trigger consultation with the National Oceanic and Atmospheric Administration (NOAA). This could potentially add lengthy delays for county road projects that will not only economically damage already strained budgets but could also lead to safety concerns as projects go unfinished. (p. 1)

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. As explained in the record, this rule will not cause a "significant increase" in the scope of Clean Water Act jurisdiction, and the agencies disagree that there will be a proliferation of litigation.**

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. 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 agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. This rule does not change the agencies'

US EPA ARCHIVE DOCUMENT

longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

Texas Farm Bureau (Doc. #14129)

17.1.358 The way the rule is currently worded, a legal argument could be made that practically any place where water collects and flows is a "water of the United States" - regardless of the frequency or magnitude of flow or the significance of a water's connection to truly navigable water. This is problematic for farmers and ranchers since water commonly flows through their fields and pastures when it rains. In many cases, these waters flow through production areas in fields where crops get planted or animals graze. (p. 2)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). Additionally, Congress has exempted certain discharges associated with farming, ranching, and forestry practices from needing CWA permits.

Maricopa County Board of Supervisors (Doc. #14132.1)

17.1.359 Maricopa County also has concerns that the expanded proposed rule will adversely impact small and large businesses in our County. We will leave it to others to articulate these concerns and note that in particular the Small Business Administration has called for the proposed rule to be withdrawn and reworked because it would have direct, significant effects on small businesses. http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Southern Company (Doc. #14134)

17.1.360 Southern Company has evaluated the implications of the proposed rule on three different capital projects in various phases of design and siting, including one new gas-fired generation facility and two renewable energy facilities. As is demonstrated from the table below, the proposal would impose significant new costs (in one case exceeding an eight-thousand percent increase) in terms of permitting and mitigation for two projects and, in those two cases, possibly foreclose the projects altogether. In the cases of one renewable energy project and the new gas-fired generation facility, the increased jurisdictional area would result in that site not being a suitable option for development due to site layout constraints and costs associated with site preparation, permitting, and mitigation. In the case of another renewable energy site, although the project would still be viable, it would be severely constrained to minimize impacts to jurisdictional waters, thereby causing a direct proportional reduction in the renewable energy build-out and increasing the price per megawatt generated. (p. 14-15)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on

US EPA ARCHIVE DOCUMENT

clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

17.1.361 These additional regulatory burdens will adversely and disproportionately impact the siting and permitting of renewable energy projects, such as solar and wind, which have significantly larger footprints in relation to their electric generation capacity, particularly as compared to fossil-fuel-fired generation. (p. 16)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

John Deere & Company (Doc. #14136.1)

17.1.362 However, meeting this future global food demand cannot be achieved if regulations inhibit productivity growth by increasing business uncertainty and raising the

US EPA ARCHIVE DOCUMENT

specter of civil and criminal liability for engaging in essential, time-imperative farming practices. (p. 3)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

17.1.363 The proposed changes will also likely create a new and challenging adjudicatory process for manufacturers. Although the EPA may release some control in the form of exemptions, applicants will still face significant burdens if the agency claims jurisdiction, by having to prove that such jurisdiction should not apply.

It is also expected that existing processes will be affected as the role of the administering agencies change. For example, the Corps of Engineers balances the value of navigable waters with public needs and economic health. Replacing this balanced approach with EPA mandates may reduce opportunities to participate in dialogue with the Corps. Manufacturers may not have many opportunities to help craft regulatory approaches encouraging business growth while being protective of the environment. Collaboration and regulatory flexibility will suffer. (p. 15)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

US EPA ARCHIVE DOCUMENT

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States,* 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

17.1.364 If adopted, the proposed definitions will create additional jurisdictional water uncertainty associated with the need to obtain section 404 permits before installing and maintaining residential and larger scale landscapes. (p. 16)

<u>Agency Response:</u> Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent

US EPA ARCHIVE DOCUMENT

with the Clean Water Act, Supreme Court precedent, and science. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.365 Conclusion and Recommendations

The stated 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. Although John Deere fully supports these objectives, the proposed rule will not achieve them.

The proposed definitions of adjacent, other waters, tributary, neighboring, and riparian areas are overly broad and lack adequate clarity and scientific criteria, thereby creating uncertainty and risk for those seeking to identify jurisdictional waters and use their land. Moreover, the proposed definitions will effectively remove the distinction between regulating water and land use, thereby effectively making the EPA/Corps the primary agencies exercising authority over agriculture, worksites, and manufacturing sites in the United States. Neither agency is tasked with its primary mission or authority to regulate on-farm activity involving the cultivation of crops and livestock. Moreover, neither agency has the expertise to effectively regulate agriculture and other commercial activities.

Accordingly, Deere recommends the agencies withdraw the proposed rule. Following this withdrawal, the agencies should work with a broad spectrum of stakeholders to develop and promote policies that recognizes the challenges and needs of those working with the land, along with the role of technology and innovation to reduce inputs and improve water quality. (p. 17)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

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

US EPA ARCHIVE DOCUMENT

interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

There is no change in the treatment of NRCS determinations. There is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

Iowa Department of Agriculture and Land Stewardship (Doc. #14148)

17.1.366 Thank you for the opportunity to comment on the proposed rule for defining waters of the United States. As outlined in joint comments recently submitted by multiple State of Iowa agencies, including the Iowa Department of Agriculture and Land Stewardship, the proposed rule and associated interpretive rule have created significant concerns both in Iowa and nationally. We would like to take this opportunity to provide additional comments specific to the unintended consequences and impacts that the proposed rule is likely to have in regards to our efforts to implement the Iowa Nutrient Reduction Strategy and the numerous soil conservation programs we deploy throughout the state of Iowa with local, state and federal partners.

The Iowa Nutrient Reduction Strategy was developed in response to Gulf of Mexico hypoxia and Iowa water quality concerns in an effort to set forth a strategy for collaboratively reducing nutrient losses (from both point and nonpoint sources) to Iowa waters and ultimately the Gulf of Mexico. The Iowa strategy adopted the same goals of 45% nitrogen and phosphorous load reductions that are utilized by the Gulf of Mexico Hypoxia Task Force (HTF), and Iowa provided critical leadership through our HTF involvement to establish the 2008 HTF Action Plan including a goal of development of state-level nutrient reduction strategies across all 12 of the HTF member states.

US EPA ARCHIVE DOCUMENT

The large goals of the HTF and Iowa strategy will require tremendous public and private resources to achieve, since current public funding levels alone are insufficient to provide the level of best management practice implementation that it will take to achieve these goals. Furthermore, the Iowa strategy will depend heavily on increasing private investments in conservation through voluntary actions, market-driven approaches, and increased targeting and streamlining of practice implementation efforts.

In order to achieve these goals the people of Iowa need clarity, consistency, and efficiency from Federal agencies charged with regulatory oversight. The proposed rule does not provide these necessary components to encourage increased water quality efforts; instead it creates vast confusion, increases uncertainty, and will create significant delays and inefficiencies for people wishing to implement practices benefiting water quality. This rule will significantly set back Iowa's efforts to implement our nutrient reduction strategy and increase further adoption of soil conservation practices in our state. Our strategy seeks to increase the number of farmers that are voluntarily adopting best management practices to address water quality concerns for nutrient loading to the Gulf of Mexico, especially those electing to do so without public funding assistance. The proposed rule and associated interpretive rule will greatly discourage these efforts by adding unnecessary regulatory compliance processes and creating costly and burdensome permitting processes. (p. 1-2)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

US EPA ARCHIVE DOCUMENT

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Namron Business Associates (Doc. #14173)

17.1.367 Pesticides and fertilizers are important tools in maintaining green spaces and protecting people and property from pests, such as ticks and rodents that can carry diseases. They are also used to control weeds that can exacerbate allergies. Unfortunately, the use of these beneficial products may be limited under the proposed Waters of the U.S. regulation. The rule could also impact my ability to install trees, grass, and other plants that play a vital role in reducing runoff and erosion, filtering groundwater, and sequestering carbon dioxide. (…)

The new designations will create confusion for lawn care and landscape professionals like myself and make it more difficult to maintain my customers' property. (…)

The lack of clear definitions will make it more difficult for lawn care and landscape professionals to determine if Clean Water Act permits will be needed to install landscapes or to apply fertilizer or pesticides. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States*, 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business

US EPA ARCHIVE DOCUMENT

community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket. The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

<u>Pacific Northwest Waterways Association et al. (Doc. #14272)</u>

17.1.368 The impacts of this proposal hit closest to home for farmers, but will have rippling affects throughout the supply chain. These new regulations will impact land use decisions, increase project costs, lengthen permit review times and mitigation requirements, and ultimately delay the growth and movement of agricultural products. In addition, we will see increased food costs as a nation, and an inhibited ability to efficiently move agricultural products throughout the country and for export to overseas markets. (p. 2)

<u>Agency Response:</u> The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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

US EPA ARCHIVE DOCUMENT

important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Spectra Energy (Doc. #14273)

17.1.369 Spectra is concerned that the agencies' increased obligations will lead to delay. Delay is particularly problematic for linear infrastructure projects like pipelines. Delay in the permitting process of even a few months can delay the completion of a project for a substantially longer period of time due to the inability to construct facilities in certain periods due to weather or environmental constraints. Construction delays can cause pipeline projects to miss their in-service dates for completion, frustrate contractual obligations for the delivery of gas or oil, slow American economic growth by failing to meet energy demand, and may require older, less efficient generating facilities to burn coal or oil until the delay can be resolved and natural gas can be delivered. Additionally, maintenance delays can raise safety concerns or require periods of reduced operation. Moreover, any substantial delay in the process can undermine and conflict with the streamlined process enacted under the Energy Policy Act of 2005 and the FERC's own Pre-Filing process, which are designed to ensure a timely, coordinated approach to pipeline permitting among the FERC, the Corps and other agencies. (p. 4-5)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will

US EPA ARCHIVE DOCUMENT

required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Texas Commission on Environmental Quality (Doc. #14279.1)

17.1.370 The extent of the requests for input indicates that the EPA/USACE continue to question the appropriate approach for clarifying the definition of "waters of the United States." (p. 3)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

Georgia Department of Transportation (Doc. #14282)

17.1.371 The Department has reviewed the proposed rule and fully supports the comments and recommendations offered by the American Association of State Highway and Transportation Officials (AASHTO) in their letter dated October 24, 2014. I've attached a copy of AASHTO's letter.

The Department maintains over 34,000 miles of roadside ditches. These roadside ditches are a critical element of the road's stormwater management system. Our maintenance forces must regularly clear these ditches to ensure that they do not become overgrown with vegetation, clogged with silt or otherwise be unable to serve this function.

US EPA ARCHIVE DOCUMENT

The Department also shares AASHTO's concern that the proposed rule could be interpreted to expand federal jurisdiction to include waters that would not currently be considered jurisdictional which is contrary to the stated principle that these regulations should clarify and not expand the scope of federal jurisdiction under the Clean Water Act. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.**

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

County of Mendocino Board of Supervisors (Doc. #14309)

17.1.372 The new "ditch" definition may require procedural and staff changes within the County; specifically, the Department of Transportation, to accommodate the potentiality of an increase in environmental compliance. The proposed rulemaking will lead to an increase in county, owned ditches that fall under federal oversight and thus, would require 404 /401 permitting. This would impact routine road and ditch maintenance and will require additional environmental compliance staff to work on permitting requirements. (p. 3)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.**

US EPA ARCHIVE DOCUMENT

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

San Joaquin Farm Bureau (Doc. #14311)

17.1.373 The recently proposed rule that would greatly expand the scope of the Clean Water Act and would have significant impacts on farming practices nationwide. The proposed rule will categorically apply the C lean Water to Act to all tributaries and enhance the definition of tributaries to include any water with a bed, banks, or an ordinarily high water mark. The proposed definition of tributaries also includes man made, seasonal, or impermanent streams that have never historically been subject to the Clean Water Act. This specific portion of the proposed rule will impact on-farm retention ponds, canals and ditches which have never been considered "waters of the United States". The expansion of this definition is far beyond the scope of the Clean Water Act and has an immediate, detrimental impact on private property. (p. 1)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual

US EPA ARCHIVE DOCUMENT

precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

The Board of County Commissioners of Otero County New Mexico (Doc. #14321)

17.1.374 For row-crop producers, the expansion of the jurisdictional definition of tributary could carry heavy costs and restrictions. The economic and compliance impacts of this potential have not been adequately analyzed. (p. 14-15)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and

US EPA ARCHIVE DOCUMENT

public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Responsible Industry for a Sound Environment (Doc. #14431)

17.1.375 The broad definitions in the proposed rule will leave professional applicators and homeowners vulnerable to increased citizen lawsuits due to a lack of clarity about which water bodies fall under CWA jurisdiction. Professional applicators may no longer be able to offer important applications for public health and the environment due to an increased risk of lawsuits. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

17.1.376 Fertilizer restrictions could include individual home lawns, gardens, parks and golf courses. Homeowners would not be able to apply plant health products on their own property without having to obtain a costly permit if water was nearby. This unintended consequence could lead to increased citizen lawsuits due to individuals reporting neighbors they believe to be disregarding CWA jurisdiction. (p. 6)

US EPA ARCHIVE DOCUMENT

Agency Response: **The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States.**

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

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

17.1.377 It is unclear if the EPA has unintentionally ignored these state provisions or if EPA unwisely relied heavily on a 2013 Environmental Law Institute report that omitted reference to nearly all of Pennsylvania's water programs in making the case that a rulemaking such as this "Waters of the United States" proposal is needed. (p. 2)

Agency Response: **The agencies did not rely on the 2013 ELI report in determining to pursue this rulemaking. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

Southern Illinois Power Cooperative (Doc. #14402)

17.1.378 Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect cooperatives by delaying and increasing the costs for (1) constructing and maintaining power lines; (2) operating and maintaining existing and new generation, including generation from both traditional fuels like natural gas and renewables; and (3) decommissioning existing generating facilities. (p. 4)

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

Reabe Spraying Service (Doc. #14404)

17.1.379 The WOTUS determination will restrict some pesticides from being used on adjacent land. The loss of a preferred pesticide may dictate the use of alternative pesticides with some unwanted consequences. The alternative pesticides may be more hazardous to the applicator or bees; have a longer reentry, plant-back, or pre-harvest interval; be less effective; or more expensive than the preferred pesticide. (p. 2-3)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on

US EPA ARCHIVE DOCUMENT

clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

<u>Wyoming Farm Bureau Federation (Doc. #14406)</u>

17.1.380 This huge expansion of jurisdiction to the EPA and the Corps will be a terrible burden for Wyoming farmers and ranchers. Farmers need to apply weed, insect, and disease control products to protect their crops. Wyoming's most productive lands are irrigated. Under these proposed rules, applying inputs such as pesticides and fertilizers could require a 402 or 404 permit because to the proximity to ditches and canals, which would be WOTUS under the proposed rules. Failure to obtain permits would subject the producer to lawsuits from the EPA or citizen groups.

These examples point out how disruptive the proposed rule would be to WyFB members' livelihoods. The risk and costs of adopting these proposed rules are extremely high. The regulation of farmlands and pastures as jurisdictional "waters" means that all activities on those lands that moves dirt or applies any product is subject to regulation. Everyday activities such as field preparation, fertilizing, applying insect and disease control products, and fence building in or near ephemeral drainages, ditches, or low spots could be a violation of the CWA, and the farmers and ranchers would be subject to large fines. Not being able to farm or ranch until a permit is issued would cost WyFB members millions of dollars. Not producing crops would also cost the local economies millions of dollars. Agriculture is the second largest industry in Wyoming. The EPA and the Corps needs to re-evaluate the potential economic impact of this rule change. If these changes could mean millions to the Wyoming economy, the impact to the nation would be billions. (…)

Currently, intermittent and ephemeral streams, isolated bodies of water such as stock ponds, and irrigation ditches and canals are NOT WOTUS. Under the proposed rules, landowners would be required to show a "significant nexus" does NOT exist for these waters to be declared not WOTUS. The cost to landowners will be significant in time and money. (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Western Coalition of Arid States (Doc. #14407)

17.1.381 Based upon our review we believe the agencies' proposal presents too many unintended consequences that will ultimately subject persons engaging in construction and development, stormwater management, and the operation and management of water, wastewater and irrigation systems to inappropriate and unwarranted CWA jurisdiction resulting in negligible environmental benefit. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

US EPA ARCHIVE DOCUMENT

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

This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States,* 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

17.1.382 Therefore, the imposition of additional permitting requirements on diversion ditches that will be above and beyond those required in the CGP will only frustrate efforts to comply with both. Additional language should be included in the Final Rule that makes these already regulated channels exempt from jurisdiction, or at the very least, that maintenance activities carried out to maintain their function, performed according to industry standards do not require additional permits. (p. 11)

<u>Agency Response:</u> In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water,

US EPA ARCHIVE DOCUMENT

into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects can proceed with the necessary environmental safeguards while minimizing permitting delays.

Indiana Pork Advocacy Coalition (Doc. #14410)

17.1.383 The Indiana Pork Advocacy Coalition represents member pork farmers in the state of Indiana on state and federal policy matters that impact their livelihood. These pork farmers rely on Indiana crop land both to raise the crops they feed to their animals and to have a place to apply the nutrients generated from their pork farms in order to fertilize the next season's crops. The vast majority of this crop land has some type of drainage feature. Our membership is concerned with how those drainage features could be regulated by this proposed rule, and how that regulation might impact the feeding of their animals and application of their nutrients. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

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

US EPA ARCHIVE DOCUMENT

water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

17.1.384 As proposed, the WOTUS rule fails to provide any clarity or predictability for farmers, including pork producers. It raises serious practical concerns with regard to its direct implementation by EPA and the Corps and its impact on the long-standing relationship between farmers and the U.S. Department of Agriculture and on the ability of farmers to manage their land and grow the feed, food, fiber and fuel that are essential to America's economy. Finally, the rule will have significant direct impacts in areas well beyond the scope of the proposal or the jurisdiction of EPA or the Corps. These include, but are not limited to, decisions on which crops to plant and which fertilizers and pesticides are best for those crops in light of ever-changing environmental and marketplace conditions; farmers' ability to access credit and their relationship with bankers and lenders; and the nationalization of what have always been local decisions on the use of private lands. It also likely will subject farmers across the country to abusive activist lawsuits that benefit neither the environment nor local economies. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

There is no change in the treatment of NRCS determinations. There is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food

US EPA ARCHIVE DOCUMENT

Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

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

17.1.385 A California operator stated "The inclusion of all 'tributaries' as jurisdictional and covering natural and man-made features that may be largely dry and broken up by a barrier will greatly affect our current and planned operations. The broad definition of tributaries will include all other waters not originally contemplated as waters of the U.S. The California central coast contains multiple watersheds and other tributaries along mountain ranges. Expanding the definition of tributaries would turn entire mountain ranges and their corresponding watersheds, be it headwaters, into waters of the U.S. Many properties will have additional tributaries that will need to be evaluated for potential impact and be permitted if necessary. These dry, ephemeral and other upland areas will need to be permitted. The broad definition includes tributaries with man-made breaks, man altered or man-made water and includes waters such as lakes and ponds. Including man-made lakes and ponds makes it unclear whether ponds utilized as settling basins for mining operations are in fact, exempt from the proposed rule. The delay involved in making a determination of whether a pond is classified as a tributary, wetland, other water or exempt could put current regular pond management and future pond projects on hold. If a settling pond cannot be used in the regular manner (example clay removal), then facilities will have to limit or stop processing aggregates while awaiting the permit." (p. 25-26)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and

US EPA ARCHIVE DOCUMENT

an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

17.1.386 EPA claims this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts to storm water run-off and require detailed storm water pollution prevention plans. These plans are required for every project, both during construction and operations. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress intended. While EPA states groundwater is excluded from this rule, the rule also says that "shallow subsurface connections" are included. Does this mean the water that fills our pits is jurisdictional? It would be a rare event to NOT encounter shallow, unconfined or perched groundwater in sand and gravel deposits that we typically mine. Will a separate permit be required for reclaiming the pit and returning it to another, beneficial use? These are just some of the many questions this rule poses, but does not answer. And, that in many ways underscores the problem with the proposed rule, the uncertainty of the scope of jurisdiction. (p. 71-72)

<u>Agency Response:</u> States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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 will continue to work closely with the states to implement the final rule.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of

US EPA ARCHIVE DOCUMENT

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

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

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Westlands Water District (Doc. #14414)

17.1.387 Definition of "Adjacent" – The Proposed Rule will classify waters that exist far beyond the ordinary high water mark ("OHWM") of a navigable water as waters of the United States, thereby capturing treatment wetlands, percolation ponds and other manmade features and expanding the footprint of existing waters of the United States. This proposed change will interfere with existing and future water supply, flood control, waste treatment and transportation projects. (p. 4)

Agency Response: The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only

US EPA ARCHIVE DOCUMENT

floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. . However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general

US EPA ARCHIVE DOCUMENT

permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.388 Under the Proposed Rule, percolation ponds and off stream reservoirs would also be reclassified as tributaries. Many percolation ponds and off stream reservoirs are constructed in locations whether they are near a traditional navigable water (or a tributary) or have a drain to a traditional navigable water (or tributary). Since these ponds stay wet on a perennial basis, they would also be classified as tributaries under the Proposed Rule. If the percolation and storage ponds are so classified, the ability of water providers to use the ponds and reservoirs for their intended purpose would be substantially impaired. (p. 10)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in

US EPA ARCHIVE DOCUMENT

paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Lyman-Richey Corporation (Doc. #14420)

17.1.389 As noted above, the majority of LRC's sites are unpermitted by the Corps, and the Agencies assert that the Proposed Rule will not require additional permits to be obtained. However, the plain language of the Proposed Rule and the Science Advisory Board's ("SAB") draft comments and letter to the EPA contradict the Agencies' claims that the Proposed Rule does not expand jurisdiction or include groundwater.[12] Under the Proposed Rule, LRC would have to obtain individual permits for each and every site, or carry the burden of proving facilities associated with its mining activities lacked a nexus significant enough to justify federal jurisdiction. In either case, LRC faces cost-prohibitive expenditures of time and resources which will directly impact its ability to fulfill contracts with federal, state, and local entities for vital infrastructure projects, as well as with private entities for vital construction activities. The following examples demonstrate the problem. (p. 4)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

[12] See Science Advisory Board (SAB) Draft Report (4/23/14). See also SAB letter to EPA regarding the scientific and technical basis of the Proposed Rule regarding "waters of the U.S." (9/30/14). The SAB's analysis illustrates the impact of the Proposed Rule and the potential for the WOTUS definition to be interpreted in a manner that would result in the assertion of federal jurisdiction over every activity that has any connection to water.

US EPA ARCHIVE DOCUMENT

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.

17.1.390 Under the Proposed Rule, a "tributary" is categorically jurisdictional, and includes "wetlands, lakes, ponds, impoundments, canals, and ditches[.]"[13] No meaningful exemption from this definition is provided,[14] and no case-by-case determination as to the status of the water will be made. Under the plain language of the Proposed Rule, this means any connection between a lake (including lakes resulting exclusively from LRC's mining operations) to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of the lake as a "tributary." In Nebraska's large river valleys, it is impossible to mine commercially-viable sand and gravel deposits without creating a sand pit lake with some potentially remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland. (p. 5)

<u>Agency Response:</u> By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a

[13] 40 CFR 230.3(u)(5)

[14] Exempt from the definition of "tributary" are ditches that "drain only uplands" and "do not contribute flow either directly or through another water" to any TNW, interstate water, interstate wetland, or territorial sea. Id.

US EPA ARCHIVE DOCUMENT

feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Minnesota Farmers Union (Doc. #14429)

17.1.391 Our members are very concerned about how this proposed rule would interact with the very stringent rule Minnesota already has governing water the Wetland Conservation Act (WCA), and also with other various water—related regulations. Our members are frustrated with the answers they get from the Corps and the time it currently takes to approve projects and feel that this proposed rule will add more time and frustration as well as another layer of bureaucracy to an already overloaded system. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

Georgia Chamber of Commerce (Doc. #14430)

17.1.392 EPA's proposed CWA rulemaking will do little or nothing to actually improve water quality across the nation. It does, however, vastly expand EPA's authority to control which project and commercial activities are approved and the timing of those approvals. This expansion is not necessary nor appropriate to protect or improve water quality. (p. 3)

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.393 The states have a critical role to play in the regulation and management of the nation's water resources. Their role must be recognized, supported and not diminished through lack of consultation or introduction of expanded rules that create management burdens or transfer the cost of regulation to a state and ultimately onto the permitted community within that state.

Finally, any and all unfunded mandates associated with this proposed rulemaking are explicitly rejected by the Chamber. (p. 5)

<u>Agency Response:</u> States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

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

17.1.394 [T]he Chamber assesses EPA's performance in this rulemaking, then it has failed, dismally. As outlined in this submission, the Chamber has deep concerns with the uncertainty being generated by the lack of clarity and the expansive scope and reach of this CWA rulemaking proposed by EPA and the U.S. Army Corps of Engineers.

The Chamber is alarmed that under the proposed rule, the agencies' authority to assert jurisdiction is vastly expanded beyond that authorized by Congress when it passed the CWA in 1972.

Chamber members have spent countless hours analyzing and reviewing the proposed rule and have determined that it will pose significant business risks to their operations across Georgia. This determination is also supported by numerous submissions prepared by industry and elected state officials across the nation.

Direct costs that would be associated with compliance with the expanded rule, as well as the costs of uncertainty that will be imposed on Georgia's economy far outweigh any benefits that will accrue through improved water management and water quality of the state's water resources.

There will be real costs and economic burdens placed on Georgia's businesses, industries and consumers that are out of proportion to the theoretical benefits EPA claims will be delivered. In particular, the Chamber expresses grave concern at the potential for the impacts of this rule to cascade through the state's regional economy and harm farmers, regional small businesses and communities hardest of all.

It is these groups that have the least market power to identify, fund and introduce economically viable solutions and management alternatives in a manner that is both timely and able to offset business, employment and community disruption. (p. 5-6)

<u>Agency Response:</u> This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period

US EPA ARCHIVE DOCUMENT

have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States,* 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

See the Economic Analysis supporting the final rule regarding estimated indirect costs and benefits.

17.1.395 For a rulemaking proposal that seeks to clarify existing regulatory processes and purports to expand the reach of the Clean Water Act by only three percent, the proposal is extremely contentious, introduces a level of confusion and uncertainty that will immediately impact business operations, investment and employment decisions and lacks details important for interpretation of:

- who will be impacted;
- where affected regions are located;
- what are the costs and benefits for water users; and
- what critical environmental and water management issues will be resolved by the implementation of this rule. (p. 6)

<u>Agency Response:</u> The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United

US EPA ARCHIVE DOCUMENT

States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

It is important to emphasize that the economic analysis supporting the rule focuses exclusively on the costs and benefits from CWA programs that would result from the associated change in negative jurisdictional determinations, rather than an analysis of how the scope of jurisdiction changes - nationwide data do not exist on the areal extent of all waters covered by the CWA. The agencies generally only make jurisdictional determinations on a case-specific basis at the request of landowners.

17.1.396 Therefore, the Chamber respectfully requests that the agencies:

1. immediately withdraw the proposed rule;
2. establish a nationwide discussion with stakeholders to develop a revised draft rule that is more consistent with: actual problems that agencies seek to resolve; the available science; and the limits established by Congress and recognized by the Supreme Court;
3. reintroduce the rule with extreme clarity and without an expansion of the extent of
1. WOTUS; or
4. work with Congress to amend the CWA to clarify EPA's concerns with any shortcomings of the existing Act. This will allow Congress, on behalf of the nation, to define the scope of regulatory jurisdiction under the CWA. (p. 6)

<u>Agency Response:</u> Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The agencies believe that sufficient time has been provided for review of the rule. This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule.

US EPA ARCHIVE DOCUMENT

Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.397 The Chamber believes that the proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the Supreme Court. In addition, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. In fact, the proposed rule is the epitome of confusion. For this reason alone, the proposed rule must be withdrawn. (p. 7)

Agency Response: **The final rule clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

US EPA ARCHIVE DOCUMENT

17.1.398 The Chamber is concerned that EPA and the Corps are showing disrespect for state and local governments. (p. 7)

<u>Agency Response:</u> The agencies will continue to work closely with the states to implement the final rule. States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

Keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule. For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

17.1.399 Lack of clarity

While EPA claims that the major benefit of the proposed rulemaking is to enhance clarity and certainty in its application of the CWA, the major concerns being expressed by Chamber members relate to a distinct lack of clarity over which streams and waterways will be impacted, the vagueness of many conditions, poorly articulated new definitions, or lack of definitions for key issues and the complete absence of any illustration of the specific footprint of impacted waters.

Chamber members have not been able to map the reach of the proposed rule to determine: if their operations will be impacted; what changes may be required to their

US EPA ARCHIVE DOCUMENT

existing operations; what the cost of these changes might be; or the timing of these disruptions to their business operations.

In the face of this level of uncertainty, business decision-making slows, investments and employment decisions are delayed or cancelled. There are no winners under this scenario.

EPA's draft rule appears to be exacerbating the very problem it is seeking to resolve. For a draft rule that has been under development for so long, it is a poor reflection on EPA's ability to manage the CWA and articulate its concerns in a clear, concise, transparent and effective manner.

Further concerns have been expressed in relation to the impact on existing permits, the status of pre 1972 assets and a reliance on EPA's future interpretations of the rule during consideration of a permit applications.

At this time, few Chamber members believe EPA's assurances relating to exemptions for existing activities or how its consideration of future permit applications will be consistently and judiciously determined.

It is critical to ensure that EPA's actions occur in a timely manner that support business and community activities and not place a regulatory speed bump in the path of critical and often time-sensitive management practices.

All of these issues are already playing on business confidence and will be exacerbated should the rule be implemented as proposed. (p. 10)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land. The final rule adds an exclusion for puddles.

17.1.400 Unintended Consequences

Many of Georgia's counties, cities and utilities have expressed their concerns that changes to the CWA definition of "Waters of the United States." will have far-reaching effects and could have unintended consequences to a number of state and local CWA programs that they are regulated by, including the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water

US EPA ARCHIVE DOCUMENT

quality standards programs, state water quality certification process, and Spill Prevention, Control and Countermeasure (SPCC) programs.

Georgia's agricultural sector is similarly concerned with the unintended consequences that will impact farmers as they seek to undertake their traditional farming activities in the face of such a vague and broad rule that will apply across much of their operational footprint. (p. 10-11)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

See the Economic Analysis for the agencies' assessment of potential increases in number of permits, as well as costs and benefits.

17.1.401 Business Uncertainty

US EPA ARCHIVE DOCUMENT

No greater example of the uncertainty being created by this proposed rule can be provided than that currently being articulated by the nation's agricultural community.

For example, will the rule regulate all ditches? Under what circumstances will ditches be exempted? Does the proposed rule include man-made ditches? Will the rule cover tributaries that have ephemeral flow, including depressions in land that are dry most of the year except when there's heavy rain?

There is simply no confidence in EPA's claims that the extension of existing exemptions for agriculture will negate any impact on agricultural operations.

The consensus amongst the Chamber's farming members is that the proposed rule: creates less clarity, not more as intended; promotes confusion and uncertainty; will add additional layers of regulatory requirements to farmers' operations; will increase costs; and that it will reduce both productivity and enterprise profitability.

Farming groups have asked EPA for, and have not yet received: more information related to jurisdiction of wetlands, vernal pools, intermittent waters and ditches; the expected process and timeline for making determinations; locations around the country where increases in jurisdictional acres are expected; and the definition of 'standard farming practice'.

The WOTUS proposal and the agriculture Interpretive Rule are a source of uncertainty, anxiety and distrust for people in rural areas. (…)

This sentiment is shared by other industry sectors who will be faced with a similar range of project uncertainties as they try to interpret or anticipate EPA's interpretation and application of the expanded rule under real field conditions.

Counties, cities, road construction, mining, utilities and property developers have all expressed concerns similar to those outlined by the agricultural sector.

With so little data available for analysis, EPA administrator Gina McCarthy's claim that:

> "Some may think that this rule will broaden the reach of EPA regulations - but that's simply not the case. Our proposed rule will not add to or expand the scope of waters historically protected under the Clean Water Act. In the end - the increased clarity will save us time, keep money in our pockets, cut red tape, give certainty to business, and help fulfill the Clean Water Act's original promise: to make America's waters fishable and swimmable for all."

is simply not defensible. Further, the Chamber does not agree with EPA's statement that this rulemaking represents no more than a three percent expansion of the existing reach of the CWA. (p. 12-13)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In the Economic Analysis for both the proposed rule and final rule, the agencies estimated the percent of currently negative jurisdictional determinations that would become positive under the final rule. The agencies provide a high end

US EPA ARCHIVE DOCUMENT

and a low end of potential jurisdictional changes when compared to the baseline of post-2008 guidance.

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction

US EPA ARCHIVE DOCUMENT

required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.402 Lack of Mapping to Illustrate Scope, Reach and Areas of Impact

Another factor contributing to the level of anxiety and confusion being expressed by business and industry is the fact that EPA has not been able to demonstrate, in any practical sense, the reach of its proposed rule or provide any mapping or data to illustrate areas across Georgia where impact will most likely be experienced.

For all the time EPA has had to develop its proposed rule and the combined agency resources that have been applied to this process, areas of Georgia and the nation that can be shown as 'failures' of the existing policy have also not been presented for critical review.

Numerous maps that have been published attest to the uncertainty that exists across the nation. The interpretation of some maps suggest that there may well be many thousands of additional stream miles under the regulatory authority of EPA if this rulemaking proceeds as proposed. Maps presented by EPA to the House Science, Space, and Technology Committee have further added to both confusion and suspicion.

Under these circumstances, individuals are not able to see the location of problems EPA is seeking to address and visualize solutions as they may be applied to their own individual circumstances. That EPA cannot clearly illustrate its claim that this draft rule will only expand the reach of its CWA jurisdiction by 3 percent is simply not a believable or tenable position.

EPA's credibility on this issues is further challenged by the existence of detailed maps first developed almost a decade ago that show, generally, the location of many streams, wetlands, rivers, lakes and other water bodies. These maps, created in this administration or the last, appear to have been developed to reflect the scope of the Clean Water Act, the Supreme Court decisions and any changes to the proposed law. (p. 14-15)

<u>Agency Response:</u> Determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of different remote sensing and desktop tools and a field visit. It is beyond the scope of this rulemaking to make any specific jurisdictional determinations and beyond the

US EPA ARCHIVE DOCUMENT

resources of the agencies to make jurisdictional determinations for all waters within a state at any one time.

See the Economic Analysis for the proposed rule and the report for the final rule which describe the agencies' methodology for estimating changes in jurisdictional determinations under the final rule when compared to a baseline of post-2008 guidance implementation.

17.1.403 Wasted Resources

The Chamber is concerned that permitting and business operational costs will increase significantly as businesses, industries, counties, cities and utilities all react to genuine doubts about how their operations will be impacted by the introduction of this proposed rule.

The amount of resources that have been applied to analyzing and responding to this rule and the overwhelming number of submissions to this public comment period (>253,115) attests to the level of anxiety, doubt and concern across all segments of the community as to where and how this rule will apply.

The Chamber acknowledges that many of the submissions that EPA will receive through this public comment period will in fact support its proposed rulemaking. However, the Chamber doubts that much of this support will represent the views of the regulated community or those small businesses across the nation who will be forced to pay the bill and who stand to be most disrupted by layers of additional regulation and uncertainty.

EPA must reconsider its approach and present a draft rule that clearly charts a pathway for all who are likely to be affected by the proposed changes. This will enable impacted individuals, businesses and communities to better ascertain the scope, cost, timing and impact these changes may impose on their operations, allowing for timely investment and operating decisions to be applied. (p. 15-16)

Agency Response: **This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.404 Definitions

US EPA ARCHIVE DOCUMENT

The proposed rule adds several new definitions that, although critical to understanding the true scope of the rule, are so vague as to allow virtually any interpretation of their limits. (…)

These definitions work in conjunction with one another so that if an area isn't a water body, it may be a tributary. If it is isolated and does not contribute direct flow, flow might nevertheless be indirect, the shallow subsurface water beneath it may be connected to a water body, or it might be in the floodplain, riparian area, or watershed and become significant when combined with "other waters."

The Chamber is concerned that it will often be impossible for landowners and businesses to escape federal jurisdiction under these revised definitions. This will build confusion, uncertainty and almost certainly add to operational costs as businesses are forced to navigate time-consuming and expensive permitting processes.

Obtaining a discharge permit is an expensive and uncertain process, which can take years and cost tens and hundreds of thousands of dollars. In many instances to do no more than continue operations that have been undertaken for years. (p. 19)

Agency Response: **The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.405 Something Is Wrong

US EPA ARCHIVE DOCUMENT

When thousands of concerned individuals, many industry and community representatives, numerous state Attorneys General and the 48 state Agricultural Commissioners represented by NASDA unite to seek the withdrawal of the proposed rule, it must surely indicate that something is very much wrong with both the substance of the proposed rule and the process EPA has initiated.

Under these circumstances, the Chamber implores EPA to withdraw its rulemaking proposal and establish a truly comprehensive and inclusive nation-wide stakeholder consultation process to ensure that a rule is crafted that meets not only the concerns that EPA has with the existing rule, but also addresses the genuine and serious concerns expressed by the regulated community and those businesses and industries who are currently outside the scope of the existing CWA but who may be captured by any expansion of the scope of the CWA as it currently applies.

If the proposed changes are so expansive that they challenge the authority of Congress, then the stakeholder consultation process should be charged with working with Congress to craft amendments to the existing CWA that allows Congress to address the limits of EPA's jurisdictional reach and issues raised by the various Supreme Court decisions. (p. 20)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

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

Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

17.1.406 [T]he Chamber implores EPA to listen carefully to the concerns expressed by these groups who collectively represent the views of thousands of businesses, counties, cities, utilities and communities. (p. 20)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators,**

US EPA ARCHIVE DOCUMENT

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

17.1.407 Conclusion

EPA's proposed CWA rulemaking will do little or nothing to actually improve water quality across the nation. It does, however, vastly expand EPA's authority to control which project and commercial activities are approved and the timing of those approvals. This expansion is not necessary nor appropriate to protect or improve water quality.

In Georgia, the Chamber has been unable to clearly define the boundaries of EPA's rulemaking footprint and, therefore, cannot advise its members: where the benefits, if any might occur; who is most likely to be impacted; and where the real costs of this expansion of EPA's control of the state's water resources will be experienced.

What is very clear to the Chamber's member is that EPA's poorly articulated rulemaking proposal has raised their anxiety and increased the uncertainty surrounding how they will be able to utilize the water resources they currently rely on to underpin their business operations and provide for their families.

They see nothing but costly imposts on their business operations and regulatory roadblocks to the efficiency of their business operations. (…)

The Chamber sees the potential for this outcome to promote endless and costly litigation, stall business and investment growth and confidence, hinder employment growth, all while delivering, at best, negligible environmental benefits.

The Chamber joins our state Attorney General and Commissioner of Agriculture and the many state and national industry groups who have urged that this draft rule be withdrawn immediately. The Chamber offers its assistance to EPA and the Corps to rewrite the proposed rule to be clear, reasonable and appropriate to protect water quality in Georgia and the rest of the nation. (p. 20-21)

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

US EPA ARCHIVE DOCUMENT

17.1.408 EPA may not intend for its rule to apply to stormwater infrastructure, but it is likely that the federal courts will say the rule does apply to stormwater infrastructure, if the rule is adopted as it is now written. (…)

For EPA to claim that the rule would increase the Clean Water Act's (CWA's) jurisdiction by approximately three percent is patently absurd. (…)

Given all of the above, and the high costs and time delays involved with the federal permitting processes, EPA's estimates of the costs of the proposed WOTUS rules to the regulated community are also patently absurd. (p. 46-47)

Agency Response: **This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).**

See the Economic Analysis for the proposed rule and the report for the final rule which describe the agencies' methodology for estimating changes in jurisdictional determinations, as well as costs and benefits under the final rule when compared to a baseline of post-2008 guidance implementation.

Responsible Industry for a Sound Environment (Doc. #14431)

17.1.409 This company is already losing customers with the current implementation of the program, and the proposed rule would have a serious impact on this company's business and its ability to be able to control invasive and nuisance weeds due to increased vulnerability to citizen lawsuits. (p. 3)

Agency Response: **The rule responds to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

US EPA ARCHIVE DOCUMENT

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. As explained in the record, this rule will not cause a "significant increase" in the scope of Clean Water Act jurisdiction, and the agencies disagree that there will be a proliferation of litigation.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

17.1.410 The proposed rule will impact all municipalities as they struggle with high permit costs and their remit to protect citizen's health and safety.

2. The proposed rule makes it more difficult to control harmful pests on private and public property if any water is near the area.

Professional applicators and homeowners would have to obtain permits to protect properties from pests like ticks, which carry harmful diseases such as Lyme disease. Applicators may not be able to treat private and public properties currently treated before the CWA definition expansion because of new permitting requirements. Likewise, homeowners may not be able to treat their own property if near any water, and costly citizen lawsuits could become more frequent due to the vagueness of the defining terms for waters of the U.S. in the proposed rule. Lyme disease and other tick-borne diseases are serious threats to human health and pesticide products play a vital role in the control of these harmful pests. Recent research conducted by the CDC estimates about 300,000 people are diagnosed with Lyme disease annually, suffering chronic health impacts such as kidney failure and blindness. (p. 4)

<u>Agency Response:</u> The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States." This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers

US EPA ARCHIVE DOCUMENT

because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

17.1.411 Many of the waters that will become jurisdictional under the new rule, such as impoundments created for storm water retention in residential areas, are currently affected by AVM, or at risk following introduction of the cyanobacterium. Curtailing treatments of these sites due to permitting constraints or confusion will create a reservoir for this toxin-producing cyanobacterium, which will facilitate transfer by water birds, boats, etc. to other water bodies, including larger reservoir systems, which may provide critical habitat to other federally listed vulnerable avian species. (p. 4)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule only affects the definition of "waters of the United States."**

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States.

17.1.412 Under the proposed rule, many important applications to treat these noxious weeds cannot be made due to the expanded definition of waters of the U.S. Herbicides help keep our park trails, sidewalks, playing fields and parks clear and safe for the public's use and enjoyment. (p. 5)

Agency Response: **The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.**

17.1.413 The proposed rule would place an undue burden on both state agencies and private landowners who now manage the water quality in millions of ponds and other water bodies. These state agencies may not have the resources to apply for additional

US EPA ARCHIVE DOCUMENT

permits to treat new waters for invasive species or algae blooms, and private landowners will not have the know-how or information to complete permit applications that will not leave them vulnerable to citizen lawsuits. The overlap in federal regulations and increased burden of NPDES permitting could lead to a decrease in state resources and management, and have a significant negative impact on public health, the environment and the economy. (p. 7)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.**

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States is available in the docket for this rule.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Shelby County Farm Bureau, Kentucky (Doc. #14449.1)

17.1.414 Reading through the proposed rule, I am more confused than ever about what exemptions farmers like me, and those I represent would have. It bothers me that for a document that is supposed to add clarity to the Clean Water Act will probably result in my having to meet more regulatory guidelines, face more restrictions on how we can farm our land, and probably forces us to spend more of our hard earned dollars and time just to continue farming! Our farmers go to length to protect their land resources and the environment with the goal to eventually pass the farm on to a future generation. They understand the value of protecting this resource, but this rule would penalize the very folks working hard to protect the environment for our future generations! (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. The final rule also includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(A), which has not changed as a result of the rule.

Adams County Beef Producers (Doc. #14455)

17.1.415 The proposed rule does not provide clarity or certainty as EPA has stated. The only thing that is clear and certain is that under this rule, it will be more difficult to farm, or make changes to the land even if those changes would benefit the environment. I work to protect water quality regardless of whether it is legally required by EPA. It is one of the values I hold as a farmer.

Farmers like me will be severely impacted; therefore, I ask you to withdraw the proposed rule. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule**

reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. The final rule also includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Soil Horizons (Doc. #14456)

17.1.416 I am a soil scientist and clean water is very important to me. Your proposed rule is a significant expansion of the Clean Water Act that will affect every American, and have a significant impact on my business and community due to the proposed increased jurisdiction over all waters. The definitions provided in the proposed rule are very broad and do not provide clarity to which waters could be considered "waters of the U.S." under CWA jurisdiction. Due to the proposed rule's complexity and lack of clarity, I request the proposed rule is withdrawn.

Well-maintained lawns are important for the environment and properly-cared for lawns reduce run-off into nearby waters. One of the unintended consequences of EPA's proposed rule could be increased erosion and runoff into many connected water bodies. The rule will have little to no impact on water quality while definitions and other aspects of the rule will be defined by the courts in citizen action lawsuits.

Thank you for this opportunity to submit these comments. EPA and the Corps should withdraw its proposed rule and keep "navigable" as the defining term for "waters of the U.S." under CWA jurisdiction. (p. 1-2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

Wyoming Mining Association (Doc. #14460)

17.1.417 However, WMA is concerned that the rulemaking language does not provide the intended clarity for the new and revised definitions and ultimately that the proposed changes will greatly expand the realm of jurisdictional waters. Because the rule does not provide the intended clarity, continued and expanded legal challenges will ensue, and ultimately may cause added expense and delays in the permitting process. Further, the WY Corps is understaffed to meet their present workload and will be seriously understaffed to handle the increased workload if this rule is put into place as currently written.

WMA is in support of the comments submitted by the National Mining Association (NMA), the Waters Advocacy Coalition (WAC) and the US Chamber of Commerce. WAC's comments provide specific details showing why the proposed rule is fundamentally flawed from both a legal and policy viewpoint. NMA's comments provide more details as to how the rule will specifically impact mining operations. WMA believes that at a minimum the rule should be withdrawn and the definitions be clarified so that the jurisdictional authority over WOUS remains within the intended scope granted by Congress. EPA and the Corps should engage the affected stakeholders so that the rule provides the intended clarity and does not create further legal ambiguities that will lead to additional uncertainties around the permitting process. (…)

The proposed rule claims to "enhance protection for the nation's public health and aquatic resources ... by increasing clarity."[15] The WMA agrees with the need for clarity surrounding the range of CWA jurisdiction. We do, however, believe that clarification will not be achieved through the proposed rule. The proposed rule does not correct discrepancies and confusion surrounding the existing CWA jurisdiction but instead increases ambiguity with the addition of other poorly defined terms such as "tributary" and "neighboring". Not only has the proposed rule failed in its main purpose of increasing clarity, but it will also serve to drastically expand federal jurisdiction, while

[15] 79 Fed. Reg. at 22,188

US EPA ARCHIVE DOCUMENT

claiming not to. Within the Economic Analysis of Proposed Revised Definition of Waters of the United States performed by the EPA and Corps, the agencies remarked that the proposed rule will result in a 3% expansion. This claim significantly underestimates the number of waters that may become jurisdictional. Therefore, the economic analysis does not adequately estimate the costs, time and/or manpower required for agencies to implement the rule, or the cost to comply with the proposed rule. (p. 1-3)

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

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The agencies updated the economic analysis supporting the rule based on the final rule policies. 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.

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

17.1.418 The City of Miramar is 31 square miles in size and has over 280 manmade lakes, ponds and canals to mitigate flood impacts and improve water quality. Under the

US EPA ARCHIVE DOCUMENT

proposed definition of WOTUS, all of the water bodies located in Miramar can be subject to numeric nutrient criteria that have not yet been established. (p. 6)

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

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."

Finally, States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA.

National Chicken Council, National Turkey Federation and U.S. Poultry & Egg Association (Doc. #14469)

17.1.419 The proposed rule would assert jurisdictional authority over countless dry creeks, ditches, swales and low spots that are wet because it rains or a farmer has installed practices to sustain the viability of his operation. Even worse, the proposed rule attempts to claim authority over remote "wetlands" and or drainage features solely because they are near an ephemeral drainage feature or ditch that are now defined as a water of the U.S. subject to CWA jurisdiction. Such unnecessary expansion of CWA jurisdiction significantly burdens poultry and egg production operations without any meaningful public health or environmental benefits. (p. 4)

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

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather

US EPA ARCHIVE DOCUMENT

exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Regarding wetlands, the final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands. The revised ditch exclusion language also states that "intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands" is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Louisiana State Senate (Doc. #14501)

17.1.420 The permitting delays and increased costs associated with the broad reach of the proposed rule will significantly hamper state and local restoration efforts given the lack of exemptions for restoration projects that actually increase wetland acreage and promote integrated coastal protection.

Louisiana has a working coast and the proposed rule impairs the Louisiana Coastal Protection and Restoration Authority's dutiful ability to balance environmental protection, conservation and restoration efforts with the health, welfare and safety of the people of Louisiana as required under the public trust doctrine imbedded in the Louisiana Constitution. (p. 1)

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

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

US EPA ARCHIVE DOCUMENT

This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

Public Works Administration, City of Billings, Montana (Doc. #14504)

17.1.421 Since stormwater management activities are not explicitly exempt under the proposed rule, I am concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S." The City is unsure of the impact that the proposed rule would have on complying with the Municipal Separate Storm Sewer System (MS4) program. Our MS4 infrastructure is comprised of ditches, drains, ponds, infiltration galleries, pipe, and curb and gutter that eventually discharge to a "water of the U.s" and is therefore regulated under the CWA Section 402 stormwater permit program. (p. 1)

Agency Response: **This rule does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).**

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. he jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

City of Dallas, Texas (Doc. #14513)

17.1.422 Regulatory Synergy: In Docket No. EPA-HW-OW-2011-0409, the City identified concerns about the potential synergy between the proposed CWA clarifications and other EPA rulemaking. The proposed definition of WOTUS would likely impact the construction permit requirements for stream buffers and expand the applicability for impaired (polluted) waters. As an example, it may be challenging to maintain a 50-foot wide vegetated buffer along an urban storm sewer that has been defined as a "tributary" under the proposed definition. This impacts about 500 local construction projects a year. In addition, the EPA's efforts towards implementing green infrastructure (bioswales, rain

US EPA ARCHIVE DOCUMENT

gardens, permeable paving, ponds, etc.) form a scenario where EPA is promoting design methods that require additional CWA permit compliance. Additional permitting is a strong disincentive to these beneficial practices, counter to the EPA/City efforts towards sustainable design. (p. 2)

Agency Response: **The agencies recognize that cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate or evapotranspirate precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both water quantity and quality concerns, as well as provide other benefits to communities. This rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices.**

The final rule expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.

Ann Marie Cain, Manager, Winnebago-Boone Farm Bureau (Doc. #14518)

17.1.423 The rule change, the way it has been proposed, would severely impact the way we could farm, and in the long run have a negative impact on the environment. While I am speaking in opposition to the new definition of "Waters of The U.S.", I would like to encourage the continuation of the current NRCS programs. The Conservation Reserve Program, the grassed buffer strips program, encouragement of grassed waterway construction, and the expansion of the cover crop seeding. These are the programs that will improve our water quality and protect our environment. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. The final rule also includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

NRCS programs are outside the scope of this rulemaking.

Tennessee Chamber of Commerce & Industry (Doc. #14522.1)

17.1.424 This rule greatly expands the authority of the Agencies beyond the boundaries of the law and will have a significant negative impact on businesses' ability to operate, maintain and expand their facilities. This rule will create unnecessary delays and costs for businesses of all sizes and in virtually all sectors as well as create additional permitting burdens and expenditures for the State of Tennessee.

Industry understands and values clean water, and welcomes the Agencies' goal of providing greater clarity and certainty to this complex regulatory issue. However, the environmental benefit of the proposed rule is unclear, costs associated with the rule (review, permitting compliance, project delays, etc.) are unknown, and it expands the authority of the Agencies in a way that is uncertain and inconsistent with current regulations, and creates greater uncertainty for businesses. This rule would force companies to perform a comprehensive evaluation of their operations to determine if the manner in which they deal with water issues, including such things as ditches and stormwater runoff, would now be jurisdictional under the new rules. New construction or expansion activities under this rule could require water permits that were not needed previously. As written this rule cannot be fixed.

TCCI and its members are troubled by the lack of consultation with the State of Tennessee, a co-regulator with the Agencies of the Clean Water Act, in preparing this proposed rule, thus undermining the core intent of cooperative federalism of the Clean Water Act as well as undermining a strong regulatory water quality program in Tennessee. As a co-regulator of water resources, the State of Tennessee as well as all states should be fully engaged, so that specific state programs and water characteristics are understood, in any process that may affect the management of waters under state authority.

We urge the Agencies to withdraw the proposal and develop a rulemaking with stakeholders that brings needed certainty to this complex issue. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

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

US EPA ARCHIVE DOCUMENT

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

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations. The agencies have included a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule. [See *Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the Revised Definition of Waters of the United States* which is available in the docket for this rule.] The agencies will continue to work closely with the states to implement the final rule.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

<u>California Building Industry Association et al. (Doc. #14523)</u>

17.1.425 The Proposed Rule superficially carries over much of the structure and approach to defining "waters of the United States" as the existing regulations. However, its new terminology and regulatory consequence will have broad-sweeping implications for the Agencies' implementation of their CWA authority, implicate many more citizen enforcement suits under the CWA, and cause uncertainty, cost, and delay for the regulated community. The new concepts introduced with the Proposed Rule are vague, defer key considerations of definitional variables for future determination based on "best professional judgment," and categorically proclaim jurisdictional any feature potentially falling within its ambiguous boundaries. (p. 11-12)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in

US EPA ARCHIVE DOCUMENT

combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.426 In response to the Agencies' earlier efforts to exert CWA jurisdiction to the outer bounds of Congressional authority, the Supreme Court has provided direction as to the limitations of that authority in Riverside Bayview Homes, SWANCC, and Rapanos. Rather than heeding that direction, the Agencies have brought forward the Proposed Rule. It is a Proposed Rule that, in advance of completion of the scientific study and review which purportedly substantiate its unprecedented reach, would categorically and "by rule" establish de facto jurisdiction over a universe of features defined in terms that are ambiguous and vague and are measured by foundational parameters that are deferred to an unspecified future time. (…)

For the reasons articulated in this letter, we respectfully request that the Agencies withdraw the Proposed Rule, and endeavor a more exacting and precise rulemaking effort that acknowledges the fact-intensive and case-specific nature of designating jurisdiction under the CWA and its related consequence. We recognize it is far from a simple task, but the regulated community deserves a full and thorough vetting of the complexities which do not function to compromise due process along the way. (p. 35)

Agency Response: **The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.**

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

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

US EPA ARCHIVE DOCUMENT

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

Whiteshire Hamroc (Doc. #14524.1)

17.1.427 The proposed rule does not provide clarity or certainty as EPA has stated. The only thing that is clear and certain is that, under the rule, it will be more difficult to farm or make changes to the land, even if those changes would benefit the environment. Whiteshire Hamroc works to protect water quality regardless of whether it is legally required by EPA. It is one of the values we hold in the agriculture industry. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

For example, the final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. The final rule also includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Ann Arbor Brewing Company, et al. (Doc. #14526)

17.1.428 For us, it's simple. Our breweries can't operate without a reliable, clean water supply. EPA's proposed rule will restore protections under the Clean Water Act that will do far more than protect the water sources for our great-tasting beer – it will ensure that the more than 117 million Americans whose drinking water comes from systems drawing supply from such streams are protected as well.

Beer is about 90 percent water, making local water supply quality and its characteristics, such as pH and mineral content, critical to brewing. Changes to our water supply –

US EPA ARCHIVE DOCUMENT

whether we draw directly from a water source or from a municipal supply – threaten our ability to consistently produce our great-tasting beer and thus, our bottom line. (…)

As businesses that depend on clean water, both directly and indirectly, we are pleased to see that the rule clearly protects all tributary streams and waters adjacent to such streams. As the rule makes clear, the science is unequivocal on the biological, chemical or physical connections between these waters and downstream water bodies.

The proposed rule has other benefits, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. As a result of these benefits, it's not a surprise that the public benefits of implementing this rule significantly outweigh the costs. Your agency's analysis was reviewed by outside experts and estimates benefits would be $388-514 million per year, which compares very well to the estimated costs of $162-279 million per year to mitigate impacts to streams and wetlands. (…)

We are pleased to be part of the broad base of support for this proposed rule which includes a diverse group of stakeholders. As different as our groups are, we have at least one thing in common – an understanding and appreciation of the critical role these waters play in our communities' economic and environmental health.

We urge you to finalize this rule as quickly as possible. (p. 1-2)

Agency Response: **Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

SC Chamber of Commerce (Doc. #14535)

17.1.429 Our comments may be summarized as falling under one primary theme and that is that despite assurances to the contrary, the proposed regulations appear to be a significant change from existing policy and regulation. Although the Chamber agrees that protecting the nation's waters, including streams and wetlands, is important, these rules as written will result in a considerable expansion of the regulatory program beyond those objectives. This jurisdictional expansion can only result in additional complexity, lengthier permit processes, duplication of existing state regulatory programs, and ultimately more costs to consumers without a commensurate environmental benefit. (p. 1-2)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.430 Shift in Grounds for Jurisdiction Under Proposed Regulations

Based on review of the proposed regulations, it appears that the basis for jurisdiction is being shifted from impacts to navigable waters specifically, to merely "impacts" to waters. The proposed regulation does not contain language to either assess the degree of impact or to clarify the degree of impact that may be determined to be "significant." For this reason, the proposed regulation appears to treat all contributions of water to any navigable water, regardless of the location of the contribution or the quantity of contribution, as equally significant. As a result, it appears that no discharge of water, regardless of its composition or volume, will be excluded from regulation.

This is in conflict with the directive provided by the Court in the sense that the court stated that the agency had authority over contributing sources that had "significance," meaning the contributions could alter the chemical, physical or biological nature of the receiving water. The shift to exercising authority of "all" impacts appears to be a significant expansion of the authority provided to the agency under the CWA.

In summary, the Chamber is concerned that the expanded jurisdiction and unclarified agency discretion about which areas would be jurisdictional creates unwarranted programmatic burdens to the regulated community. Project developers and managers would be forced to treat a number of currently nonjurisdictional site features as WOTUS and to guess what additional areas might be jurisdictional, especially under the "adjacent waters" and "other waters" definitions. In turn, developers, managers and regulators would have to expend considerable resources on assessing potential jurisdiction within a project site and dealing with the consequences if more features are determined to be

US EPA ARCHIVE DOCUMENT

jurisdictional. The ensuing delays and project costs far exceed the potential environmental benefits. (p. 8-9)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated

US EPA ARCHIVE DOCUMENT

waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

Good For You Girls Natural Skincare (Doc. #14536.1)

17.1.431 We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, Definition of "Waters of the United States," without delay and reject any efforts to weaken the proposal. (p. 2)

Agency Response: **Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Texas Poultry Federation (Doc. #14542)

17.1.432 TPF believes the proposed rule is unnecessary, not based on sound science, will have a negative effect on Texas producers, and potentially on producers' willingness to undertake future conservation practices. (p. 2)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

US EPA ARCHIVE DOCUMENT

The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Bangor Area Storm Water Group, Hampden, Maine (Doc. #14543.1)

17.1.433 The Bangor Area Storm Water Group (BASWG) applauds the U.S. Environmental Protection for their efforts to provide increased certainty and predictability in the proposed rule, as well as minimize the number of case specific determinations required across the U.S. However, the proposed rule as written not only does not achieve these goals, but actually increases confusion over a number of issues critical to MS4s in our region. The BASWG is especially concerned about confusion created by lack of clarity around several definitions critical to defining which water bodies are and are not jurisdictional under the proposed rule and the need for explicit inclusion of stormwater-related practices under jurisdictional exclusions. (p. 1)

Agency Response: **Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.**

The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific

US EPA ARCHIVE DOCUMENT

characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

Middle Niobrara Natural Resources District (Doc. #14552)

17.1.434 Recreation, tourism, and groundwater-dependent agriculture must also rely upon effective, efficient regulatory requirements and administrative actions, where necessary, to address negative impacts to local water resources. To the extent the Agencies claim jurisdiction under the CWA, MNNRD expects timely enforcement; however, MNNRD and local landowners have already waited years for the EPA to resolve CWA enforcement issue within the Niobrara River basin.

The Proposed Rule would expand federal jurisdiction over the entirety of MNNRD's jurisdiction, which would require CWA permits for many private and governmental activities that are currently unpermitted. The cost and time frame for CWA permitting processes, whether administered by the Corps, or the Nebraska Department of Environmental Quality ("NDEQ"), will directly impact local landowners and the decisions they make to locate in MNNRD's jurisdiction and contribute to the local economy. Furthermore, the likely increase in the number of enforcement actions due to the sweeping increase in the scope of federal jurisdiction will only hamper the resolution of currently unresolved enforcement issues. (p. 2)

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

CWA enforcement is outside the scope of this rulemaking.

Eco-Justice Ministries (Doc. #14554.1)

17.1.435 Eco-Justice Ministries affirms the proposed definition of "waters of the United States" under the Clean Water Act as an important and helpful clarification of the currently ambiguous language. We strongly encourage definitions that are inclusive of headwaters and wetlands. (…)

In our work with churches, we consistently affirm that God's creation as an ecological, interconnected system – a scientific principle as well as religious truth. In this ecological world, the effects of pollution can be very far-reaching. The Clean Water Act must

US EPA ARCHIVE DOCUMENT

protect human health and environmental integrity through definitions that cover all waters which are tied to the primary waters of the U.S. (…)

The proposed definitions have been carefully and thoughtfully formulated to describe the characteristics of intermittent streams, and to exclude geographic features that cannot be considered waterways. We appreciate the difficulty of creating such definitions, and we agree that headwaters and occasional streams must be included in the definitions.

Eco-Justice Ministries strongly supports the proposed definitions of "waters of the United States" under the Clean Water Act. We urge the EPA to be expansive and inclusive in providing CWA protection to headwater streams, intermittent and ephemeral waters, and wetlands. (p. 1-2)

Agency Response: **Thank you for your support. The rule does include ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.**

Science demonstrates that distance is a factor in the connectivity and the strength of connectivity of wetlands and open waters to downstream waters. Thus, waters that are more distant generally have less opportunity to be connected to downstream waters.

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity.

Connecticut Marine Trades Association (Doc. #14558)

17.1.436 CMTA strongly urges the EPA and associated parties to withdraw the proposed rule redefining the waters of the United States under the Clean Water Act. (…)

For CMTA and its members, especially those owning and operating water-dependent businesses, this broad rule change will have a deep economic impact without any clear enhancement or benefit to the environment and could severely limit fundamental changes property owners may need or desire to make to their properties. As regulated as this industry already is, another layer is simply beyond necessity. (…)

We believe the proposal should be withdrawn. The negative economic consequences of the proposed rule far outweigh the potential benefits. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic**

US EPA ARCHIVE DOCUMENT

drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.

Todd County Farm Bureau (Doc. #14559.1)

17.1.437 If implemented, this proposed rule would force many of the farmers I represent to exit farming. This rule will impact many Todd County family farms in a negative way, but it also has the potential of hurting others in our communities and the local economies. EPA and the U.S. Army Corps of Engineers is urged to withdraw this rule. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Union for Reform Judaism (Doc. #14560)

17.1.438 The proposed rule would provide a new regulatory definition of Waters of the U.S. protected under the Clean Water Act. The new definition would allow the Environmental Protection Agency to regulate and protect tributary streams, waters adjacent to such streams, and other waters that are shown to collectively play a significant function with respect to downstream waters in the watershed. The rule would also reaffirm preexisting exemptions and codify for the first time exemptions that had previously only been followed as a matter of administrative policy.

The Environmental Protection Agency and Army Corps of Engineers proposed definition of Waters of the U.S. under the Clean Air Act would address this dangerous problem by protecting critical water resources across the United States. The Reform Movement applauds the EPA and Army Corps of Engineers effort to strengthen and clarify the Clean Water Acts definition of Waters of the U.S. and urge you to finalize this strong proposed rule. (p. 1-2)

Agency Response: Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and

US EPA ARCHIVE DOCUMENT

2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Hoosier Energy (Doc. #14561)

17.1.439 The broad definition of tributary and the narrow exclusion for ditches would mean that normal maintenance activities such as mowing, cleaning or erosion control within these ditches could be subject to Section 404 or NPDES permitting requirements. (p. 2)

Agency Response: Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Jefferson Parish, Louisiana (Doc. #14574.1)

17.1.440 Drainage is the mainstay of coastal civilization. The ambiguity in the proposed rule between excluded drainage ditches and ditches regulated as tributaries cannot stand

US EPA ARCHIVE DOCUMENT

in the way of local needs. Once a ditch is federally regulated, local parishes and counties are at the mercy of cumbersome, time-consuming and expensive federal programs, and vulnerable to federal enforcement and federal citizen suits, typically without additional funding. Federal regulation of ditches unduly interferes with local flood and vector (e.g., mosquito) control, ditch and levee maintenance, and stormwater management in order to protect the health and welfare of local citizens. (…)

Besides the expense of new water quality dictates and potential delays in providing and maintaining local flood control in coastal areas impacted by hurricanes (e.g., Katrina), the delay and potential reduction in vector control due to federal regulations cannot be overlooked. Waters and wetlands in coastal Louisiana are often breeding grounds for nuisance mosquitoes. Mosquitoes have historically carried diabolical diseases (e.g., malaria, and now West Nile Disease and encephalitis). EPA and states already have a pesticide general permit, and any further regulation of vector control in an expansion of waters under the Clean Water Act is not warranted in light of public health and safety concerns. (p. 2-3)

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.**

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

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

US EPA ARCHIVE DOCUMENT

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

Alliance Coal, LLC (Doc. #14577)

17.1.441 The proposed rule's categories of "waters of the United States" and associated definitions are overbroad, ambiguous, and not supported by the science. Contrary to the agencies' assertions, the proposed rule will lead to more confusion for regulators and the regulated community, and by no means establish the certainty or predictability the agencies claim. Rather, the rule is deliberately left vague to allow for sweeping jurisdictional determinations.[16] This "consultation process" is a time consuming and costly endeavor. During a recent "consultation" with the Corp of Engineers, Alliance spent approximately $300,000 on attorneys and consultants to ascertain that onsite waters should not be considered WOTUS.[17] This cost did not include expenses generated by the Corp District or HQ offices. If the agencies truly want to create consistency, they must revise these definitions, meet with stakeholders to understand their concerns, and gather further scientific evidence.

Recommendations

Defining which waters fall under federal authority is not an easy task. But the agencies cannot take the easy way out by illegally asserting jurisdiction over everything. If the agencies are interested in developing a meaningful, balanced, and supportable rule, they must take a more methodical approach, one that is supported by the science and is true to Congress's intent and Supreme Court precedent. We do not believe that it was EPA's intent to regulate post-disturbance on-site waters. However, Alliance urges the Agencies eliminate ambiguous language and to clarify that on-site water management features do not constitute "Waters of the United States."

Alliance Coal, LLC recommends that the agencies withdraw the proposed rule, engage in meaningful dialogue with the regulated community and States about more reasonable, focused, and clear changes to existing regulations, and initiate a replacement advanced notice of proposed rulemaking or notice of proposed rulemaking that reflects those consultations and is supported by science and case law. (p. 4)

[16] See *Rapanos*, 547 U.S. at 727 ("The Corps' enforcement practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'") (citing GAO Report 04-297, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, at 26 (Feb. 2004)).

[17] U.S Army Corp of Engineers Jurisdictional Determination Guidance Document, p. 36 (May 30, 2007)

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.**

In addition, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

This rule does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

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

County Commissioners Association of Pennsylvania (Doc. #14579)

17.1.442 Floodplain management: With thousands of miles of waterways in Pennsylvania, the ability to manage flood waters is critical, and there are concerns over how this proposed rule may impact counties' public disaster response, mitigation and recovery processes with an unforeseen additional regulatory process. Many communities have

US EPA ARCHIVE DOCUMENT

public infrastructure to funnel water away from low-lying roads, properties and businesses. In recent years, our state has seen several major storms wreak havoc, such as Tropical Storm Lee and Hurricane Irene in the fall of 2011, which have taken substantial time and resources from which to recover. Combined with the impacts of rising flood insurance costs, the commonwealth's counties seek to do as much as they can to implement mitigation projects and encourage municipalities to participate in the Community Rating System under the National Flood Insurance Program by undertaking a comprehensive approach to floodplain management. As with every other aspect of governance, though, there are limited resources for such efforts and time is of the essence since the next big flooding event could occur at any time. Counties want to use the time and funding they have in the most effective way possible, but adding confusion and bureaucratic burdens to these waterway projects only makes it harder to take action that will keep our citizens out of harm's way. (p. 6-7)

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

The agencies have clarified stormwater related exclusions in response to numerous public comments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events, as a result, stormwater features that convey runoff are expected to only carry ephemeral flow. However, this exclusion does not change the agencies' longstanding practice of viewing some waters, such as channelized streams or piped streams, as jurisdictional even where used as part of stormwater management systems. Thus, stormwater control features that have been built in or excavated from jurisdictional waters continue to be jurisdictional waters of the United States.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

State of Wyoming (Doc. #14584)

17.1.443 The proposed rule clearly expands federal jurisdiction over water and diminishes state rights and property rights. Claims are being made publicly by the Agencies to the contrary. For example, EPA has claimed that this proposal does not broaden coverage. See EPA Waters of the United States Website. However, on this public website urging support for the proposal, the EPA identifies the lack of existing federal authority to regulate small tributaries as an impediment to its compliance and enforcement efforts and as justification to broaden its authority under the proposed rule.

US EPA ARCHIVE DOCUMENT

On its website, the EPA also lamented discontinuing enforcement actions in Arizona because non-point source pollution on small tributaries to the San Pedro River were beyond its regulatory reach. EPA then offered the content of the proposed rule as a solution. It therefore stands to reason that the EPA views the proposed rule as giving the agency jurisdictional tools to control waters previously beyond their reach.

Different messages for different audiences. It is one thing to propose a rule that is excessive, onerous, and in derogation of states; it is another entirely to assure the public that they have misunderstood the proposal and then saddle those same people with the burden of a rule the content and intent of which was misrepresented by the Agencies.

The lack of sincerity, clarity, and the variety of interpretations from the Agencies themselves is troubling and frames the problematic nature of the proposal. (p. 7-8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

Central Arizona Water Conservation District (Doc. #14585)

17.1.444 If subject to CWA jurisdiction, CAP would inevitably be subject to more costly, complex, and time-consuming permitting. Specifically, CAP would be subject to the section 404 dredge and fill program and to Arizona's water quality standards programs, such as anti-degradation. At this time, CAWCD does not obtain 404 permits to perform earth-moving work in the canal unless that work was to impact a jurisdictional WOTUS. Nor is CAWCD required to comply with Arizona's water quality standards program because CAP is not a "surface water," defined by the Arizona Department of Environmental Quality in language substantially similar to the current EPA definition of a WOTUS.

This rulemaking could result in delays to the maintenance of the aqueduct system and the pumping plants, including the typical dredging of the system and repairs that are required on an annual basis. Of additional concern is that this rulemaking could impact CAWCD's ability to perform emergency repairs of the system. (…)

Without a specific exception for CAP or public water supply systems, that possibility could have a chilling effect on CAP's ability to perform its role of providing a sustainable source of water to Arizona's communities, industries, and farmers. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

US EPA ARCHIVE DOCUMENT

Regarding water supply, the agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

The rule does not change the fact that discharges of backfill, fill, and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits can proceed with the necessary environmental safeguards while minimizing permitting delays.

City of Henderson, Nevada (Doc. #14588)

17.1.445 Members of WESTCAS have reviewed the proposed ruling to evaluate the potential impact to the regulated community, particularly in those arid member states. Based on this review it is believed that the proposed ruling presents many unintended consequences that will subject persons engaging in construction and development, stormwater management, and the operation and management of water, wastewater and irrigation systems to inappropriate CWA jurisdiction. (p. 2)

Agency Response: The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where

US EPA ARCHIVE DOCUMENT

such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

Waters of the United States Coalition (Doc. #14589)

17.1.446 Citizen enforcement has always played an important role in ensuring that the Act is enforced appropriately and in the interests of the people of the United States. However, when EPA intends one thing, it cannot control third parties who may desire another. For that reason it is imperative that the EPA draft the Proposed Rule as if it is to be applied verbatim. Overbroad requirements can and do get misconstrued. (p. 19)

Agency Response: The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

CalPortland Company (Doc. #14590)

17.1.447 The proposed rule depends on a raft of unclear, undefined and overbroad terms, including "ordinary high water mark," "floodplain," "present climactic conditions," "moderate to high flow," ecological processes and plant and animal community structure in th[e] area," "exchange of energy and materials," "lake," "pond," "similarly situated," and "single landscape unit." (…) The Agencies should not adopt new terms which will require case-by-case analysis, like "floodplain," "riparian area," and "shallow subsurface hydrology."

The agencies should not adopt terms that required significant, case-by-case scientific input, like "floodplain," "riparian area," and "shallow subsurface hydrology." (…)

This rulemaking should focus on regulatory interpretation, not public policy making. (…)

Clarity – missing from the proposal- is particularly necessary where there are potential criminal penalties.

Clarity is also particularly necessary given the potential for citizen enforcement of the Clean Water Act

The rulemaking should be abandoned and the Agencies should re-propose a new rule which is clear, simple to implement, and within their statutory authority. (…)

While jurisdictional determinations are good for five years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms; 15 to 30 years is not uncommon. The companies in our industry are very concerned that past understandings of what was jurisdictional will now be subject to new review. A change in what is considered jurisdictional will have significant impacts on our material reserves, and will affect the life of our facilities while delaying the start-up of new sites. Ultimately

US EPA ARCHIVE DOCUMENT

this change will disrupt the supply of aggregates to our biggest customers: residential home construction, commercial buildings, schools, highway programs, airports and municipal projects. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. For example, the final rule includes greater clarity and consistency in the exclusion for ditches; clarifies the definition of tributaries, and provides a more detailed definition of "significant nexus."**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule uses distance limits with the 100-year floodplain to define adjacency for floodplain waters. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. . However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

National Council of Farmer Cooperatives (Doc. #14597)

17.1.448 [The proposed rule] will result in a significant expansion of the liabilities that agriculture faces, and for some producers these liabilities will be very substantial and possibly catastrophic. It is unlikely that there will be a farmer or rancher in the country that will not find their operation and activities under greater federal regulatory control and scrutiny. (p. 3)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. The final rule also includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(A), which has not changed as a result of the rule.

Southern Arizona Cattlemen's Protective Association (Doc. #14598)

17.1.449 SACPA believes the proposed regulations to be an easily mutated vehicle to facilitate potential massive regulatory takings. The proposed regulations would effectively devalue private property without just compensation by making its continued use so burdened that future production would be deemed infeasible. (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

Please see Section I.C. of the Technical Support Document regarding "takings."

New Belgium Brewing Company (Doc. #14601)

17.1.450 I am writing to express our support for the Environmental Protection Agency (EPA) Proposed Rule: Clean Water Act; Definitions: Waters of the United States.

As brewers we depend on clean water for our success. Beer is 90% water. That's why we're pleased that the EPA issued new draft rules to clarify protections for water bodies under the Clean Water Act. This action gives us the confidence that our growing brewery

US EPA ARCHIVE DOCUMENT

needs. We will continue to grow if we can count on clean water which is essential to brewing our beers and being prosperous.

It makes sense to protect tributary streams and nearby waters because the science shows, without doubt, that they are linked to downstream water quality. And other waters should be protected when they have similar impacts downstream. Keeping water upstream clean and minimizing our collective impact is good for business and good for communities.

Clarity in regulation and the protection of natural resources are keys to economic development. (…)

The administration's proposed rule would restore clear national protections against unregulated pollution and destruction to nearly two million miles of streams and tens of millions of acres of wetlands in the continental US. These water bodies prevent flooding, filter pollution, supply drinking water to millions of Americans, and provide critical fish and wildlife habitat. What's more, they provide these valuable services for free. In fact, the cost-benefit analysis done for the Clean Water Rule estimates that it would generate between $388 million and $514 million per year in economic benefits, far exceeding expected costs ($162 to $278 million annually). (…)

Ours is not the only brewery that depends on clean and abundant water for success. The craft beer industry in the United States is thriving. In Colorado alone we have over 242 licensed breweries employing over 5,000 people. Nationwide there are 2,768 craft breweries employing 110,000 people. We rely on clean, plentiful water supplies to craft great beers and employ tens of thousands of Americans. These jobs cannot be outsourced and they range from production technicians to brewers to microbiologists and chemists to sales and marketing, human resources, bottlers, managers and other professionals and skilled trades. These are good jobs at growing companies. We rely on responsible regulations that limit pollution and protect water at its source for our growth.

In addition to water as a beer ingredient we also rely on clean water nationwide to be available for barley, hops and other agricultural products that we use.

Under these new proposed safeguards hundreds of communities will now enjoy the full protections of our nation's clean water laws. Bringing these streams and wetlands under the umbrella of the Clean Water Act will also help protect drinking water for 117 million people. According to the EPA's analysis, approximately 3.7 million Coloradans get their drinking water, in whole or part 98% of Colorado's drinking water is supplied in whole or part by intermittent, ephemeral or headwater streams. The clarified regulations will also safeguard natural flood protection, since wetlands and streams help catch and soak up rain. This is no small benefit; 9.6 million homes and $360 billion dollars-worth of properties lie in flood-prone areas. We witnessed firsthand in the last two years in Colorado how wildfires and floods can affect the water supply. We do not need the added anxiety of human introduced pollutants in wetlands, headwaters and streams.

Thriving businesses like New Belgium have the opportunity and the responsibility to do everything in our power to protect the water that we need to grow our company and expand the local economies in which we work. (p. 1-2)

<u>Agency Response:</u> Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for

US EPA ARCHIVE DOCUMENT

about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Northwest Farm Credit Services (Doc. #14606)

17.1.451 Unfortunately, the proposed rule would only create more confusion because the broad and poorly defined categories of features that are WOTUS could bring large numbers of features on or near operations everywhere into question as possibly WOTUS. This confusion and concern will only persist if the rule is finalized. Inevitably, litigation will ensue to determine the scope of the regulations which will be costly and take years to resolve. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

In addition, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Washington State Potato Commission (Doc. #14609)

17.1.452 Our growers are concerned the proposed rule, if adopted as written or expanded to any tributary with evidence of flow as proposed by the Science Advisory Board, could negatively impact their future. The proposed rule is too broad in categorizing tributaries and other waters as waters of the U.S. and contains no transparent limitations on what waters are jurisdictional and what waters are not. Basically the proposed rule would assert that CWA jurisdiction would be expanded to any place where water flows, including dry washes, small streams, ditches, artificially or naturally created ponds or wetlands, or other water features that could eventually flow into or be subjectively determined to affect the water quality of a traditionally navigable water which the CWA originally was intended to protect. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The final rule clarifies the definition of tributaries. Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule.

For ephemeral streams, the rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

The rule also provides a revised exclusion for ditches to provide greater clarity and consistency. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Finally, the rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land. The final rule also adds an exclusion for puddles.

American Soybean Association (Doc. #14610)

17.1.453 The WOTUS rule, along with the Interpretive Rule (IR) and the Memorandum of Understanding (MOU) between the agencies, would increase the risk of liability of farming and ranching operations under the Clean Water Act (CWA) and would negatively impact farmer participation in conservation programs. It appears to have been promulgated without adequate legal analysis and little input from the agricultural community that will be impacted by the proposed WOTUS rule and related materials. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule 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 Interpretive Rule was on public notice from April 21, 2014, and was extended until July 7, 2014. Since the close of the public comment and as directed by Congress the agencies withdrew the Interpretive Rule was withdrawn on January 29, 2015, by the agencies.

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

Virginia Agribusiness Council (Doc. #14612)

17.1.454 Placing more uncertainty and onerous regulation on farmers could have a disastrous effect. By placing common land features, such as ditches, ponds, and even low-lying areas, under the potential jurisdiction of the federal government, farmers could in fact see cases where they are forced to apply for federal permits to complete common farming activities, such as applying fertilizer, protecting crops from disease and pests, and building fences. (p. 1)

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

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Minnesota Milk Producers Association (Doc. #14615)

17.1.455 Despite the agencies' assertions that no new types of waters will be subject to the Clean Water Act's jurisdiction; the proposed definition leaves the door open to include

US EPA ARCHIVE DOCUMENT

generally exempt waters, such as isolated wetlands, farm ponds, and ditches. Therefore, this could add federal permitting and limit agricultural practices of farmland adjacent to these features. As stated previously, we believe this is beyond Congressional intent. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Commercial Real Estate Development Association (Doc. #14621)

17.1.456 We agree that current regulations lead to inconsistent determinations of WOTUS boundaries and have proven subjective in many parts of the country. However, we are concerned that certain aspects of EPA and Corps (Agencies) intent of clarification is not fully achieved with the proposed language, and this could cause interpretations in the field that would lead to both additional inconsistent determinations and an expansion in the area/coverage of the definition of WOTUS beyond the original intent of Congress.

It is vital that the EPA and Corps understand that the determination of the definition of (WOTUS) is ultimately a policy decision that incorporates economic realities in a scientific framework. While science should play a leading role in helping shape this policy, the policy decision has to reflect legal precedents, economic impacts, property rights and historic practices.

We submit that a successful definition of WOTUS should reflect the following theme: "Healthy federal, state and local economies and clean waters of the U.S. are integrally related; balanced economic development and protection of our waterways are not mutually exclusive." [18] (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

[18] Borrowed the concept from the first sentence of the Chesapeake Bay Preservation Act.

US EPA ARCHIVE DOCUMENT

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

17.1.457 We agree with the scientific principal that all water is ultimately connected.[19] The reason that the definition of WOTUS is so contentious is because regulators and scientists have used that basic principal as a justification for protecting waters that do not significantly alter or affect traditionally navigable waterways. What is needed is a WOTUS definition that is reflective of a balance of economic development and protection of our waterways. (p. 2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. The rule also recognizes that our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.**

17.1.458 We remain concerned that the new regulations, as currently written, will continue to create confusion to the regulated community for what is considered a WOTUS. We also contend that these regulations will result in a significant increase in the extent of WOTUS, both in geographical areas and in WOTUS determinations, contrary to the stated purpose of the Agencies. (p. 8)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators,**

[19] All water on planet earth in some manner is connected through the hydrologic cycle.

US EPA ARCHIVE DOCUMENT

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

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.

Natural Resources Council of Maine (Doc. #14622)

17.1.459 In conclusion, NRCM strongly supports EPA's proposed clarification of the definition of "Waters of the United States". We believe this proposed rule will help protect Maine's clean water, its outdoor recreation industries, and its citizens. (p. 2)

Agency Response: Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

State of Oklahoma (Doc. #14625)

17.1.460 Unfortunately from Oklahoma's perspective, the proposed rule does not make it any more clear or precise which waters fall under CWA jurisdiction unless we are to assume that nearly all waters fall under such jurisdiction. Having not been involved in the deliberations prior to drafting the rule, and given the expedited review timeline that we now face, we are concerned that EPA and the Corps have made a policy decision that all connections between waters are "significant" regardless of how much or how often they actually contain water or influence truly navigable waters. Essentially, EPA and the Corps have taken an already fuzzy line and moved it from one place to another without making the line any less fuzzy. (…)

Essentially, the proposed rule can be interpreted to open the door for most water features, and even dry land, to become WOTUS-a broad expansion of the areas across the landscape where no "dredge or fill" material or other "pollutant" can be "discharged" without a federal permit. It begs the question whether anything within a watershed will ever be deemed so insignificant that the federal government leaves regulatory discretion to Oklahoma and the other states. (p. 10)

US EPA ARCHIVE DOCUMENT

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

The rule has also expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for waste treatment systems designed consistent with the requirements of the CWA remains substantively and operationally unchanged.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.

Maryland Grain Producers Association (Doc. #14627.1)

17.1.461 Maryland farmers are good stewards and innovators when it comes to conservation. Uncertainty over jurisdiction of the Clean Water Act may lead to reluctance of farmers to install voluntary conservation practices or even maintain their important drainage features. This is not in the best interest of EPA or water quality. We encourage EPA and the Army Corps of Engineers to take the time to engage with producers and local conservation organizations to craft the rule in such a way that allows landowners and local organizations to maintain jurisdiction over the aforementioned agricultural features. No two farms are the same and therefore a one-size-fits-all approach simply will not work. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

US EPA ARCHIVE DOCUMENT

The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

New Jersey State Senate (Doc. #14628)

17.1.462 We support the draft rule's proposal to restore Clean Water Act protection to all tributaries of navigable waterways. Failure to do so would jeopardize water quality in our larger river sheds and estuaries. It would also put at risk the millions of dollars and thousands of jobs generated by water related tourism activities and other businesses that are dependent on clean water supplies. (p. 2)

Agency Response: **Thank you for your support. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.**

The Humane Society of the United States (Doc. #14629)

17.1.463 While The HSUS believes, in the wake of *Rapanos* and *SWANCC*, that additional clarification is needed as to what constitutes "navigable waters" or "the waters of the United States"[20] the proposed rule falls short in doing so.

Of particular concern, the proposed rule excludes from "waters of the United States" a number of categories of waters that it deems-without adequate explanation- to be non-jurisdictional, including "[d]itches that are excavated wholly in uplands, drain to uplands, and have less than perennial flow," "[d]itches that do not contribute to flow ... to a traditional navigable water," and features such as groundwater.[21] There is no sound legal

[20] CWA § 502(7); 33 U3.C 5 1362(7).
[21] 79 Fed. Reg. at 22,193.

US EPA ARCHIVE DOCUMENT

or scientific basis for excluding these broad categories of waters from the jurisdictional definition, especially considering the proposed rule does not explain how doing so will help maintain the chemical, physical, and biological integrity of the nation's waters. (p. 1-2)

Agency Response: **Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."**

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has

US EPA ARCHIVE DOCUMENT

been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

CropLife America (Doc. #14630.1)

17.1.464 FIFRA use restrictions on terrestrial pesticide product labels often state "do not apply to water" and may require no-spray setbacks from jurisdictional waters to avoid potential spray drift. Confusion over the agencies' proposed expansion of WOTUS definition may expose pest control operators to legal uncertainty under CWA and/or FIFRA, and threaten effective pest management in certain topographies. This will be particularly difficult for aerial applicators that apply pesticides under contract and generally have no first-hand knowledge of the features on the ground. It would be impossible for a pilot to recognize a remote ephemeral "tributary" or aggregated "other water" from the air at 150 mph flying over an unfamiliar farm field or forest. (p. 4)

Agency Response: The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

Brevard County Natural Resources Management Office (Doc. #14632)

17.1.465 If the new definition of "tributary" is adopted, federal water quality standards will apply virtually everywhere in our ditch system, unless there is a specific exclusion for all

US EPA ARCHIVE DOCUMENT

ditches, stormwater conveyances and attenuation ponds, regardless of connectivity, floodplain or other significant nexus. This means that we would have to add treatment projects throughout the network, not just at the downstream collection points. Such distributed treatment would be a waste of valuable resources, is economically infeasible and technically impossible. (p. 2)

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

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

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6). However, this exclusion does not change the agencies' longstanding practice of viewing some waters, such as channelized streams or piped streams, as jurisdictional even where used as part of stormwater management systems. Thus, stormwater control features that have been built in or excavated from jurisdictional waters continue to be jurisdictional waters of the United States.

US EPA ARCHIVE DOCUMENT

New Mexico Association of Commerce and Industry (Doc. #14638)

17.1.466 [T]he proposed rule to define waters of the U.S. is overbroad, will regulate large areas of the desert, and is based on inadequate science. (p. 1)

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

Arizona Chamber of Commerce and Industry (Doc. #14639)

17.1.467 [U]nder the proposed rule, Arizona's canal systems, drainage systems, ditches and private property could be subject to federal government control and frustrate Arizona's local governments' and tribes' abilities to manage water allocation and usage efficiently. According to a recent economic analysis, our system of canals is responsible for more than 30 percent of Arizona's gross state product. To propose a rule that could, even hypothetically, bring one-third of Arizona's economic engine under federal jurisdiction without consulting the appropriate stakeholders is unconscionable.

Water is a precious resource and is particularly important in the West because of its scarcity. In Arizona, we are proud of our innovative, collaborative water management that has allowed our state to grow and prosper while providing a safe, sufficient water supply. We are concerned about the proposed rule's potential to interfere with this, and are deeply troubled by the EPA and the Corps' failure to engage Arizona stakeholders to address our distinctive needs and concerns. (…)

On behalf of Arizona's business community, we urge you to reject the proposed rule to modify the definition of "water of the United States" under the Clean Water Act for the reasons set forth above. EPA and the Corps should not move forward on any subsequent proposal until they have fully engaged Arizona's stakeholders to fully understand and address our distinctive concerns and conditions, including our canal systems and ephemeral erosional features, such as dry desert washes and arroyos. (p. 2-3)

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

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that

US EPA ARCHIVE DOCUMENT

do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries. The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule.

Finally, the rule includes an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond.

US EPA ARCHIVE DOCUMENT

The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Exelon Corporation (Doc. #14641)

17.1.468 Additional time needed for permitting would obviously delay completion of renewable projects and the added costs would likely cause certain renewable projects to become uneconomical, and, as a result, cancelled. (p. 4)

Agency Response: The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.469 Currently, discharges from the ponds to the nearby WOTUS are subject to NPDES permit discharge limits, whereas discharges to the pond itself are not. The cooling ponds could be deemed "adjacent" to a WOTUS under the Proposed Rule and, thus, discharges to the pond could become subject to thermal limits. If this were to occur, Exelon would be forced either to shut down its plants or retrofit the plants with very costly alternative cooling measures, such as cooling towers, with no added environmental benefit. Most facilities in competitive markets could not afford this expense. (p. 4)

Agency Response: The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

US EPA ARCHIVE DOCUMENT

Vulcan Materials Company (Doc. #14642)

17.1.470 Vulcan Materials Company respectfully requests that the USEPA and the USCOE withdraw the proposed rule and not proceed with this rulemaking. (…)

The changes outlined in the proposed rule will have a negative impact on the aggregates industry and Vulcan is no exception. The impacts of the proposed rule addressed in these comments are expected to affect the aggregates industry overall and are not unique or prejudiced towards Vulcan Materials Company. (p. 3-5)

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Tarrant Water Regional Water District (Doc. #14643)

17.1.471 Based on our review, the proposed rules will result in inappropriate and unwarranted CWA jurisdiction that will weaken our ability to improve stormwater quality and construct and maintain water supply projects in a timeframe needed to ensure reliability to our nearly 2 million customers. (p. 2)

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

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

US EPA ARCHIVE DOCUMENT

Ohio Corn & Wheat Growers Association (Doc. #14646)

17.1.472 Our concerns with the proposed rule fall into four broad categories and some of the uncertainty surrounding the rule. First is the way the rule defines what is a tributary and what is adjacent water subject to the Clean Water Act. Second is how unmistakable it is that the proposed rule represents a significant expansion of federal Clean Water Act jurisdiction. Third, relative to the scope of jurisdiction, while it may be true that some ditches are not waters of the U.S. under the proposed rule, the fact is that vast numbers of ditches are or could be subject to federal jurisdiction. Lastly, if these or other drainage features and waters like them that are located on our farms are made jurisdictional, we face the risk of lawsuits challenging our use of fertilizers and pesticides that may come in contact with those features as a violation of the Clean Water Act without a federal national pollution discharge permit. (p. 1)

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

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries. The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term

US EPA ARCHIVE DOCUMENT

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

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

<u>Resource Development Council (Doc. #14649)</u>

17.1.473 Additionally, the proposed rule creates more confusion. It does not streamline the process, or provide permitting clarity. (p. 3)

<u>Agency Response:</u> The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

US EPA ARCHIVE DOCUMENT

Berkshire Hathaway Energy Company (Doc. #14650)

17.1.474 A broad definition of tributaries, adjacent waters, and "other waters" (which requires a case-by-case assessment) as proposed by the Agencies is likely to severely limit the ability of electric and natural gas utilities to avoid waters of the U.S. and, due to its expansiveness, may effectively render NWP 12 useless. (…)

This expansion or reinterpretation of the definition of waters of the U.S. occurs at a time when the transition from carbon-intensive fossil resources to less carbon-intensive resources such as renewables and natural gas, as contemplated by EPA's recently proposed Clean Power Plan, requires fewer, not more hurdles, and shorter, not longer, permitting times. This chilling effect on the 404 permitting process will affect the development of renewable energy projects, which may put states at odds with emissions reduction obligations under renewable portfolio standards or the proposed Clean Power Plan. (p. 3-4)

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

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14

US EPA ARCHIVE DOCUMENT

("Linear Transportation Projects") may specifically apply to the circumstance described.

Minnesota Farm Bureau (Doc. #14653)

17.1.475 A new "other waters" category serves as a catch-all would include anything with a "significant nexus," either alone or in the aggregate, that would affect the "chemical, physical, or biological" integrity of a navigable water. The proposed rule suggests that other waters could be connected even if they are located in different landforms, have different elevation levels, and have different soil and vegetarian characteristics as long as they "perform similar functions" and are located "sufficiently close" to a traditional "water of the United States." While this gives regulators a broad swath of jurisdiction, it would be impossible for a typical farmer to know if a wet spot or dry land feature on their land could be deemed to have a "significant nexus" to a navigable water. (p. 3)

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

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed.

US EPA ARCHIVE DOCUMENT

Finally, the rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.

City of Pittsburg (Doc. #14660)

17.1.476 We support the US Environmental Protection Agency and US Army Corps of Engineers proposed Definition of "Waters of the United States Under the Clean Water Act" to clarify which streams, wetlands and other waters are covered by Clean Water Act protections, Wetlands and small streams, including those that flow only seasonally, have a direct impact on the health and quality of larger streams and rivers downstream. These resources are critical drinking water sources, and they protect communities from flooding and filter pollutants. (…)

Millions of small streams and wetlands provide most of the flow to our most treasured rivers, including The Allegheny, the Monongahela and the Ohio – Pittsburgh's treasured Three Rivers. If we do not protect these networks of small streams, we cannot protect and restore the lakes, rivers and bays that our economy and way of life depend on. We will also be jeopardizing jobs and revenue in businesses that depend on clean water, including outdoor activities like angling and water-based recreation. (p. 1)

Agency Response: **Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Pima Natural Resource Conservation District (Doc. #14720)

17.1.477 The proposed regulations not only affect farmers and ranchers across the nation, in addition to specifically harming our District Cooperators, but also affect small businesses, small communities, forestry, mining, manufacturing and all productive uses on private land. Our District Cooperators are largely small, rural family enterprises that would be unfairly burdened by the time and expense required for a small family business to comply with the additional expenses which would result from redefining the realm of applicability of the Clean Water Act. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic**

US EPA ARCHIVE DOCUMENT

drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

In addition, 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.

Chilton Ranch, LLC (Doc. #14724)

17.1.478 Prior to the Supreme Court's Rapanos decision, our family ranch had to apply for a 404 permit to construct a road across a wash that is dry almost 100% of the time. The regulatory approval process, which necessitated hiring attorneys and environmental consultants, cost about $40,000. All we wanted to do was cross a dry wash on our legal right of way so that we could have legal access to 240 acres of our private property. The process took several years. We then abandoned another project that would have required culverts in two other dry washes on an existing ranch road after concluding from our prior experience that seeking a 404 Corps permit was too expensive in time and money. Keep in mind that this is private property we are talking about in an area in which dry washes are often no more than a few hundred feet apart. It is impossible to traverse your own land without crossing a low place in our hilly terrain. (p. 2-3)

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

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Great Plains Canola Association (Doc. #14725)

17.1.479 Farming operations in the southern Great Plains will be unsustainable if routine water management decisions/practices are subjected to new government regulatory requirements for which implementation is impractical at best and impossible at worst. The EPA claim that farmers would actually be faced with reduced regulation under this

US EPA ARCHIVE DOCUMENT

proposal is not supported by the details found in the proposal. Unfortunately, the rule would saddle producers with permitting requirements that would make profitable farming even more challenging. Permitting requirements are a particular concern for GPCA producers as any regulation induced delay in time-sensitive management practices could potentially result in total crop loss. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

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

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Oregon Farm Bureau (Doc. #14727)

17.1.480 The CWA authorizes third party lawsuits if a third party believes that a person or entity is violating the CWA. As discussed above, the proposed definition identifies new waters (that include land and land features) that would become subject to CWA regulation. Agriculture is reliant on both land and water, but not necessarily traditional navigable waters. As such, many agriculture activities that impact these land and water features will require a section 402 or 404 permit. In Oregon, it is easy to anticipate a number of situations in which a neighbor disagrees with the management of neighboring agriculture or forestry land use and by simply filing a lawsuit, the neighbor can stop, or at least economically damage, a neighboring family farming and forest owners. While these likely lawsuits will not provide any benefit to Oregon's water quality, it will absolutely cripple our agriculture economy and the many families and communities that rely on

US EPA ARCHIVE DOCUMENT

Oregon agriculture. This was never the intent of Congress and should not be the result of this draft rule. (p. 3)

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

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

Lake County Division of Transportation, Lake County, Illinois (Doc. #14743)

17.1.481 In summary, the Lake County Division of Transportation opposes provisions contained in this rulemaking which significantly restrict the ability of the County to maintain and repair its roadside ditches and stormwater facilities, and could result in increased federal regulation for MS4s. These provisions would result in project delays and increased costs to the County and its citizens associated with additional federal permitting requirements. (p. 2)

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the**

US EPA ARCHIVE DOCUMENT

need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency.

The rule does not change the fact that discharges of backfill, fill, and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. 323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. 325.2(e)(4)).

The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6). However, this exclusion does not change the agencies' longstanding practice of viewing some waters, such as channelized streams or piped streams, as jurisdictional even where used as part of stormwater management systems. Thus, stormwater control features that have been built in or excavated from jurisdictional waters continue to be jurisdictional waters of the United States.

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system.

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community.

Wisconsin Pork Association (Doc. #14745)

17.1.482 As proposed, the WOTUS rule fails to provide any clarity or predictability for farmers, including pork producers. It raises serious practical concerns with regard to its direct implementation by EPA and the Corps and its impact on the long-standing relationship between farmers and the U.S. Department of Agriculture and on the ability of farmers to manage their land and grow the feed, food, fiber and fuel that are essential

US EPA ARCHIVE DOCUMENT

to America's economy. Finally, the rule will have significant direct impacts in areas well beyond the scope of the proposal or the jurisdiction of EPA or the Corps. These include, but are not limited to, decisions on which crops to plant and which fertilizers and pesticides are best for those crops in light of ever-changing environmental and marketplace conditions; farmers' ability to access credit and their relationship with bankers and lenders; and the nationalization of what have always been local decisions on the use of private lands. It also likely will subject farmers across the country to abusive activist lawsuits that benefit neither the environment nor local economies. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. The final rule does not change the treatment of NRCS determinations, the definition of wetlands or tools for delineating wetlands, nor the exemption for minor drainage.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

US EPA ARCHIVE DOCUMENT

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

South Carolina Forestry Commission (Doc. #14750)

17.1.483 The SCFC acknowledges that within the proposed new rule, EPA has protected and restated the silvicultural exemption as provided under section 404(f)(l)(A) of the Clean Water Act which is routinely utilized in the implementation and operation of ongoing forestry activities carried out within "waters of the US". However, in the opinion of the SCFC, the proposed rule has overreached in the expansive definitions it has created for numerous fluvial and riverine related features, such as "floodplain" and "riparian area", and the proposed rule will only create additional confusion, ambiguity, and subjectivity in the practical application of the rule to activities on the ground. Furthermore, it appears that the rule will expand the reach of "waters of the US' as currently understood, through the use of terms such as "all tributaries," which will include ephemeral streams. Also, man-made ditches and minor drainage features used for draining surface water should not be regulated in the same way as natural streams and wetlands. (p. 1)

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

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new

US EPA ARCHIVE DOCUMENT

exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. . However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

Minnesota United Snowmobilers Association (Doc. #14758)

17.1.484 [T]he proposed rule could potentially impose additional bureaucratic red-tape, which would impede our volunteer efforts to develop and maintain the integrated winter trail system. (p. 1)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

US EPA ARCHIVE DOCUMENT

Clean Water Action Colorado et al. (Doc. #14760)

17.1.485 This rule is long overdue. We are supportive of this effort to restore Clean Water Act protections to all wetlands and tributary streams, as Congress originally intended when it passed the landmark Act in 1972. (p. 1)

Agency Response: Thank you for your support. The agencies agree that this final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Farm Credit Illinois (Doc. #14767)

17.1.486 If the proposed rule is implemented as currently drafted, American farmers and ranchers will face unprecedented levels of uncertainty, new onerous permitting requirements, increased litigation risks, added costs, deterioration of the safe harbor for "normal farming" operations, and a potential detrimental impact to obtaining the level of financing needed to operate – all of which will negatively impact agriculture and, correspondingly, everyone who relies on the food products grown and produced by the American farmer. (p. 5)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will also clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

US EPA ARCHIVE DOCUMENT

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

QEP Resources, Inc. (Doc. #14772)

17.1.487 EPA officials have repeatedly made several general statements during the public relations campaign put forth in support of the proposed rule: the proposed regulatory changes will remove uncertainty in jurisdictional determinations under the Clean Water Act; the changes are science-based; this proposed rule will NOT expand the jurisdictional reach of the Clean Water Act, specifically "will not add to or expand the scope of waters historically protected under the Clean Water Act." QEP appreciates the fundamental function of the Clean Water Act, and the stated goals of the proposal as set f011h by EPA, but respectfully suggests that in order to ensure each statement above is accurate, the proposal needs to be withdrawn and significantly re-worked.

The Proposal Inserts Confusion and Uncertainty

The proposal does nothing to clarify the existing jurisdictional determination process under the Clean Water Act. In fact, it appears to complicate the analysis by adding new definitions for "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." While one stated aim of the proposal is to set forth a description of jurisdictional waters that will reduce case-by-case determinations, at the same time, EPA creates a broad category of "other waters," which can be determined jurisdictional based on that same dreaded case-by-case determination when those waters "alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas." There are a host of additional considerations/analyses that come into play, including what is meant by "region," and "similarly situated," which hinges on proximity and "function," and impact on the chemical, physical and biological integrity of the navigable or interstate waters. Incredibly complex concepts and processes layered on each other do not clarify the jurisdictional analysis. Jurisdictional waters are expanded to include all tributaries, and all adjacent "waters," where the current legal standard is concerned solely with adjacent "wetlands." Put simply, it is difficult to see how, with all the expansions of the definitions and assumed jurisdictional waters, the proposal is designed to do anything but significantly expand the acres of regulated waters in the country. (…)

The Proposal Must Clearly Support Existing Determinations in order to Limit its Scope

Given the emphatic statements from throughout the Administration that this proposal will not expand the jurisdictional reach of the Clean Water Act, QEP expects to be able to rely on past agency permitting decisions and jurisdictional determinations. Without explicit language grandfathering in those past authorizations and determinations, industry and regulators will face uncertainty and the assurances provided that this proposal will not expand jurisdiction will not be honored. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

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

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. . However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features

US EPA ARCHIVE DOCUMENT

not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

Irvine Ranch Water District (Doc. #14774)

17.1.488 The proposed rule could have a significant financial impact on the nation and a robust financial analysis should be conducted prior to the adoption of any new definition. Of particular concern is the potential increase in jurisdictional boundaries regulated under the CW A resulting from the proposed rule's changes. These changes could result in a substantial increase in the number of projects that exceed the nationwide permit threshold, resulting in a dramatic increase in the number of individual permits required.

US EPA ARCHIVE DOCUMENT

This would substantially increase the workloads of Corps and EPA staff, resulting in lengthier and costlier processing for public and private construction projects across the nation. (p. 6)

Agency Response: **This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.**

In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. The existing regulations represent one appropriate baseline for comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline.

For purposes of this 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.

The EPA have completed an economics analysis to accompany the final rule which will again include an assessment for all programs of the CWA based on the analysis under the Section 404 program.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

PPL Services Corporation (Doc. #14777)

17.1.489 The expansion of areas that will now be considered "waters of the United States" will significantly complicate the siting process for the new transmission line projects, the permitting and construction of new lines, the permitting and rehabilitation of existing

US EPA ARCHIVE DOCUMENT

transmission lines (many of which are at the end of their useful life and must be upgraded/replaced to keep up with growing power demands and reliability directives). The expansion would also slow down and further complicate repairs and maintenance of the equipment along our thousands of miles of right-of-way (much of which is located in remote areas with no permanent roads). (…)

When siting new lines and substations, utilities must first prove a need, but then they must show the proposed route is the best overall alternative balancing environmental impacts, historical impacts, social impacts, costs, landowner consideration, safety, etc. The proposed rule will significantly complicate this process. (…)

Substations, for instance, are typically placed in areas that would not be used for other purposes. These areas could be interpreted to be included in the floodplain definition of the proposed rule. It is not clear how these critical substations would be maintained or if the facilities would need to be moved. The expansion of the definitions in the proposed rule would make it problematic to locate electrical transmission equipment where it is required and would adversely impact our ability to site, install and maintain the equipment. (p. 4-5)

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

The final rule includes also several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. . However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

US EPA ARCHIVE DOCUMENT

17.1.490 The new rule has the potential to complicate the energy generation/transmission process in ways that would adversely impact the electrical grid and the ability to provide electricity to customers in a reliable and efficient manner. (p. 5)

Agency Response: **This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule.**

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Washington Farm Bureau (Doc. #14783)

17.1.491 Regulators simply must begin to understand that overregulation can threaten farm profitability and increase the likelihood a farm will be paved over and converted to subdivisions. Once working farms are lost, the jobs and local food they produced are often displaced to foreign soils with little or no regulation. The people of our state and nation deserve better. Local food security matters. We all eat.

The proposed WOTUS rule does not provide clarity. It does not reduce confusion, and it does not narrow EPA's regulatory jurisdiction. Only one thing appears certain: the proposed rule will prompt waves of new citizen suit litigation, producing new legal uncertainty and costs for farmers and ranchers. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

US EPA ARCHIVE DOCUMENT

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Royalty Owners & Educational Coalition (Doc. #14795)

17.1.492 The proposed EPA-U.S. Army Corps of Engineers definition of waters and indeed potential waters that fall under federal jurisdiction represents a clear example of regulatory overreach and must be rejected as fatally flawed. Only the agencies themselves and environmental interests typically opposed to commercial development, modern agriculture, and resource extraction argue that this rule is not a massive expansion of federal regulatory authority. The job creators who are working to lift the U.S. out of the economic doldrums and feed this nation remain uniformly opposed to this proposed definition. (p. 1)

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

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

17.1.493 The proposed EPA-Corps of Engineers definition of "Waters of the United States" is overly expansive, unworkable, will increase citizen suits, and reduce royalty income by increasing the cost of every well drilled thus undermining this economic miracle. Furthermore, in many instances royalty owners also have a surface interest that will be negatively impacted by the proposed definition's impact on agricultural and commercial activity. (p. 3)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are

US EPA ARCHIVE DOCUMENT

considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

17.1.494 The proposed definition will:

- Dramatically expand waters subject to citizen suits under 33 U.S.C. 5 1365(a)(l);
- Expand EPA jurisdiction under the "Oil Discharge Rule" (40 CFR Part 110.1);
- Force the re-write of most producer SPCC plans under 40 CFR Part 112.2;
- Expand EPA authority with regard to hazardous substances under 40 CFR Part 116.3 and Part 117.1;
- Force a reconsideration of National Pollution Discharge Elimination System Permits under 40 CFR Parts 122-124;
- Impact 404 Permits under40 CFR Part 230.2 and 404 Dredge and Fill Permits under 40 CFR Part 232.2;
- Impact National Contingency Plan (40 CFR Part 300.5) and National Contingency Plan Appendix E (40 CFR Part 300, App. E);
- Increase CERCLA requirements under 40 CcoFR Part 302.3;
- Impact Effluent Limitations under 40 CFR Part 401.11; and,
- Have broad Endangered Species Act implications.

This definitional change will have a significant negative impact on U.S. energy production and therefore royalty income.

Many other ROPE concerns (and the well-articulated legal and economic bases for such concerns) are reflected in comments offered by other organizations representing oil and gas producers.

In conclusion, ROPE stands in categorical opposition to this rulemaking. In their search for unattainable, and largely unnecessary, regulatory certainty and consistency, the agencies have failed to fully consider and acknowledge the potentially devastating impact of this rule expansion to virtually every U.S. business and industry, particularly resource-based industries such as oil and natural gas exploration/production. (p. 3-4)

US EPA ARCHIVE DOCUMENT

Agency Response: **This rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule**

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Ingram Barge Company (Doc. #14796)

17.1.495 Overall, the Agencies' Proposed Rule impermissibly broadens Clean Water Act jurisdiction, by misconstruing the "significant nexus" test articulated in Justice Kennedy's concurring opinion in *Rapanos*, as well as too broadly defining terms in the Proposed Rule, creating new and overbroad categories of jurisdiction. Additionally, the Agencies' review of the costs of the Proposed Rule is improper. The Proposed Rule additionally does not account for the final scientific review of EPA's Scientific Advisory Board. Additionally, the majorities of the House of Representatives and the Senate, including members of both parties, are on record as opposing the Agencies' current efforts to expand CWA jurisdiction. Therefore, for all of the reasons listed above, we would respectfully ask the Agencies to consider delaying the issuance of the Proposed Rule or to narrow its scope appropriately. (p. 4)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

US EPA ARCHIVE DOCUMENT

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

The Clean Water Rule is also informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

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

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of

US EPA ARCHIVE DOCUMENT

entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

Florida Agricultural Aviation Association (Doc. #14797)

17.1.496 The FAAA is very concerned with the agencies' proposed regulation of what appears to be millions of newly-designated ephemeral and intermittent conveyances, ditches or other "waters of the U.S." (WOTUS) that will be difficult for us to identify and thus may subject our commercial pilots to CWA enforcement and potential citizen suits under the CWA. The FAAA supports the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments. For more than 75 years, conservation districts have led the efforts to ensure a clean and sustainable water supply for the nation. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

CWA enforcement is outside the scope of this rulemaking.

ProLawn Plus (Doc. #14800)

17.1.497 [R]egarding pesticide applications, this rule would expand the areas that would require. us to obtain permits and thus make it difficult for us to control harmful pests like ticks which lead to harmful diseases like Rocky Mountain Spotted Fever and Lyme Disease as well as invasives like poison ivy and other noxious weeds. (…)

I feel that the proposed rule will have will have a significant negative impact on small businesses like mine. Well-maintained, dense lawns are actually beneficial for the environment by actually reducing runoff into water bodies. This rule would create unnecessary paperwork and liability for us, increase the cost of our services to our customers and would have minimal effect on water quality. (p. 1)

Agency Response: **The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of**

US EPA ARCHIVE DOCUMENT

pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

<u>Abilene Chamber of Commerce (Doc. #14817)</u>

17.1.498 We believe that rather than provide clarity, this creates more ambiguity. We also believe that rather than narrowing the scope of jurisdiction, the new rules actually create a mechanism to expand EPA jurisdiction. Both of these will serve only to increase burdens forced upon our small business owners and farmers across Abilene, West Texas and the entire United States. This has been reinforced by the staunch opposition of national farm groups, chambers of commerce and the Small Business Administration. The EPA has a charge to protect multijurisdictional waterways from hazards. However, that jurisdiction should not be extended to areas where there are clearly no national concerns except to protect private property owners' rights.

We believe that significant review needs to be made of this rule. For that reason, we would ask that it be returned to the EPA for additional consideration. (…)

The proposed rule would significantly expand the scope of navigable waters subject to Clean Water Act jurisdiction by regulating small and remote waters -- many of which are not even wet or considered waters under any common understanding of that word. I write in opposition to the proposed rule. (p. 1)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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

US EPA ARCHIVE DOCUMENT

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.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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

Anderson, R. (Doc. #14818)

17.1.499 I can tell you that for myself and the farmers and ranchers I know, this rule has only made them more confused. That is because the broad and poorly defined categories of features that are WOTUS will easily bring into question large numbers of features on or near farms everywhere. None of us will know for sure whether or not these features are formally jurisdictional without a determination by a federal official, a process that will be inherently subjective. This process will also be time consuming, as federal agencies can take quite a while to act sometimes, and in farming and ranching, time is of the essence. This confusion and concern will only persist once the rule is finalized and we are left wondering just how much of our farms or ranches are directly subject to the Clean Water Act. Almost every acre of ground we farm is close to some type of drainage feature, be it a slough, ditch, or creek. Regulations that would make it difficult to farm or work around these features would make it hard to farm period, and add to the already high cost of operation. Many operators are already very conscious of water features, and these added regulations are not needed. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

US EPA ARCHIVE DOCUMENT

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Georgia Agribusiness Council (Doc. #14859)

17.1.500 So far, the only thing that is clear about the proposed changes to the CWA is that all parties are confused, and this confusion has led to distrust. Landowners see the proposal as a land grab. We need clarity. Landowners believe increasing the scope of CWA will leave their farms and small businesses at the mercy of EPA. We need clarity. Landowners see this as an open door to environmental activists to pursue civil lawsuits under new interpretations of the rule change. We need clarity. EPA needs to withdraw the rule and reboot to get it right. Honestly, we don't see how EPA could possibly move forward when such confusion by the regulated community exists. It's unfathomable. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

US EPA ARCHIVE DOCUMENT

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

Please also see Section I.C. of the Technical Support Document regarding "takings."

H. G. & N. Fertilizer (Doc. #14869)

17.1.501 I am STRONGLY OPPOSED to EPA's new definition of waters of the United States. EPA's rule ignores the will of Congress and is contrary to two U.S. Supreme Court decisions. Ditches should be removed from the definition of tributary as this term is overly broad. This proposed rule will have an extreme impact on my business and the operations of my farmer customers with regard to the application of agricultural inputs (nutrients and crop protection product) which are absolutely necessary to produce crops in Illinois. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

US EPA ARCHIVE DOCUMENT

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404.

For example, the rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

US EPA ARCHIVE DOCUMENT

Steele Ranch, Inc. (Doc. #14874)

17.1.502 This rule will make it increasingly difficult for a rancher to make changes to the land, even if the changes are environmentally beneficial. I feel that it is my responsibility as a rancher to be a good steward of the land, protect the land as well as water quality regardless of whether or not it is required of me. I make my living off of the land, and protecting it as well as the environment are duties that I take very seriously. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers and landowners in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

Clean Water Action Connecticut et al. (Doc. #14884)

17.1.503 This rule is long overdue. Many of our organizations have spent more than a decade advocating to restore Clean Water Act protections to all wetlands and tributary streams, as Congress originally intended when it passed the landmark Act in 1972. (p. 1)

Agency Response: Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

17.1.504 The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public

US EPA ARCHIVE DOCUMENT

benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend. (p. 2-3)

Agency Response: **The agencies agree. 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.**

In addition, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

National Sunflower Association (Doc. #14894)

17.1.505 Additionally, the proposed rule asks for comments on whether to conclude by rule that certain types of "other waters," including prairie potholes, and perhaps other categories of waters, have significant nexus and should ALL be considered jurisdictional under the Clean Water Act. This is an example of the broad expansion of authority that worries sunflower producers most. A small pool of water that may or may not appear annually, where water does not stand permanently, is a far cry from what is generally considered "wetlands" or "navigable waters."

While leaving these "other waters" out of the final rule does not meet the agencies' stated goals of increased clarity, predictability, and certainty, labeling all of these "other waters" as jurisdictional –with the multiple regulatory requirements of the Clean Water Act – is an unacceptably heavy burden for sunflower producers. A farm simply cannot remain viably if ongoing farming practices are subject to a wide array of regulatory permitting requirements that may take months and/or years to acquire. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

In this final rule, the agencies have identified by rule, five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they perform similar functions and are located sufficiently close together in the watershed to function as a single system in affecting downstream waters. These five types of waters are prairie

US EPA ARCHIVE DOCUMENT

potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. Supported by Justice Kennedy's opinion in *Rapanos*, the agencies determined that such waters should be analyzed "in combination" (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

Wetlands and open waters in non-floodplain landscape settings ("non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of groundwater that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or seeds to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes or vernal pools) can be connected to downstream waters through surface water, shallow subsurface water, and groundwater flows, and through biological and chemical connections.

Indiana Cast Metals Association (Doc. #14895.1)

17.1.506 The proposed rule unnecessarily expands the scope of federal authority over water and land uses across the U.S. and could impose significant negative impacts on the metalcasting industry with little, or no, meaningful human health and environmental benefits. Consistent with the comments below, INCMA urges EPA and the Corps to withdraw the proposed rule, consider the potential impacts of this action on metalcasting operations, and develop a more appropriate rule that is consistent with the CWA and the need to protect human health and the environment. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.507 THE PROPOSED RULE SIGNIFICANTLY INCREASES THE AMOUNT OF AREA SUBJECT TO CWA JURISDICTION

Despite the assurances from EPA and the Corps that the proposed rule would have no substantive regulatory impact and would reduce the areas that are subject to CWA jurisdiction, maps developed by EPA and the U.S. Geological Survey identify 8.1 million miles of rivers and streams that would be subject to CWA jurisdiction under the revised

US EPA ARCHIVE DOCUMENT

definition of waters of the U.S. in the proposed rule. This represents a significant increase of more than 130 percent over the 2009 estimate of 3.5 million miles subject to CWA jurisdiction that EPA provided in a previous report to Congress. Furthermore, some states have reported an even greater increase of areas that would be subject to CWA jurisdiction under the proposed definition of waters of the U.S. This increase is a direct result of the expanded definition that includes ephemeral streams and the land areas that are adjacent to them as "waters of the U.S." subject to CWA jurisdiction. (p. 1-2)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

Determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of different remote sensing and desktop tools and a field visit. It is beyond the scope of this rulemaking to make any specific jurisdictional determinations and beyond the resources of the agencies to make jurisdictional determinations for all waters within a state at any one time. The maps references in the comment were not developed to portray the specific scope of waters of the U.S. under the rule.

17.1.508 THE EXPANDED CLAIM OF JURISDICTIONAL AUTHORITY OVER ALL "TRIBUTARIES" WILL LEAD TO CONFUSION, INCREASED BURDEN AND POTENTIAL LIABILITY

Despite the claim of EPA and the Corps that the proposed rule clarifies an existing regulatory program, the proposed rule expands the definition of "tributary" to cover anything that is capable of contributing any amount of flow to "downstream" locations that eventually connect to larger water bodies. The expansion of the types of waters, drainage features, and other areas that will fall under the definition of "tributary" will lead to confusion as to whether or not low spots and drainage swales in areas at or near a facility are jurisdictional under the proposed rule. Accordingly, to be safe and avoid potential liability under the CWA, metalcasters may need a federal water permit to conduct most routine maintenance or process activities that are a vital part of its operations. (p. 2)

Agency Response: **The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in**

US EPA ARCHIVE DOCUMENT

paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404.

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule

17.1.509 THE PROPOSED RULE FURTHER EXPANDS JURISDICTION WITH BROAD CATEGORY OF "OTHER WATERS"

In addition to expanding the scope of CWA jurisdiction with the definitions of tributaries and adjacent waters, the proposed rule also includes "other waters" as waters of the U.S. The definition of "other waters" is similarly vague and overly broad. This further expansion of CWA jurisdiction goes beyond any authority that Congress intended to provide and leaves metalcasting operations and other landowners vulnerable to unnecessary and inappropriate enforcement actions, because no clear guidance is provided by the proposed rule. (p. 3)

<u>Agency Response:</u> The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted

US EPA ARCHIVE DOCUMENT

circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

The final rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

17.1.510 The proposed rule lacks clarity, is ambiguous, and would impose undue and unnecessary burdens on metalcasting operations and other landowners without providing any meaningful human health or environmental benefits. The proposal should be withdrawn so that the overly broad scope and the devastating impacts of the rule can be assessed more thoroughly, particularly with respect to small businesses. Such action is warranted because EPA and the Corps are not compelled to issue the rule by a court order or court-issued deadline. Accordingly, the agencies can take the necessary time to redraft the rule consistent with federal statutory authority, state rights, and local land use provisions. In addition, the extra time would allow the agencies to develop a rule that is

US EPA ARCHIVE DOCUMENT

protective of human health and the environment, does not impose unnecessary burdens on law-abiding landowners, and that is clear and understandable.

INCMA appreciates the opportunity to provide these comments on the proposed rule to define "waters of the U.S." pursuant to the CWA as it applies to metalcasting operations. We urge EPA and the Corps to withdraw the proposed rule, consider the potential impacts of the permit conditions on these operations, and issue a more appropriate rule to define waters of the U.S. that should be subject to CWA jurisdiction. (p. 4)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

Regarding small businesses, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

Florida Rural Water Association (Doc. #14897)

17.1.511 The rule proposal is comprehensively inclusive and therein lies the problem. The proposed rule appears to take an extremely expansive view of federal jurisdiction over surface waters. The proposal vests agency personnel with seemingly unfettered discretion to declare almost any wetland, pond, impoundment, canal, or other surface water "jurisdictional" based on their "best professional judgment" and considerations of floodplains, biological interactions, riparian zones, and other loose concepts. (p. 2)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> 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 Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters

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

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

<u>The Wildlife Society (Doc. #14899)</u>

17.1.512 The Wildlife Society supports the fundamental approach of using the best science compiled in the Environmental Protection Agency (EPA) Science Advisory Board (SAB) report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence in the development of the proposed rule. We strongly support the EPA's approach of "science first" as the goals of the Clean Water Act (CWA) cannot be achieved without being firmly rooted in the physical, chemical, and biological principles associated with rivers, wetlands, and other water bodies. We believe that the protections given to all tributaries and wetlands adjacent or with a significant nexus to waters of the United States under the CWA are appropriate and consistent with the preponderance of science regarding their connectivity to downstream waters. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Golden Gate Salmon Association and Pacific Coast Federation of Fishermen's Association (Doc. #14900)

17.1.513 The undersigned fishing and seafood organizations write in strong support of the Environmental Protection Agency's (EPA) proposed clean water protection rule. We represent businesses that supply fish and seafood to America's tables every day. We know the importance of sustainability firsthand: our livelihoods are inextricably linked to the health of the marine environment. When water pollution or drainage of wetlands and tributary streams harms aquatic life and harvest rates, our businesses ultimately pay the price. EPA's Clean Water Protection Rule helps to avoid these risks by restoring longstanding water quality protections that have been under-enforced for nearly a decade due to legal uncertainty.

Our businesses rely on healthy marine life, and marine life requires clean water. When pollution degrades our aquatic resources, we see the effects in our bottom line. Algal blooms, fueled by pollution in some areas, have tainted seafood with toxins that are unsafe to eat. Moreover, these events can cause consumers to avoid seafood even after it is once again safe to eat.

The Clean Water Act was intended to help prevent pollution from entering many waterways where we fish and harvest. Yet recently, the Act's scope of protection has been cast into doubt by a set of ambiguous court decisions. This has resulted in significant backsliding in water quality as legal uncertainty has prevented the effective enforcement of legal protections. In many cases, direct discharges or destruction of nutrient-filtering wetlands has taken place even in waters that should rightfully be protected by the law.

US EPA ARCHIVE DOCUMENT

EPA's proposed rule is designed to address this problem. By clearly signaling which waters are protected and which waters are not, the rule will once again allow EPA and the Army Corps of Engineers to administer the law with clarity, certainty and efficiency. Better enforcement of Clean Water Act protections is essential if we are to reverse our nation's persistent coastal and inland water pollution.

Our organizations ask EPA to produce a strong rule that will protect the waters we rely on. By protecting clean water, this rule protects our businesses and the safe and healthy seafood that Americans love. We therefore urge you to produce a strong, science-based rule that will protect water quality for our industries and the nation. (p. 1)

Agency Response: **Thank you for your support. The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Arizona's Generation & Transmission Cooperatives (Doc. #14901)

17.1.514 Beyond Section 404 permitting, the Proposed Rule would also impose significant costs associated with compliance obligations under multiple CWA programs that rely on the definition of Waters of the U.S. For example, CWA Section 311 relates to the spill of petroleum products to Waters of the U.S., and requires development of a formal Spill Prevention Control and Countermeasure (SPCC) plan for operations that utilize petroleum products above a certain threshold. The SPCC plan has a particular set of requirements and is subject to federal audit. However, cooperatives, whether or not they meet the threshold to require an SPCC plan, incorporate best management practices into their operations to minimize or eliminate costly petroleum spills, making an SPCC plan

US EPA ARCHIVE DOCUMENT

redundant and unnecessary. This expansion would apply equally to CWA Sections 303 (impaired waters) and 402 (stormwater discharges), all at an additional expense to cooperatives.

Contrary to the Agencies' assertions, the Proposed Rule significantly expands the Agencies' authority and will require a commensurate increase in compliance requirements. This additional regulatory burden will directly affect cooperatives' ability to provide safe, affordable, and reliable power to end use consumers. Subjecting cooperatives to permitting requirements for impacts to small ephemeral washes is onerous and will result in unnecessary expense with no meaningful benefit to clean water. (p. 8-9)

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

The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional.

By clarifying the definition of "tributary," the agencies also intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

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

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards, identification of impaired waters, or sections 402 and 404. CWA enforcement is also outside the scope of this rule.

US EPA ARCHIVE DOCUMENT

This action would not require facilities that have prepared SPCC plans to update these plans. The owner/operator of a facility that has an SPCC plan in place has already determined that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b).

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

The EPA did consider costs to other Clean Water Act programs in its economic analysis, and did not limit its analysis to Section 404. The EPA considered costs regarding compliance with Clean Water Act Sections 404 and 401, Section 402, Sections 303 and 305, and Section 311. The agencies welcomed public comment on this analysis during the public comment period. The EPA have completed an economics analysis to accompany the final rule which will again include an assessment for all programs of the CWA based on the analysis under the Section 404 program. See the Economic Analysis for further discussion of the costs and benefits assessment.

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

17.1.515 Notwithstanding these positive impacts, the golf industry will suffer disproportionate adverse impacts if the present WOTUS rule is finally adopted. (…)

Additionally, given the disparate nature of resources at play in this rulemaking, the golf industry reserves the right to supplement its comments as other information becomes known to it from any source, or to the extent that additional changes are proposed by EPA or the Corps or by any other federal entity. This reservation, for example, would include the right to respond to events such as the draft EPA Science Advisory Board comments, apparently provided to EPA Administrator McCarthy. This reservation includes, without limitation, the opportunity to submit further comments due to any EPA or Corp decision to withdraw the proposed rule, and to reissue the proposed rule when additional reviews and the like are completed. (…)

Finally, the golf industry reserves the right to seek the reviews and assistance of other federal agencies, such as the Small Business Administration (SBA), regarding compliance with mandatory requirements of federal law. The golf industry is also concerned that the WOTUS rule, as written, and as implemented, might raise constitutional "regulatory taking" issues; this area should be closely reviewed by the agencies prior to finalizing WOTUS. The golf industry reserves the right to raise such claims in the future. (p. 2)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The agencies believe that sufficient time has been provided for review of the rule.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

In addition to a wide range of stakeholders, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

Please also see Section I.C. of the Technical Support Document regarding "takings."

17.1.516 The golf industry is committed to water quality goals and environmental stewardship. Our comments are submitted consistent with that commitment and acknowledgement of the importance of the CWA in protecting and restoring surface waters in this country. The golf industry believes the presently proposed rules are simply beyond the legal boundaries of EPA established by Congress, and economic realities of this industry. Significant revision is requested. EPA and the Corps are urged to consider these comments in drafting its rulemaking process, and to closely consider taking the actions described herein.

EPA and the Corps (together, the Agencies) are soliciting comments on a proposed rule that redefines CWA under all CWA programs. The proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the Supreme Court. In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented at golf facilities and elsewhere. (…)

The proposed rule will result in redundant and incongruent regulatory requirements that are inconsistent with the purpose and structure of the CWA. More consideration should

US EPA ARCHIVE DOCUMENT

have been given to the ramifications that would be caused by this expanded jurisdiction. These comments identify practical problems with the proposed rule for golf facilities and request that:

(1) the Agencies withdraw the proposed rule;
(2) consult with stakeholders, including the above mentioned golf associations; and,
(3) work to revise the proposed rule to resolve these important issues.[22] (p. 3-4)

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

In addition, this rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.517 In fact, EPA should consider adopting a more positive approach to lawful wetlands management, rather than one based only on enforcement (e.g., provide "credits" to golf courses for storm water management, particularly for innovative approaches; with credits being usable, or tradable, for golf course development and maintenance). (p. 5)

Agency Response: **Wetlands management is outside the scope of this rulemaking.**

17.1.518 The golf industry has also sought to work cooperatively with EPA and with States, and continues to ask that a more limited, and positive regulatory approach be ultimately adopted. (p. 6)

Agency Response: **EPA appreciates the past cooperative efforts with the golf industry.**

17.1.519 Changes to CWA regulations that would change the scope of federal jurisdiction will have substantial effects on the ability to finance and develop new projects and perform routine maintenance. Defining WOTUS within the CWA should be very succinct and clearly understood to avoid unnecessary impacts to golf course operations. The proposal would impact millions of additional people beyond those in this segment of the recreation industry. Instead, the WOTUS rule may well encourage litigation, thereby

[22] The above named is a member of the Waters Advocacy Coalition, WAC, and incorporates by reference comments submitted on behalf of WAC. WAC comments address in detail the legal, scientific and economic deficiencies associated with the rulemaking.

US EPA ARCHIVE DOCUMENT

exacting heavy legal fees and costs, and the delays and uncertainties of the judicial process. Such a potential outcome should be avoided.

The proposed rule essentially quadruples the footprint of the Agencies over land and water control in the country and because of that golf course design, construction and maintenance will fundamentally change. Golf course features that convey water, manmade or natural, could now be potentially jurisdictional and require more permits. (p. 8)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404. For example, the rule does not change the fact that discharges of backfill, fill, and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However many activities associated with routine or emergency road maintenance or repair have been and continue to be exempt from such permitting.

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule

17.1.520 With the proposed revisions to the regulations, it is anticipated that permitting with regard to the CWA will become exponentially more involved and more difficult resulting in increased cost and time as well as litigation. This will be due to the introduction of "significant nexus" as determining factor for Waters of the U.S. Where the objective as stated in the Supplementary Information of the proposed regulation, again in the Executive Summary and elsewhere of the proposed regulation is "to ensure protection of our nation's aquatic resources and make the process of identifying waters of the U.S. less complicated and more efficient. The rule achieves this by increasing the CWA program transparency, predictability and consistency. This rule will result in more

US EPA ARCHIVE DOCUMENT

effective and efficient CWA evaluations with increased certainty and litigations." We disagree.

The proposed rule impacts the entirety of the CWA. This is significant and will have far reaching impacts. The golf industry is concerned that the proposed rule's categories of WOTUS and associated definitions are overbroad and ambiguous and do not reflect environmental sustainability – a balance between people, planet and profit. The scale is tipped toward "planet" and not a balance of the three. We believe the proposed rule will lead to more confusion for regulators and the regulated community and won't establish the certainty or predictability the Agencies claim.

We believe the proposed rule will have the exact opposite result stated by the EPA and Corps, causing much more uncertainty as to definitions and evaluations, especially concerning "significant nexus," significantly lengthening the time involve in permitting related to the CWA and substantially increasing the cost of the permitting process due to the aforementioned issues and the need for more litigation.

We ask the EPA and Corps to meet with stakeholders including the golf industry to understand our concerns, gather further scientific evidence, and revise the proposed rule accordingly. (p. 10)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site

US EPA ARCHIVE DOCUMENT

specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.521 Recognize and Revise Limitless Federal Authority

The golf industry is concerned the Agencies' authority to assert jurisdiction is limitless under the proposed rule. The proposed rule creates broad categories of waters that would now be considered jurisdictional by rule. This is inconsistent with the limits established by Congress and recognized by Supreme Court decisions. The Agencies assert that the scope of the CWA jurisdiction is narrower and the proposed rule does not extend jurisdiction over any new types of waters. We disagree. (…)

Through use of the broad definition of "tributary," the Agencies will extend jurisdiction to any channelized feature (e.g., ditches, ephemeral drainages), stormwater conveyances (e.g., swales, bioswales, grassed waterways), wetlands, lakes or ponds, excluding exemptions, that directly or indirectly contributes flow to navigable waters, without any

US EPA ARCHIVE DOCUMENT

consideration of the duration or frequency of flow or proximity to navigable waters. See 79 Fed. Reg. at 22, 201. Many features on the golf course landscape that carry only minor water volumes or store runoff/irrigation water would now automatically be subject to federal CWA jurisdiction. As we note above, golf courses are designed to take advantage of these features both for aesthetic and functional reasons. These include ephemeral drainages, stormwater drainages and culverts, vegetative features that conduct sheet flow, ornamental bodies of water and man-made drainage, stormwater storage features, swales, bioswales, irrigation ditches; that contribute to flow. Broadbased definitions and rules are not favored option to resolving jurisdictional determinations. (p. 10-11)

Agency Response: **The final rule expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land.**

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States." Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather

US EPA ARCHIVE DOCUMENT

exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

17.1.522 We request the Agencies look at what their proposed rule is doing to an industry largely comprised of small business members who strive to enhance the environment as they also make important contributions to the economy.

In light of the proposed rules numerous ambiguities and inconsistencies, the golf industry recommends the Agencies withdraw the proposed rule. The golf industry invites the Agencies to engage in discussions with stakeholders to develop a revised proposed rule that is more consistent with the available science and with the limits established by Congress and recognized by the Supreme Court. (p. 19)

Agency Response: **Again, this rule reflects significant consultation with many stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups,**

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Browns Valley Irrigation District (Doc. #14908)

17.1.523 The definition of tributary in the proposed rule is so broad that numerous man-made, non-stream conveyances would become "waters of the United States" and subject to full spectrum of Clean Water Act permitting. The proposed definition of tributary would have broad implications for the Browns Valley Irrigation District. As was

US EPA ARCHIVE DOCUMENT

mentioned previously, the Browns Valley Irrigation District maintains almost 80 miles of manmade canals and ditches. (p. 2)

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

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

The final rule includes an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404

US EPA ARCHIVE DOCUMENT

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule

Northwest Public Power Association (Doc. #14909)

17.1.524 The ambiguity of the proposed "other waters" term would increase the cost of doing business for electric utilities, a critical industry and economic driver of the U.S. These cost increases impact the cost of electric power and other utility services for consumers. For example, the proposed rule would increase the number of permits required and the cost for utilities to site, construct and maintain facilities such as electric distribution substations and the transmission and distribution lines used to serve customers; (…)

The rule would "federalize" many of the local geologic and man-made water related features common to these utility service systems. This will further complicate the permitting and approval process, negatively impacting the ability of utilities to timely and cost effectively respond to the significant challenges noted above. (p. 2-3)

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

The final rule includes several other changes to provide the additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404

US EPA ARCHIVE DOCUMENT

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule

Oklahoma Pork Council (Doc. #14911)

17.1.525 As proposed, the WOTUS rule fails to provide any clarity or predictability for farmers, including pork producers. It raises serious practical concerns with regard to its direct implementation by EPA and the Corps and its impact on the long-standing relationship between farmers and the U.S. Department of Agriculture and on the ability of farmers to manage their land and grow the feed, food, fiber and fuel that are essential to America's economy. Finally, the rule will have significant direct impacts in areas well beyond the scope of the proposal or the jurisdiction of EPA or the Corps. These include, but are not limited to, decisions on which crops to plant and which fertilizers and pesticides are best for those crops in light of ever-changing environmental and marketplace conditions; farmers' ability to access credit and their relationship with bankers and lenders; and the nationalization of what have always been local decisions on the use of private lands. It also likely will subject farmers across the country to abusive activist lawsuits that benefit neither the environment nor local economies. (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

In addition, the rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as

US EPA ARCHIVE DOCUMENT

irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

The Fertilizer Institute (Doc. #14915)

17.1.526 The consequence of this wetland becoming jurisdictional would be a more than a year-long shutdown of the mine (under conservative estimates) while addressing Section 404 permitting requirements. A mine shutdown would result in a direct loss of approximately 100 jobs due to layoffs, and ultimately even more jobs indirectly due to the loss of mine production. These losses would represent severe economic impacts for the workers and the local community, as well as to the member as it attempts to navigate the Section 404 permitting process. The proposed definition of WOTUS will change significantly the member's ability to manage operational flexibility when unexpected permitting disruptions occur, without providing any additional safeguards or environmental protection, because these areas are covered under state rules and requirements. (…)

[A] member's operations uses an extensive water recirculation system comprised of ditches and other man-made conveyances to recycle water back to its production plant from settling areas, transfer and balance water between facilities, and to direct water to various CWA Section 402 permitted outfalls for discharge. The member's operations regularly require changes to the land surface, for example to relocate draglines and other recirculation components. This, in turn, often requires changes to the recirculation system ditches and conveyances. The Corps repeatedly has attempted to assert CWA jurisdiction over these areas and the recirculation system for permitting and mitigation purposes. The member has spent significant time and resources rebuffing these efforts, insisting the Corps abide by the law. Since the Proposed Rule was published, the Agencies have informed the member that they will consider these areas jurisdictional ditches, unless the member can demonstrate that the ditches in the recirculation system qualify for the very limited "uplands only" exception.[23] Because such a demonstration would be extraordinarily expensive and time consuming, and because factually very few of the system's ditches can be said to be cut wholly in, and drain, only uplands, it is likely that the Agencies will assert jurisdiction over this man-made system that ultimately functions solely as a permitted point-source. That will create additional operational issues, vastly decrease operational flexibility, and ultimately force the member to expend significant extra costs to avoid impacts to its own recirculation system, and/or go through the Corps' extensive permitting process (including funding for mitigation)[24] for areas that would not previously have been considered jurisdictional. All of this will produce little to any

[23] Issues related to the Proposed Rule's limited exceptions are discussed at length in the WAC comments.

[24] The member typically is able to purchase mitigation bank credits for a cost of $100,000 to $150,000 per credit. Those costs are two to three times the Agencies' estimated, nationwide average costs for such mitigation ($24,989 to $49,207), in addition to being well above the costs the Agencies set forth for the State of Florida ($35,000 to $90,000). Economic Analysis at 17, App. A.

US EPA ARCHIVE DOCUMENT

additional environmental benefit, as discharges from these areas already are permitted. (p. 3-4)

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

The final rule includes several other changes to provide the additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

US EPA ARCHIVE DOCUMENT

The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.

17.1.527 [A]s WOTUS, even routine maintenance on stormwater conveyances could now require a Section 404 permit. For example, the installation of baffles and weirs to facilitate removal of pollutants such as sediment in stormwater (as required by stormwater permits) would now require complex Section 404 permitting procedures. (p. 10)

<u>Agency Response:</u> The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions.

US EPA ARCHIVE DOCUMENT

Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information. The rule also does not affect or modify existing statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding practice, these exempt activities do not change the jurisdictional status of the water body as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404.

Devon Energy Corporation (Doc. #14916)

17.1.528 Devon has developed relationships with the Corps District Offices that regulate many of the federal waters where Devon operates. As a result, we have learned to appreciate the regional differences in hydrology, climatology and additional physical sciences and how the Jurisdictional Determination process can vary due to these factors. The existing system of determining jurisdiction is not broken and from a practical sense, the Corps and industry have been successful at protecting WOTUS.

Devon strongly objects the Proposed Rule and respectfully asks the EPA to withdraw it. In addition to the issues explained below, the Proposed Rule expands federal jurisdiction well beyond hydrologic water connections and creates more confusion than it clarifies. The technical practicability and economic reasonableness of implementing the Proposed Rule does not weigh favorably. As a result, there will be unintended consequences for our industry and others. (p. 1-2)

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

The final rule includes several other changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and

US EPA ARCHIVE DOCUMENT

standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

17.1.529 Devon respectfully requests that the Agencies withdraw the Proposed Rule and instead re-propose the rule only after careful consideration of the comments, further collaboration with states and industry subject matter experts.

The Proposed Rule takes on a "one size fits all" approach which does not compliment the regional differences in geography, climate, geology, soils, hydrogeology and rainfall as well as the comprehensive state programs protecting streams and wetlands. The imposed burden to operators faced with time sensitive decisions where technical practicability and economic reasonableness hasn't been integrated into the rule making process would severely impact industry's ability to conduct business.

Ultimately industry needs consistency from the Agencies and confidence at conducting "Self Verification" and utilizing NWPs when applicable. Self Verification is an accepted method of applying NWPs. The availability of the Self Verification process is considered by the Corps as being of benefit to the Nation as it can reduce otherwise required interaction for Regulatory approvals. But with the lack of clarity that's been proposed, the successful process of Self Verification will be adversely impacted. (p. 11)

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Again, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to

US EPA ARCHIVE DOCUMENT

develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Region 10 Tribal Caucus (Doc. #14927)

17.1.530 Our Nation's waters provide irreplaceable benefits to tribal people across the U.S. Unfortunately, many of our waters and the fish and other resources that depend upon them are contaminated or at risk.

To safeguard these resources, Congress passed the Clean Water Act ("CWA") more than four decades ago. The CWA established a national goal that all waters of the U.S. should be fishable and swimmable. The goal was to be achieved by eliminating all pollutant discharges into waters of the U.S. by 1985 with an interim goal of making the waters safe for fish, shellfish, wildlife and people by July 1, 1983. However, those goals have been far from achieved and the law is broken due to confusing court interpretation.

Legal uncertainty about what the law protects has denied pollution protections under the CWA to approximately 20 percent of the 110 million acres of wetlands in the continental United States putting at risk the drinking water supplies of 117 million Americans.

This rulemaking is extremely important because nearly all of the Clean Water Act's critical water quality protections and pollution prohibitions apply only to "waters of the United States." It is essential to the continued protection of our Nation's waters that the EPA and the Corps continue to assert jurisdiction over our Nation's waters to the fullest extent permitted by the law.

Tribal communities depend on the CWA to protect waterways and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health and well being. The Tribal Caucus believes that the proposed rule will restore protections to many of our waterways.

This proposed rule makes clear that many vulnerable waters will be covered by the CWA's pollution prevention and cleanup programs and protect those waters that the science shows have important effects on downstream waterways. (p. 1-2)

Agency Response: **The agencies agree. 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**

US EPA ARCHIVE DOCUMENT

four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

17.1.531 As such, almost all of SRP's stormwater retention basins will become jurisdictional waters under the proposed rule when they have not been subject to such regulation before.

If the proposal is not withdrawn or modified it would adversely affects SRP's ability to manage stormwater. First, it would create jurisdictional waters within the property boundaries of SRP facilities. Second, it would not allow SRP to use on-site retention basins to meet the general secondary containment requirements for oil-filled equipment under EPA's Spill, Prevention, Control and Countermeasures (SPCC) regulations in 40 CFR Part 112. Third, it would increase the number of CWA §402 or §404 permits needed to operate and maintain existing facilities most of which are zero liquid discharge (i.e., they do not discharge stormwater directly to jurisdictional waters or to a municipal separate storm sewer system ("MS4")). (p. 3)

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

The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

US EPA ARCHIVE DOCUMENT

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.

This action would not require facilities that have prepared SPCC plans to update these plans. The owner/operator of a facility that has an SPCC plan in place has already determined that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b).

17.1.532 If these retention basins become jurisdictional, SRP would be required to apply for and obtain coverage under Arizona's §402 Pesticide General Permit (AZG2011-001), and possibly coverage under a §404 permit for maintenance activities that involve excavating or grading. If this were to occur, SRP would likely no longer support the municipal use of its transmission rights-of-ways for stormwater projects. (p. 4-5)

<u>Agency Response:</u> The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The

US EPA ARCHIVE DOCUMENT

exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

The rule does not change the fact that discharges of backfill, fill, and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However many activities associated with routine or emergency road maintenance or repair have been and continue to be exempt from such permitting (see, e.g., 33 C.F.R. 323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F. R. 325.(e)(4)).

17.1.533 Subjecting dry ditches to jurisdiction under the CWA would require SPCC plans not only at Desert Basin but at three other of SRP's generating stations. SRP believes the agencies' proposed definition change is unnecessary as it does not provide any additional protection to navigable waters. It will, however, substantially increase the burdens for SPCC plan creation and maintenance by facilities subject to the provisions of the Oil Pollution Prevention regulation. (p. 12)

<u>Agency Response:</u> Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in

US EPA ARCHIVE DOCUMENT

paragraphs (a)(1) through (a)(3) of this [rule].” A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the proposed ditch exclusions and the final rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

17.1.534 SRP estimates that if the agencies proceed with changing the jurisdictional status of dry ditches, MS4s, and retention basins, it will increase SRP's §402 permitting activity from 2 to 5 construction general permits per year to more than 50 per year. Additional permits and SWPPP's would be needed for construction of new electrical transmission and distribution lines, new substations, and converting open irrigation ditches to closed pipe or concrete-lined systems. We view this as an unnecessary burden that does not provide any measurable environmental benefits. (p. 12-13)

Agency Response: **This rule will not affect the current implementation of the various CWA programs in regulating discharges of pollutants into waters of the United States, such as the development of water quality standards or sections 402 and 404.**

This rule only affects the definition of “waters of the United States.” There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. Section 404(f)(1)(B) exempts dredge and fill activities “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.” Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation’s businesses depend on clean water to operate. Streams and wetlands are economic drivers because they

US EPA ARCHIVE DOCUMENT

support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Kansas Cooperative Council (Doc. #14938)

17.1.535 The confusion generated by this rule makes it difficult to know what will be a regulated WOTUS, especially in areas where water features do not have consistent flow. Agriculture producers, agri-service providers and others in the regulated community could easily and unknowingly conduct activities over a dry or damp area which meets the agencies' technical definition of WOTUS. The regulated community is left to guess when and where a National Pollutant Discharge Elimination System (NPDES) permit is required for conducting certain practices. The rule, coupled with the previously released interpretive rule, adds further confusion as to what farming practices the agencies consider exempt from permitting (although we argue the IR attempts to inappropriately limit the agricultural exemptions in the CWA) . Additionally, it is often time consuming and expensive to get a permit and there is no guarantee that EPA will actually grant the permit. Penalties for failing to have the appropriate permit are significant. These difficulties in determining when, where, and over what water features the rule will apply means the regulated community is not afforded due and proper notice as to what is regulated under the rule. (…)

That huge expansion of WOTUS streams will, in Kansas, require KDHE personnel to conduct analysis on remote streams and "waterways" across the state. We use the term "waterways" loosely because in Kansas, many of these features will be dry for months, even years, at a time and only occasionally will they actually be wet. Staff time and the cost of paying staff to analyze these remote and often dry features will divert valuable resources away from efforts that are accomplishing real good in advancing our state's overall water quality goals. As stewards of the land and taxpayers interested in the wise use of Kansas' financial and staff resources, that diversion away from real, productive water quality efforts is a sad irony of the proposed rule's practical application. (p. 2-3)

Agency Response: **Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins." 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.**

US EPA ARCHIVE DOCUMENT

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

Association of American Pesticide Control Officials (Doc. #14940)

17.1.536 AAPCO has specific concern that failure of the WOTUS Rule to establish criteria for the use of FIFRA registered pesticide products "to, over or near water(s)" creates an increased level of vulnerability for legal action under the CWA against pesticide applicators and state regulatory agencies for operations conducted in compliance with FIFRA and state pesticide control programs. (p. 1)

Agency Response: The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

FIFRA requirements are outside the scope of this rulemaking.

Soil and Water Conservation District (Doc. #14943)

17.1.537 The Central Valley and Penasco Soil and Water Conservation Districts agree that the Clean Water Act protects waters and has created non-regulatory programs that have been effective on land use compacts and continues to be. But our Districts also agree that we have a problem with how this proposed rule is written and that the cost benefit analysis is extremely flawed. The people should not have to be required to apply for a federal permit for every land use in order to make a living and to have a federal police state looking over the citizen's shoulders, singling them out for extreme persecution and

US EPA ARCHIVE DOCUMENT

economic destruction in order to set an example to their neighbors. We are opposed to the proposed rules under the Clean Water Act as stated in these comments. (p. 5)

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

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. The existing regulations represent one appropriate baseline for comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline.

Environmental Defense Fund (Doc. #14946)

17.1.538 The draft rule does not restore jurisdiction over all waters formerly protected by the CWA. Rather, it restores jurisdiction over some formerly protected waters based on an extensive record of peer reviewed science and consistent with the Clean Water Act and the case law.

The draft rule does not overturn or diminish any of the existing agricultural Clean Water Act exemptions. In fact, part (b) of the draft rule actually broadens existing agricultural exemptions. (p. 1)

Agency Response: **The agencies agree. 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**

US EPA ARCHIVE DOCUMENT

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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The 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.

Gessner, L. (Doc. #14959)

17.1.539 For some, people feel that this rule will allow agencies to make unjust decisions about land use and farm practices. Much push back from the agriculture is present due to regulation of farm runoff. Farmers feel that they are being over regulated and this new rule will decrease their profits. The proposed rule for regulating certain waters, including some pertaining to agricultural uses, however, will not include prior converted cropland, and ditches that do not contribute flow, either directly or through another water. This is a major misunderstanding of this rule. However, it will have a big impact if the rule regulates water on a farm. The clarification of the Clean Water Act has the intent that waters will be clean for humans, community, and the economy. The assertion that farming practices will be made more cumbersome for farmers is true in some cases. However, I agree that protecting the water in streams and wetlands is essential to human health. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

Williams, E.H. (Doc. #14961)

17.1.540 Operations that are normal to farming such as tillage, applying fertilizers and pesticides, or mowing ditches which could cause vegetation (a biologic material) to be discharged would all become unlawful without a CWA permit. Similarly such normal operations as repaired tile drainage systems, or reconstructing grass waterways could violate the CWA without the proper permits.

All of my normal practices could also result in some concerned citizen deciding to file legal proceedings against what I do as part of my normal business practices. There have

US EPA ARCHIVE DOCUMENT

been too many instances of such frivolous lawsuits being filed in Illinois, with the added legal costs that the defendants have to pay! (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation.

Nucor Corporation (Doc. #14963)

17.1.541 In the event such ditches are considered "waters of the United States", they will be subject to regulation under CWA Section 404 dredge and fill requirements. This imposes unduly burdensome permitting requirements on an owner of property on which these ditches are located, whenever maintenance, reworking, relocation or other minimal

US EPA ARCHIVE DOCUMENT

activity will take place, even though such activity would have no impact on downstream waters. (p. 10)

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.**

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Santa Barbara County Farm Bureau (Doc. #14966)

17.1.542 Farmers and ranchers are stewards of the land and care about the environment and water quality. Farmers and ranchers know the ground they farm and should have clear guidance about how to comply with the law. Unfortunately, the Proposed Rule creates confusion and risk by providing the Agencies with almost unlimited authority to regulate, as they deem appropriate, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds, and isolated wetlands found in and near farms and ranches across the nation. (…)

US EPA ARCHIVE DOCUMENT

By expanding the number of waters deemed jurisdictional, more farmers and ranchers may face enforcement and citizen lawsuits. Third-party lawsuits have become the new norm for regulating farmers. Even when farmers protect water quality and comply with the law, they could be forced to defend themselves in court.

Under the Proposed Rule, farmers, ranchers, and other landowners would face tremendous roadblocks to ordinary land-use activities, from building a fence to treating for or pulling weeds to controlling insects. These "roadblocks" are both costly and time consuming. (p. 1-2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

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

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. The rule does not affect private property rights.

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation.

Citizens Campaign for the Environment (Doc. #14967)

17.1.543 This common-sense rule is urgently needed, and recent Congressional attempts to prevent this proposed rule are just another example of regulatory confusion and attempts to rollback necessary water protection measures. Clarifying the definition of Waters of

US EPA ARCHIVE DOCUMENT

the United States and reasserting the EPA's authority to protect these waters is clearly necessary. CCE fully supports the EPA and Army Corps proposed Clean Water Protection Rule and urges you to approve and implement this rule as soon as possible. (p. 2-3)

Agency Response: **Thank you for your comment. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Office of the Governor, State of Alabama (Doc. #14969)

17.1.544 The proposed rule would simply replace one ambiguity with another, expanding the Federal Agencies' authority while encroaching upon the authority of the states. The Federal Agencies do not have sole authority over Alabama's waters. Alabama is an integral and mandatory partner in the regulation of the waters within its borders. Expanding the definition of "waters of the U.S." is an encroachment on Alabama's sovereignty, fundamentally altering our ability to make decisions regarding the use of land within our borders. This encroachment and the Federal Agencies' failure to consult with the states are fundamental flaws that cannot be solved without immediate withdrawal of the proposed rule. Extending the comment period is insufficient and will not address the states' root concerns.

Further, the expanded definition will increase costs for Alabama's citizens. Alabama's economy is resilient, but the impact of the proposed rule could have dire consequences. Large sectors of Alabama's economy-development, agriculture, industry-and the livelihoods that depend on these sectors will be hampered by the proposed rule. Regulatory and litigation costs will increase in correlation with the Federal Agencies' increased authority. Even if the Federal Agencies do not enforce their authority to the fullest extent, third party challenges may force them to do so. In addition to these direct costs, the uncertainty of an expanded, ambiguous, litigation-prone definition will further stifle development and damage Alabama's economy. (p. 1-2)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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**

US EPA ARCHIVE DOCUMENT

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 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.

Although the Agencies cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Cassia County, Idaho Board of Commissioners (Doc. #14972)

17.1.545 Our second concern is that the rules are not specific enough, nor well enough defined to describe in enough detail the Waters of the US" and to further define CWA's significant terms to ensure that those rules will not have or exercise unintended consequences in the future. Lack of definition will assuredly lead to Court decisions to define and clarify terms. (…)

Our third concern in review of this matter is that the proposed language would pose devastating economic liability and damage on local government entities, local businesses, and private landowners. In order for any local interest to perform their no& duties and functions, they may well be faced with costly and time consuming federal permitting process. So, in the instance of needing to maintain a ditch free of weeds to handle run-off water, instead of being able to act, a local entity would have to forbear and watch as his own property or that of a neighbor is damaged by flooding, then to face liability for that damage. Or, in the alternative, act to clear the ditch and face federal action and fines. This is a horrible juxtaposition for the local landowner to face in his everyday affairs. It is unfair, unwarranted and unconscionable. (p. 1-2)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific

US EPA ARCHIVE DOCUMENT

analyses prior to determining jurisdiction and any need for permit or enforcement actions.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

National Association of County Engineers (Doc. #14981)

17.1.546 In general, we have significant concern with the proposed rule. After numerous discussions with EPA, we have a better understanding of the intent of the rule; however, we do not believe the current language reflects that expressed. These proposed rules, being extremely vague, would result in significant inconsistent interpretation by regulators. By definition, rules must be clear and concise. Unfortunately, the proposed rules fail at this requirement. In addition, contrary to what has been reported, the proposed rule would greatly expand the number of jurisdictional waters and would result in huge increases in time and costs for compliance. Moreover, these increased costs would not result in improved water quality. (p. 1-2)

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

The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Nuclear Energy Institute (Doc. #14985)

17.1.547 The proposed rule, on the one hand, will create significant practical problems for NEI members as they generate emission-free electricity from nuclear power plants and plan new facilities. As a result, the proposed rule will make electricity generation more expensive, increasing electricity costs for consumers and the American family. (p. 1-2)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's

US EPA ARCHIVE DOCUMENT

businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Missouri Soybean Association (Doc. #14986)

17.1.548 Restricts farmers ability to farm - The most agricultural productive and rich farmland in the state is located within the floodplains of the Missouri, Mississippi and our other major rivers. Much of that prime cropland would be left unproductive and useless without the vast network of drainage ditches and infrastructure that drains excess water off and away from crop fields. All crop fields in the river bottom have some sort of drainage ditch. Small ditches feed into larger branches that feed into larger trunks that exit into a major river, often times through important infrastructure like culverts, flood control gates and levees. If a crop field becomes submerged under water for any amount of time, crops drown, so managing and maintaining ditches so that they are clean and properly sized and graded to drain water away effectively is a farmer's top priority every spring. How are farmers expected to stay competitive and productive if they are spending all their time contemplating what is and what isn't a WOTUS on their land and acquiring permits and approvals to conduct routine maintenance of their farming operation? This is an unreasonable and unworkable expectation and resultant burden will come at a significant cost to the farmer. (p. 9)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

New Jersey Farm Bureau (Doc. #14989)

17.1.549 What is being proposed now, however, is a far broader approach that relies on categorical interpretations to include certain water body-types under the Clean Water Act. Most notably, water body-types that are currently only subject to coverage under the Clean Water Act if all of the above-referenced criteria are met, such as ephemeral

US EPA ARCHIVE DOCUMENT

streams that flow only during rain events, ditches and isolated wetlands that are not connected to "navigable waters", could now potentially be regulated across-the-board because of this far-reaching categorical designation process.

The jurisdictional inclusion of these waterways would mean new permitting obligations for farm-operators or, worse yet, the restriction of certain commonly-accepted farming activities. The Clean Water Act restricts any activities that result in the presence of "pollutants" in a jurisdictional water-body unless permit coverage is obtained. This includes the use of pest and weed control mechanisms. Farmers are not automatically entitled to such permit coverage, however, and could therefore experience significant delays in obtaining a permit, an ill-effect that impacts their farm business by preventing them from carrying out certain activities until such permit coverage is in place. In severe cases, farm-operators could be denied permit coverage altogether, resulting in an outright prohibition against specific farm management practices in or near these newly-designated "Waters of the United States". (p. 2)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

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

17.1.550 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. The City of Northglenn 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. 5)

US EPA ARCHIVE DOCUMENT

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

Orange County Public Works, Orange County, California (Doc. #14994)

17.1.551 The Proposed Rule does not discuss or analyze the potential impacts on MS4s. The proposed definition of "waters of the US." would inappropriately capture much of MS4s as jurisdictional waters. Designating certain MS4s as waters of the U.S. would interfere with the statutory duties of OCFCD and would effectively prevent MS4s from being operated in the manner that is currently mandated by many NPDES MS4 permits that have been promulgated by USEPA and the States. (p. 1-2)

Agency Response: **It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."**

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

Arizona State Senate, Legislative District 14 (Doc. #14995)

17.1.552 Congress, not federal agencies, write the laws of the land. When Congress wrote the Clean Water Act, it clearly wrote that the law applied to navigable waters. Is a small ditch navigable? Is a stock pond navigable? Is a puddle in your back yard navigable? These Agencies are not authorized to expand their authority over dry streams and washes. This reflects a concerning trend wherein federal agencies interfere with the property rights, water rights and natural resource industries of rural America. These outrageous federal actions have caused, and will continue to cause, devastating consequences to the livelihoods of the citizens I represent – farmers, ranchers, miners, homebuilders, developers, manufacturers and those in the construction industries – families in Cochise, Greenlee, Graham and Pima Counties. This confusing, unnecessary expansion of the

US EPA ARCHIVE DOCUMENT

federal government's power must end now. These Agencies should respect the limits set by Congress and honor State's rights.

The proposed rule is sweeping in its scope and has the potential to make virtually any body of water that could eventually flow into "waters of the United States" subject to federal regulation, regardless of how remote or isolated such waters may be from truly navigable waters. As the range of waters that are considered "waters of the United States" increases, so does the outrageous permitting and compliance costs to family farms, ranches, small business and local governments. This extremely cumbersome, time-consuming and abundantly complex process will hinder rural Arizona's economic growth, the backbone of our economy. These Agencies are manipulating science and using flawed economics to expand federal regulatory jurisdiction while grossly understating the cost of that expansion.

These Agencies have stated that the proposed rule provides clarity and certainty. The only thing that is clear and certain is that, under this proposed rule, it will be more difficult to farm, ranch, build homes or make changes to the land- even if the changes would benefit the environment. The proposed rule unlawfully and unconstitutionally seeks to assert federal jurisdiction over local water and land use management. Accordingly, I strongly urge the Agencies to withdraw this proposed rule. (p. 1-2)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

US EPA ARCHIVE DOCUMENT

Anonymous (Doc. #15006)

17.1.553 The proposal has a number of changes that will immediately affect the way my family operates. The two parts of this proposal that are on the forefront of my mind is spraying and ditches. I understand the proposal to further restrict spraying and even require permits before individual spraying events. At this point I must not that my family holds private applicators licenses. I feel this program is quite adequate in educating farmers to proper ways of applying chemicals, personal hazards, and possible negative effects to the environment. These are all things that a farmer must consider before purchasing, mixing, and spraying chemicals, and are subjects thoroughly covered in the course. I feel much of the proposal in regards to chemical is unnecessary as this certification is in place and carries a lot of weight, in a positive light, in the agricultural industry for both farmers and commercial/custom applicators. As to the regulations of individual spraying events, it is clear many negative effects would result from such a measure. The chief of which would simply be weed control. Farmers today are faced with weeds that grow several inches a day. In many cases these weeds cannot be controlled effectively unless they are sprayed before they reach four inches tall. If the window of growth prior to four inches is missed up to three passes with chemicals may be applied. Each application is more potent than the last. Therefore any delay in spraying, that is not weather related, can result in increased cost, yield loss, and use of chemicals that can have negative implications for the environment. That, is to say, it would lead to increased use of the costly chemicals, farmers first, and then EPA is trying to limit.

In addition the proposed regulation on ownership of and increased regulation of ditches has huge implications for agriculture, and specifically farmers in my area. Farmers in this area utilize ditches to drain their fields to allow for crop production. The soil here is a clay based soil and thus holds water really well. Tiling is not an option in our part of Illinois as the soil does not have enough silt for it to be effectively drained in that way. Each field has at least one place that is hard to drain. This is true for even the best ground. The wet patches could be in the middle of an otherwise dry field, or they could be along a tree line. Generally these patches are less than a half acre, and usually less than a quarter acre. A simple ditch three to six inches deep will allow the moisture to drain and allow for crop production. Excessive use of ditches is wasteful to farmers. If there becomes a problem with washing soil the farmer will often drill wheat and reduce tillage in the area. If the problem persists the farmer will seek help from the soil and water conservation district, and will abide by the plan developed with their assistance. The proposed regulations would inhibit a farmers ability to use experience to effectively manage his land. Often the only way truly to understand how water moves on our soil is through years of observing. Most all farmers are good stewards of their land. The few who are not do not stay in business very long.

Long-term I think this proposal has serious negative implications. The whole tone in which the proposal has been written is quite troubling. I think the regulation on changing grass waterways and permanent ditches is quite cumbersome, and will do more harm than good. Again the farmer is the best steward of the resources he has been given. Oftentimes the grass waterway has already been put into a CRP type program. A farmer can see if something is going wrong. Maybe it is clogged naturally with sod. Maybe a tree fell in the ditch and altered its flow. Still maybe an out of control tree CRP program on a

US EPA ARCHIVE DOCUMENT

neighboring piece of land caused the creek to flow out of the waterway on your field and in turn out across your field. The increased EPA regulations in the proposal would only further the difficulty of these situations. The farmer in charge may have been able to otherwise solve the problem quickly and simply, through use of his careful observation over years of experience. Additionally a farmer should be able to add a ditch and waterway if he sees there is an erosion problem. For example often times oil production leaves a mess behind know as an salt slick. These areas will not grow crops and often result in terrible washes, and severe loss of soil. A farmer should be able to make a common sense decision, correct the problem, and get government assistance to do so if they wish. It would be pretty sad to say a farmer could not fix an erosion problem on land he had to manage due to a government regulation. (p. 1-2)

Agency Response: **The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage.**

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

US EPA ARCHIVE DOCUMENT

Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

OG&E Corp (Doc. #15012)

17.1.554 Due to the proposed definition of WOTUS to include "tributaries" and "other" water, OG&E believes that there will be an increase in incidental spill notifications and reporting to the National Response Center (NRC). What was once a notification to our state regulatory agencies, the Oklahoma or Arkansas Departments of Environmental Quality, will likely no longer be sufficient. Such an increase in reporting requirements will necessarily drive an increase in the burden on staffing and technology resources needed. (p. 2)

Agency Response: The owner/operator of a facility that has an SPCC plan in place has already determined that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b).

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

17.1.555 The increase in regulatory review and the almost certain increase in the total number of individual Section 404 permits that will be required for transmission line projects prior to start of construction will increase the timelines of projects from roughly 10-months for nationwide permits to over 2 years for individual permits, increase the costs of projects by an estimated $300,000 per permit, and thus threatens to impact the reliability of the transmission system by delaying the installation of projects needed for reliability.[25] This rule would bring about additional unnecessary delay and costs to the transmission siting and construction process. (p. 3)

Agency Response: Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

[25] EEI Comments

US EPA ARCHIVE DOCUMENT

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.556 An increase in jurisdictional waters would affect the landscape maintenance of power plants, substations, service centers and transmission/distribution line rights of way over OG&E's 30,000 square mile-territory. An increase in restrictions on pesticide use and or, ability to physically access and clear, the right of ways, would be driven by this increase in jurisdiction which conflicts with the NERC reliability standards which require utilities to properly clear and maintain sufficient areas around electric infrastructure to assure the safe and reliable operation of the facilities. (p. 3)

Agency Response: **A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this proposal affect private property rights.**

17.1.557 OG&E strives to be as efficient as practical in the use and consumption of water at its facilities. One such way that OG&E accomplishes this is the reuse of process water that is cycled through onsite settlement ponds for reuse and then periodically dredged. EPA's proposed rule could make that system impractical or require permitting each time the onsite, isolated ponds are dredged. (p. 4)

Agency Response: **The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond.**

17.1.558 Many ephemeral and intermittent streams, as well as "other" waters that will fall within the expanded jurisdiction will require monitoring strategies, which will entail the need for additional personnel and resources by the States to complete this goal. With the reductions in budgets and adoption of "doing more with less" strategies, States will be required to compromise services in some areas to accommodate the increase in requirements set forth by the EPA. Part of this compromise may also be an increase in fees to permit holders and customers to offset increased budget costs. (p. 4)

US EPA ARCHIVE DOCUMENT

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

17.1.559 Increases in jurisdictional waters and any potential complications to water quality-based designations, could have a detrimental impact in beneficial use designations which could take at least a year within the state regulatory process to be promulgated into rules, thus causing further delays and driving up costs of projects or permits. These delays would also have negative impacts on the reliability of OG&E infrastructure. (p. 4)

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

The Agencies stands by the assertion that states should not incur these costs because states already have standards in place for streams (often multiple types of streams) and wetlands. Under current practice, the agencies already assert jurisdiction over most waters in the categories at issue for this rule, so it is more a matter of whether or not the standards in place apply to a particular water or not. EPA also points out that prior to the Supreme Court cases addressing CWA jurisdiction, by and large the same water quality standards were in place to cover all waters at issue for this rule.

States typically develop water quality standards for general categories of waters, including wetlands; in addition to creating site-specific standards and more generic standards that can apply broadly. State water quality standards have been in effect prior to and continuing after the *SWANCC* and *Rapanos* decisions. Therefore, requirements for state water quality standards to be consistent with the CWA (designated uses, criteria to protect those uses, antidegradation policies) will likely not require any changes as a result of this rule. What could change is whether or not those standards apply to a specific water. To the extent a state believes there are needs for water quality standards development for specific types of waters, those needs would exist with or without this rule.

Utility Water Act Group (Doc. #15016)

17.1.560 As proposed, the Agencies' broad assertion of jurisdiction would subject many more projects and activities undertaken by UWAG members to CWA jurisdiction, and would mean that projects that otherwise would have qualified for relatively streamlined

US EPA ARCHIVE DOCUMENT

permitting processes under nationwide or regional general permits would be required to undergo lengthier and costlier individual permit procedures, and face various other costs, because more features would be deemed jurisdictional. These impacts would affect utilities and their customers, and are inconsistent with the Administration's stated goals of promoting grid resiliency, generating power from cleaner sources, decommissioning older facilities, and constructing new sources including renewable generation. The Proposed Rule could apply to a myriad of internal features at utility company facilities – most of which are components of facility systems that already are controlled at their points of discharge to waters properly regulated under the CWA – and would result in duplication of effort and unnecessary regulation of features. (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.561 The Proposed Rule would fundamentally alter how the electric utility industry is regulated under the CWA, resulting in substantial new costs and burdens for the industry, for consumers of electricity, and, by extension, for the U.S. economy, without any corresponding environmental benefit. (p. 4-5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

US EPA ARCHIVE DOCUMENT

17.1.562 A broader WOTUS definition that includes more features than are currently regulated as WOTUS – such as more ditches, floodplain waters, and isolated waters – means that more activities will need a CWA § 404 permit. With respect to ditches alone (which would be regulated subject only to narrow and unclear exclusions), the Proposed Rule would have enormous impacts. Electric utility companies often rely on networks of ditches to manage stormwater on their facilities, and electric utility line corridors often follow infrastructure (such as roadways) or span areas (such as farmlands) that similarly rely on ditches to manage water. To the extent electric utility infrastructure must cross or otherwise impact ditches or other features that currently are not treated as jurisdictional but could be considered jurisdictional under the Proposed Rule, more § 404 permit requirements and lengthier § 404 permit processes will result.

The need to obtain a § 404 permit often, in turn, triggers related requirements, such as conducting mitigation, obtaining a CWA § 401 water quality certification from state authorities, completing a National Environmental Policy Act ("NEPA") environmental review (such as an environmental assessment or environmental impact statement), and completing Endangered Species Act ("ESA") § 7 consultation. Any one of these processes can take over a year and result in costs running into hundreds of thousands of dollars. For example, meeting mitigation requirements requires locating and paying into an available mitigation bank. Where such a bank is not available, the permittee must spend substantial effort to design and implement (and provide financial assurances for long-term management of) a mitigation plan comprised of onsite and/or offsite mitigation projects. Moreover, potential litigation from external third parties hovers over all permitting activities.

In addition, while certain projects qualify for the relatively streamlined (and thus faster and less costly) review processes of CWA § 404 general permits, including nationwide permits ("NWPs"), the Proposed Rule could cause more projects to exceed NWP and other general permit thresholds, resulting in more projects undergoing lengthier and more costly individual permit processes. For example, electric utility companies often rely on NWP 12 for utility lines. NWP 12 is available only for projects that meet specified limits, including a loss of no more than ½ acre of WOTUS for each "single and complete" project that relies upon NWP 12. While utility companies frequently manage to configure utility lines to stay within the ½ acre limit by avoiding wetland and stream features to the extent practicable, the Proposed Rule's expansion of jurisdiction to include the types of ditches, ponds, and other wet or potentially wet features often found on land spanned by transmission lines would substantially increase the likelihood that electric utilities would be unable to stay within NWP 12 limits. This means that a project that would qualify for an NWP today may require an individual permit under the Proposed Rule, requiring more mitigation and otherwise causing overall increases in permitting costs and delays.

As the Supreme Court noted in Rapanos, an applicant will spend on average more than twice as long and nearly ten times as much money obtaining an individual permit than a NWP. Rapanos, 547 U.S. at 721 (noting a 2002 study showing that an average applicant for an individual § 404 permit spends 788 days and $271,596 to complete the process, while the average NWP applicant spends 313 days and $28,915, costs that do not include mitigation or design change costs) (citing David Sunding & David Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent

US EPA ARCHIVE DOCUMENT

Changes to the Wetland Permitting Process, 42 NAT. RESOURCES J. 59, 74-76 (2002) (hereinafter "Sunding & Zilberman (2002)"). The Court noted that "[o]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." Id. (citation omitted). Accordingly, the Proposed Rule would add substantial time and costs and increase regulatory uncertainty for important energy infrastructure projects. Finally, by exerting federal control over virtually all water features, the Proposed Rule would make it virtually impossible for states and the regulated community to develop their water resources and to permit construction of intake structures necessary to access any newly developed water resources without federal permission in the form of a § 404 permit. (p. 16-18)

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these

US EPA ARCHIVE DOCUMENT

actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

17.1.563 If the Proposed Rule results in converting any industrial water features from nonjurisdictional to jurisdictional, that change will alter the point of compliance at which any technology or water quality-based limit must be met. Such a change would create significant regulatory compliance issues and impose enormous and unwarranted new costs, both (1) to the electric utilities and others in the regulated community, and (2) to state and federal permit writers who will need to grapple with the permitting implications of such changes. (p. 19)

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

US EPA ARCHIVE DOCUMENT

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

17.1.564 If the ditches and associated features were jurisdictional, a utility could be required to obtain a permit every time it constructed, repaired, or even maintained the right-of-way (e.g., through plant clearing or herbicide application). This would be unthinkably burdensome and costly. (p. 58)

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

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

US EPA ARCHIVE DOCUMENT

water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch. Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

17.1.565 If these ditches were declared WOTUS, there would be significant new regulatory burdens and cost impacts. Activities that involve dredging (i.e., sediment removal) or filling (e.g., culvert installation or building expansions) of any portion of the ditch system would require permitting and potential mitigation. Compliance with NPDES permitting obligations would be of particular concern. If the ditches of the stormwater drainage system were determined to be WOTUS, the compliance point(s) would move from where the water leaves the drainage system to all of the discrete points where the stormwater enters the ditch, increasing the cost and technical complexity of compliance, assuming it is possible to comply. Depending on how many internal discharges are made to a ditch prior to its current compliance discharge point, monitoring costs could increase exponentially, as each internal stream discharge into the ditch could require monitoring. Actual physical access to the newly located "outfalls" may be problematic. Even if access were possible, these new compliance points would impose numerous new requirements and associated new design, permitting, construction, and operational costs for facilities. These additional burdens would delay many routine types of maintenance and minor modification activities. (p. 64-65)

Agency Response: **See previous response. It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."**

17.1.566 The Proposed Rule Would Alter How the Electric Utility Industry Is Regulated Under the CWA, Resulting in Substantial New Burdens.

The Proposed Rule would have a substantial impact on the electric utility industry, specifically by requiring costly permitting and new regulatory compliance measures for many additional industry activities. The Proposed Rule would subject more projects and activities to CWA jurisdiction because more features would be deemed jurisdictional. For example, at generating stations, an ephemeral wash could be deemed jurisdictional even though the wash drains into a landfill collection pond, which in turn discharges through an NPDES-permitted outfall into a non-navigable stream. The wash would likely meet the broad proposed definition of "tributary," and the separation of the wash from traditional navigable waters by a man-made collection pond, a pipe, and a non-navigable stream would not break the jurisdictional connection. Thus, expansion of a solid waste facility to extend over the wash would require authorization and mitigation. One UWAG member reported an instance where the Corps insisted on treating a facility's stormwater ditches as jurisdictional streams despite production of evidence that the stormwater

US EPA ARCHIVE DOCUMENT

ditches were stormwater conveyances constructed wholly in uplands and draining into an upland pond. (p. 88)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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.

It is longstanding practice that non-jurisdictional geographic features may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to jurisdictional waters through these non-jurisdictional features would be subject to other CWA regulations (e.g., CWA section 402).

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States." Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

17.1.567 The sheer acreage of renewable projects can be very substantial, and make avoidance even more impracticable than at other smaller facility sites. A UWAG member with experience in wind generation in the Midwest estimates a footprint of approximately 93 acres of land is required to produce 1 megawatt ("MW") of electricity, meaning that a wind generation facility can be thousands of acres, with a 10,000-acre site being a representative benchmark for a commercial facility. A UWAG member with experience with solar development in the Southwest estimates that a footprint of approximately five acres of land is needed to generate 1 MW of electricity, meaning that a commercial solar generation site can easily be 4,000 to 5,000 acres in size. Consistent with that enormous land area, if a broader WOTUS definition is finalized (as proposed by the Agencies), project developers of renewable generation facilities in particular could face significantly increased permitting burdens and associated costs because they could impact large numbers of widely dispersed jurisdictional features. Most of these renewable projects currently do not require § 404 permits, or if they do, qualify for NWPs. That would likely change significantly under the Proposed Rule. (p. 90-91)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.568 More Activities Would Undergo Lengthier and Costlier Individual Permit Processes.

Projects that would qualify for relatively streamlined permitting processes under NWPs or regional general permits would be required to undergo lengthier and costlier individual permit procedures under the Proposed Rule because more features would be jurisdictional, thereby increasing the likelihood of exceeding NWP or regional general permit thresholds. Even those projects that still may qualify for NWPs or regional general permits are more likely to face heightened regulatory burdens. For example, NWP 12 (for utility line crossings) requires preconstruction notification if one of several conditions is met, including loss of more than 1/10 of an acre of WOTUS and several other conditions that are far more likely to be met if more areas are jurisdictional.[26]

[26] The seven named conditions are: "(1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a [Rivers and Harbors Act] section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials." Corps, 2012 Decision Document for Nationwide Permit 12, at 22 (2012), available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf. The last five conditions are all more likely to be met if the scope of WOTUS jurisdiction increases.

US EPA ARCHIVE DOCUMENT

Assume that a utility is building a transmission line that runs along a river and includes support structures placed in ditches that drain the utility corridor but that do not flow to the river or any other jurisdictional water, as well as support structures in the river at a crossing of the river. Under the current regulations, no CWA § 404 permit is needed except for the river crossing. Under the proposed WOTUS rule, however, the ditches might be jurisdictional "tributaries" simply because they contribute flow, even indirectly, to the river and have a bed and banks. (Even if not "tributaries," they could be "adjacent" waters because they are in the same floodplain as the river.) Appropriate mitigation would be required for ditch impacts. And the amount of impacts might be enough that the acreage limits for the applicable NWP may be reached, and an individual permit needed instead.

Additional examples of instances in which individual permitting burdens would be likely to develop include maintenance and repair of existing transmission facilities, new transmission and distribution facilities needed for grid upgrade or resiliency or connecting new generation sources (such as wind, solar, or other renewable projects) to the grid, and new substations or switch yards. If existing facilities are surrounded by newly-found WOTUS as a result of the Proposed Rule, routine maintenance will become anything but routine or cost-effective.

The costs of obtaining a § 404 permit rather than an NWP or other form of general permit can be significant. In a study published in 2002 (which therefore underestimates current costs), economists David Sunding and David Zilberman found that obtaining an individual permit on average took 788 days and cost $271,596, while obtaining an NWP took 313 days and cost $28,915. Those figures do not include mitigation or design change costs associated with permitting.[27] The study's authors found that overall costs to the public and private sectors of obtaining wetlands permits was more than $1.7 billion annually.[28] Many of these costs are passed to ratepayers. The more features that are jurisdictional, the less likely an NWP may be used.

Adjusting the 2002 figures for inflation through 2011, the costs according to the Sunding & Zilberman (2002) study would be $35,954 for an NWP and $337,577 for an individual permit. At least one UWAG member's practical experience regarding individual permitting is the cost figure for utility projects can reach $500,000, and the process can take about three years to complete. In the particular UWAG member's experience that served as the basis for those higher figures, the linear project was subject to NEPA consultation and required preparation of an Environmental Impact Statement.

Because of increased time associated with the individual permitting, as well as pre-and post-application evaluation, applicants are more likely to concede that a connection exists and that their project will impact WOTUS than to challenge the Agencies' assertion of jurisdiction and risk delaying the project timeline even further. These concessions are

[27] See supra p. 8. Mitigation costs can be substantial. One UWAG member recently surveyed Florida mitigation banks with available credits. On average, the average wetland mitigation cost per credit (which covers approximately one acre of impact) based on that analysis was $136,500.
[28] See Sunding & Zilberman (2002) at 81.

US EPA ARCHIVE DOCUMENT

likely to result in over-regulation and mitigation for many projects where the law and science would not support EPA/Corps jurisdiction.

Even with those concessions, however, a "fast" individual permit process still takes considerably more time than an NWP, and that additional time could hamper compliance with the numerous other regulatory deadlines that utilities now face in light of recent rulemakings. For example, one UWAG member, for projects related to the Mercury and Air Toxics Standards ("MATS") rule, was able to secure regional general permits under the current regulations, but if it had had to go through individual permitting, it could have been hard-pressed to meet the MATS compliance date. (p. 91-94)

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.569 Projects Would Face Greater Mitigation Costs.

To the extent that more electric utility projects and activities would be subject to CWA jurisdiction and associated lengthier and costlier individual permit procedures under the Proposed Rule, these projects and activities also would likely face greater mitigation costs because, with more deemed "impacts," greater mitigation responsibility will be imposed. (p. 94)

Agency Response: **See previous response. In the economic analysis supporting the final rule, the agencies estimate costs and benefits associated with an increase in individual and general 404 permits.**

17.1.570 Customer Service Could Suffer.

US EPA ARCHIVE DOCUMENT

The slower timeframe and increased implementation costs for utility projects because of the Proposed Rule in turn could hamper utility customer service. For example, nearly all electric lines are built along ditches or run through areas where there may be small natural depressions that hold water at some point during the year. Given the narrow ditch exclusions, many of these ditches would be jurisdictional under the Proposed Rule. When a storm knocks these lines down, in order to restore power, equipment often must operate in these ditches and other "wet" areas. If those features are jurisdictional, a utility would need to rely on an existing general permit (such as NWP 3 for maintenance and repair work or NWP 12 for utility lines) and comply with any associated preconstruction notification and wait periods (which can take weeks or longer to meet), obtain an individual permit, or risk violating the law. In turn, utilities could be forced to elevate an administrative process designed to protect ditches over acting in the best interest of their customers and the public to restore power quickly. (p. 96)

Agency Response: **The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.**

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

US EPA ARCHIVE DOCUMENT

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

17.1.571 The Risks and Costs of Increased Third Party Litigation Under This Unclear Proposed Rule Are Well-Documented and Substantial.

When agencies issue regulations that are plagued by uncertainty, that uncertainty increases the risk of third party litigation, such as citizen suits under CWA § 505 that seek to enforce against facilities for alleged "unlawful" CWA activities. By taking advantage of unclear language, creative suits can interpret language in ways that even the Agencies never intended.

This third party litigation comes at great cost to UWAG members and other industry parties, who may be forced to defend well-intentioned activities in the face of creative, but not implausible legal theories presented by plaintiffs about what the regulations should mean. These suits require resources, both time and money, that would be better spent on other projects, including environmental protection.

Already plaintiffs are using the language of the Proposed Rule and its extreme breadth, to bolster their position in pending litigation. For example, Galveston Baykeeper, Inc. filed suit against Trendmaker Homes, Inc. and Trendmaker Clear Lake, LLC on May 20, 2014 in federal district court in Texas.[29] In its complaint, Galveston Baykeeper alleges that the defendants failed to obtain a § 404 permit for construction activity, in violation of §§ 404 and 301(a). Galveston Baykeeper Complaint ¶¶ 1-2. The plaintiff asserts that the defendants' development activities have resulted in the discharge of fill materials into prairie potholes, which the plaintiff asserts are jurisdictional wetlands with a significant nexus to nearby bayous. Id. ¶ 14. In asserting that a "significant nexus" exists, plaintiffs assert that the potholes are "hydrologically and physically connected" to the bayous and are within the same 500-year floodplain. Id. ¶¶ 25-28. This explanation of "significant nexus" in essence adopts the definition of adjacent waters presented in the Proposed Rule. Compare id. ¶¶ 25-28 with Proposed 40 C.F.R. § 122.2(c), 79 Fed. Reg. at 22,268 col. 2 (definition of "adjacent" and related definitions).

The early use of the Proposed Rule's concepts, even before it is binding law, confirms that plaintiffs can and will use the rule's breadth to initiate new enforcement suits, which will come at great cost to developers, municipal and private parties, UWAG members, and other members of the industry community. Those expenses in turn would be passed on to ratepayers. (p. 96-97)

[29] Complaint, Galveston Baykeeper, Inc. v. Trendmaker Homes, Inc., Case No. 4:14-cv- 01500 (S.D. Tex. May 30, 2014) (hereinafter "Galveston Baykeeper Complaint").

US EPA ARCHIVE DOCUMENT

Agency Response: **The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).**

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

Association of American Railroads (Doc. #15018.1)

17.1.572 [T]he effect of the proposed rule on railroad construction and operations, and as a result on the national economy, will be substantial. This is due to the Agencies addition of ditches, riparian, and floodplain areas as Waters of the United States. (p. 3)

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

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

US EPA ARCHIVE DOCUMENT

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.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Jackson Family Wines (Doc. #15019)

17.1.573 In addition, the increase in the amount of waters that fall under federal jurisdiction under the Clean Water Act will make it difficult for many farmers and ranchers to comply without utilizing the services of attorneys and consultants, making farming the land even more costly and difficult. Farmers have a finite amount of money, making it difficult to spend money on third-party certified sustainability programs or conservation projects that contribute to protection of natural resources, which further demonstrates farmers' desires to be stewards of the land. We would rather spend money and energy on cooperative and collaborative actions that benefit the environment as opposed to more process. The adoption of the Proposed Rule will prove to be very costly — and take money from projects that further all of our goals. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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 recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

National Wildlife Federation (Doc. #15020)

17.1.574 This rigorous and transparent proposed rulemaking process offers the best opportunity in a generation to clarify which waters are – and are not – waters of the U.S. subject to the Clean Water Act in a manner that provides more clarity than ever before. This rulemaking is informed by over 30 years of agency field experience, by the most comprehensive synthesis of stream and wetland connectivity science ever compiled, and by well over one million public comments.

We urge the agencies to move expeditiously to finalize a strong final rule, consistent with the rule's foundations in the connectivity science, the goals of the Clean Water Act, and the Kennedy significant nexus jurisdictional standard. Until that final rule is in place, the 2003 and 2008 guidance documents and the lack of a clear jurisdictional standard for judicial review continue to require cumbersome, confusing, and resource intensive case-specific jurisdictional determinations. And millions of stream miles and wetland acres, drinking water supplies for 117 million Americans, healthy waters to support a healthy economy, and the effectiveness of the Clean Water Act itself all remain at risk. (p. 12)

Agency Response: **Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

Alaska Miners Association (Doc. #15027)

17.1.575 The fact is EPA and the Corps have proposed a rule that radically redefines Waters of the U.S., under any program regulated by the Clean Water Act. This redefinition broadens the scope of Clean Water Act jurisdiction much further than that has been set in statute by Congress and recognized by the United States Supreme Court. The legality of this is questionable at best, and likely to result in intervention by the legislative and judicial branches. The Clean Water Act was explicitly limited to Waters of the United States as they had been historically designated – expanding jurisdiction by regulatory fiat beyond the limits of the Act as determined by the legislative and judicial branches is simply unlawful.

In addition, the proposed rule ignores decisions set out in the Rapanos v United States Supreme Court case, in which Justice Kennedy outlined a "significant nexus" standard. The legal proceedings that have taken place regarding the Clean Water Act are the very reason the agencies cite for the need to redefine Waters of the U.S. If that indeed is the case, then the outcomes of the cases need to be implanted into this proposed rule. Instead, tenuous but sweeping connections are made from "adjacent" water features to any navigable water, ensuring that waters clearly not intended for regulation by the Clean Water Act now qualify for jurisdictional determination. This is in direct conflict with Justice Kennedy's opinion. It would also be useful for the agencies to actually address the issue of significant nexus in a meaningful way by providing field-usable standards

US EPA ARCHIVE DOCUMENT

determining the difference between significant connections and mere connections. That EPA published this proposed rule in advance of the science being conducted to support the rule change being finalized is appalling.

The EPA and Corps argument that future "uncertainty" will be avoided, and the states and public be spared tedious case-by-case determination by widening the definition of waters of the U.S. is certainly true, but disingenuous. All certainty and discussion would be avoided by redefining every drop of surface water in the United States as "jurisdictional," but that is hardly the intent of the Rapanos decision.

Legal issues aside, AMA remains gravely concerned about the proposed rule. Our major concern lies is the lack of clarity throughout the document. Definitions of numerous key terms and concepts, like waters, floodplain, wetlands, subsurface connection, etc. are ambiguous and unclear. Without explicit definition of all technical and enforceable terms, we are left with an unpredictable and confusing proposed rule. Both agencies have hosted many public forums in which stakeholders have posed questions about the rule, and in many cases, the agencies could not provide definitions, or responded that the intent of the proposed rule is not captured in its language. The agencies must publish, communicate, and implement clear definitions of every single element within the proposed rule.

By its terms (or lack thereof), the proposed rule expands jurisdiction to waters, except decorative ponds, not previously regulated under the Clean Water Act, such as drainages, ditches, floodplain areas, industrial ponds, and more. These are not intended to be covered under the Act. Doing so will result in fundamental changes to many programs already being implemented under the Act, and we stand concerned that the agencies have not adequately considered the implications of doing so. (p. 1-2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.**

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

US EPA ARCHIVE DOCUMENT

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.

More specifically, the agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Edison Electric Institute (Doc. #15032)

17.1.576 As proposed, the agencies' broad assertion of jurisdiction would subject many more projects and activities undertaken by EEI members to CWA jurisdiction, and would mean that projects that otherwise would have qualified for relatively streamlined permitting processes under nationwide or regional general permits would be required to undergo lengthier and costlier individual permit procedures and face various other costs and uncertainty because more features will be deemed jurisdictional. These impacts would affect utilities and their customers, and are inconsistent with the Administration's stated goals of promoting grid resiliency, generating power from lower emitting generating sources, constructing new infrastructure including renewable generation, and streamlining regulations and the permitting process. (p. 3)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.577 [T]he proposed rule would directly impact the construction, operation, and maintenance of the nation's electric generation, transmission, and distribution infrastructure-infrastructure that is critical for providing affordable and reliable electricity to homes, businesses, towns, and government throughout the country. The electric utility industry is quickly transitioning toward low emission generation sources, including wind and solar, to meet some of this demand. These projects often require miles of new transmission lines to connect to the grid, meaning both the facility and its transmission lines are likely to face added costs and delays described above. To provide clean, reliable baseload power, electric utilities also increasingly look to new natural gas generation plants. But building these new facilities and their infrastructure is now more likely to face substantially greater costs and delays if the proposed rule is promulgated. The proposed rule would likely have negative impacts on electric utilities of all sizes by: (1) hindering generation from domestic sources of energy; (2) delaying critical electric transmission line projects, thereby affecting grid reliability and resiliency; and (3) delaying the decommissioning and restoration of former utility sites. (p. 18-19)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and will reduce the need for permitting authorities, including the

US EPA ARCHIVE DOCUMENT

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

17.1.578 The proposed rule would assert jurisdiction over such features where an agency official determines that he or she can discern a bed, bank and ordinary high water mark (OHWM). As has been noted by many, including Justice Kennedy, the identification of an OHWM is highly subjective and inconsistent.[30] As a result, the construction, operation, maintenance, and repair of transmission and distribution structures would more often require expensive and time-consuming individual section 404 permits—a significant new burden with little or no corresponding environmental benefit. These burdens could reduce or eliminate the economic viability of many energy projects. (p. 24-25)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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.

[30] 547 U.S. at 781. Even the Corps recognizes this problem. *See* Matthew K. Mersel, Development of National OHWM Delineation Technical Guidance, Engineer Research and Development Center (March 4, 2014).

US EPA ARCHIVE DOCUMENT

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

17.1.579 There is a strong national interest in a reliable and resilient electric transmission and distribution grid. The White House Rapid Response Team for Transmission has recognized the need for streamlined permitting of electric transmission projects. By undercutting the ability to rely on NWP 12, the proposed rule would run counter to this national interest. (p. 26)

<u>Agency Response:</u> Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations

US EPA ARCHIVE DOCUMENT

that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

17.1.580 If under the proposed rule, additional portions of rights-of-way were considered to contain waters of the U.S., utilities would more often need a permit to spray herbicides for weed control or to conduct other forms of right-of-way maintenance, triggered by the assertion of federal jurisdiction. EPA and states have issued general permits for weed control, but if you spray more than 20 linear miles, there are added burdens. And, if the area is considered to contain a water of the U.S. or potential habitat for threatened or endangered species, there are even more requirements. Similarly, utilities maintain the property around generating facilities and transfer stations. Using herbicides in these areas will give rise to the same issues.[31]

Thus, the broad expansion of what is considered a water of the U.S. under the proposed rule would significantly affect the ability of EEI members to construct, operate, and maintain electric generation, transmission, delivery, and related facilities and to rely on the lands, rights-of-way, and facilities they own to generate, transmit, and deliver electricity to their customers. All of these impacts will delay energy development, increase uncertainty, pose potential reliability risks, and increase the cost of electricity for consumers. (p. 26-27)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and will reduce the need for permitting authorities, including the

[31] See, e.g., EPA's Pesticide General Permit, 76 Fed. Reg. 68750 (Nov. 7, 2011).

US EPA ARCHIVE DOCUMENT

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

A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

Colorado Agricultural Aviation Association (Doc. #15033)

17.1.581 We believe the proposed rule would further challenge the timely use of FIFRA-registered pesticide products for pest control in crops and forests by creating confusion and legal jeopardy for aerial applicators and their clients, not to mention all the other segments of society likely to be affected by the rule. Due to the life cycles of pests, generally there is only a small window of time to make successful control applications; aerial application is the only method to achieve coverage of the necessary acreage in such a compressed time period. Timely pest-control efforts will be hampered by the proposed rule, as aerial applicators and their customers work to identify newly-defined jurisdictional waters and properly adjust pesticide applications to comply with product label restrictions and PGP requirements. (p. 5)

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

The rule does not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

US EPA ARCHIVE DOCUMENT

California State Assembly, District 17 et al. (Doc. #15035)

17.1.582 As local and state decision makers, we know that broad federal protections are critical to protecting our local waters. Water flows downhill, and each of the lower 48 states have water bodies that are downstream of one or more other states. Maintaining consistency among water pollution programs throughout these states is essential. Since the passage of the Clean Water Act, California has come to rely on the Act's core provisions and have structured our own water pollution programs accordingly. We support the draft rule's proposal to restore Clean Water Act protection to all tributaries of navigable waterways. Failure to do so would jeopardize water quality in our larger riversheds and estuaries. It would also put at risk the millions of dollars and thousands of jobs generated by water related tourism activities and other businesses that are dependent on clean water supplies.

This commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade and better protection for critical water resources on which our communities depend. We strongly support finalization of Definition of "Waters of the United States Under the Clean Water Act." (p. 1-2)

Agency Response: **Thank you for your support. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

Institute of Scrap Recycling Industries, Inc. (Doc. #15041)

17.1.583 To summarize ISRI's comments, the proposed definition of "waters of the United States" in the Proposed Rule entails sufficient uncertainty that, besides being less clear than the existing definition, it would likely give rise to surprising regulatory outcomes neither expected nor intended by Congress via the Clean Water Act. Such surprising regulatory outcomes could also lead to pointless and unnecessary additional regulation, which would also waste EPA's limited resources. For this reason, the proposed definition is flawed and needs to be revised. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

US EPA ARCHIVE DOCUMENT

The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.584 While it is unlikely that the proposed definition of "waters of the U.S." in the Proposed Rule would change substantially the set of industry facilities required to have and to operate in accordance with an NPDES permit or an SPCC plan, the proposed definition and the uncertainties associated with it, if finalized as proposed, could lead to surprising regulatory outcomes. Such surprising outcomes would not likely be what Congress either intended or expected when crafting the CWA, and the possibility of these surprising outcomes would suggest that the proposed definition is flawed. How such surprising and unintended outcomes could arise from the proposed definition and possible remedies to correct its flaws are discussed in the following section. (p. 2)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

Iowa Environmental Council (Doc. #15042)

17.1.585 Iowans recognize the value of clean water. Over 600,000 Iowans are dependent on public water supply systems that depend on small headwater or intermittent streams. Our state sees over $1.5 billion dollars of wildlife-related recreation spending every year. We want action to protect our water resources. The proposed rule will strengthen the Clean Water Act's scientific and legal foundation and protect the critically important streams and wetlands that Iowans rely on. (p. 2)

Agency Response: **Thank you for your support. The agencies agree. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Great Lakes Indian Fish and Wildlife Commission (Doc. #15048)

17.1.586 As the EPA and the Corps finalize and implement this rule, it bears remembering that the federal government owes particular treaty and trust obligations to GLIFWC's member tribes. This includes the obligation to consult when jurisdictional determinations are made in the ceded territories described above. Tribes may have specific traditional knowledge or other information about certain waterbodies that would aid in the determination of a significant nexus; whether the nexus is purely physical, chemical or biological, or whether the nexus can be based on a connection to interstate or foreign commerce. In addition, tribal interest in a particular waterbody or wetland may counsel the assertion of jurisdiction by the federal government. First, the consequences of a jurisdictional determination may impact a tribe's treaty reserved hunting, fishing or gathering rights, rights that the US government has an obligation to protect. Second, as discussed above, the tribal use of a waterbody to provide resources that may enter into interstate comment should factor into jurisdictional determinations. (p. 4)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states**

US EPA ARCHIVE DOCUMENT

and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

Hawkes Company (Doc. #15057)

17.1.587 The Proposed Bill Lacks Full Congressional Support

Many members of Congress have publicly opposed the proposed rule, seeing it at "outside of the EPA's authority and overly burdensome." Like other concerned groups, members of Congress see the proposal as an overreach of the EPA's authority that could have terrible consequences for the American public. One Senator notes: "[t]his proposed rule appears to be a massive federal water grab that will cost land owners, ranchers and small business owners thousands in permitting fees and compliance costs." Additionally, an Alaskan Senator noted that "[i]f the EPA is not careful, this rule could effectively give the federal government control of nearly all of our state."[32]

The concerns of the legislative branch are not exclusive to congressional representatives. Those representatives are voicing the concerns of their constituents. This proposal is a gross overreach by the EPA and Corps, which has created a bipartisan split in Washington. The agencies must address the concerns of the politicians and their constituents instead of adopting a potentially harmful rule. By gaining more bipartisan support, the agencies will appease more stakeholders in the process, potentially shifting the burden away from specific small businesses and other small constituencies.[33] (p. 3)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. Pollution threatens these economic drivers and we all know the dangers of pollution upstream: water flows downstream and carries pollutants with it. Right now, many streams and

[32] Amena H. Saiyid, House Republicans ClaimMost Lawmakers Oppose Proposed Water Jurisdiction Rule, Bloomberg Law (May 5, 2014).
[33] *Id.*

US EPA ARCHIVE DOCUMENT

wetlands lack clear protection from pollution and destruction. One in 3 Americans, 117 million of us, get our drinking water from streams that are vulnerable. Sixty percent of the nation's stream miles – the vital headwaters that flow downstream after rain or in certain seasons – aren't clearly protected. Millions of acres of wetlands that trap floodwaters, remove pollution, and provide habitat for fish and wildlife are at risk.

The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

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

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal

US EPA ARCHIVE DOCUMENT

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.

National Mining Association (Doc. #15059)

17.1.588 The Agencies maintain in the preamble that the "scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations,"[34] and they have publicly disclaimed any intent to regulate new categories of waters.[35] Indeed, discussions between NMA members and the Agencies have led NMA to the understanding that the Agencies do not intend to expand the definition of "waters of the United States" to encompass currently non-jurisdictional on-site or ephemeral waters. NMA is nevertheless concerned that the rulemaking language is not precise enough to ensure that the agencies stated intentions are fulfilled, nor to provide the clarity which the Agencies seek to establish.

In particular, NMA is troubled by the breadth and ambiguity of the definitions in the proposed rule, which could be misconstrued as encompassing previously non-jurisdictional waters and treatment systems on mine sites across the country. NMA is likewise concerned about the potential for improper expansion of jurisdiction over certain marginal ephemeral features, the regulation of which would do little to advance the objectives of the CWA.

Such outcomes could subject mining operations to onerous administrative or judicial proceedings in which mining companies bear the burden of disproving jurisdiction over water features that the Agencies do not even intend to include within the scope of "waters of the United States." Mining companies would also be faced with substantial implementation challenges not anticipated or intended by the Agencies. Furthermore, such definitional ambiguities could force the Agencies to waste resources by having to clarify their intent through amicus briefs during protracted litigation. To avoid these unintended consequences, NMA hereby urges the Agencies to revise the proposed rule to ensure that previously non-jurisdictional water features and on-site treatment systems remain specifically excluded from the definition of "waters of the United States," and to provide greater clarity concerning the scope of CWA jurisdiction over non-perennial streams. (p. 2)

Agency Response: **The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap**

[34] 79 Fed. Reg. at 22,218.

[35] See House Transportation and Infrastructure Water Resources and Environment Subcommittee, Hearing on the CWA Jurisdictional Rule, Panel 1, 113th Cong., 19-20 (June 11, 2014) (statements of Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, and Deputy Administrators of the U.S. EPA, Bob Perciasepe).

US EPA ARCHIVE DOCUMENT

floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

National Mining Association (Doc. #15059.1)

17.1.589 OHWM (along with a bed and bank) is used to define the presence of all tributaries including ephemeral and intermittent waters that contribute flow to an (a)(1) through (a)(4) water (page 22,218 of the Proposed Rule). However, GEI notes there is a significant amount of ambiguity in the kinds of features that are used to define OHWM and, hence, distinguish between ephemeral channels and erosional features such as gullies and rills. Given that the USEPA and ACOE specifically request help with developing more clarity for distinguishing between erosional features and ephemeral channels, this memorandum explores the difficulties in clearly making such a distinction by relying on bright line indicators. GEI also recommends additional considerations that could be used to provide more clarity, and make identifying erosional features excluded from jurisdiction in the proposed rule more straightforward and scientifically defensible. Our analysis relies primarily on our review of the ACOE's recently released technical guidance on identifying OHWM in non-perennial streams.[36] (p. 1)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

[36] Mersel K. Matthew, et al., August 2014, "A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark Classification"; "A Guide to Ordinary High Water Mark Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coastal Region of the United States."

US EPA ARCHIVE DOCUMENT

The agencies plan to develop further implementation guidance and conduct training following the release of the rule.

Arizona Farm Bureau Federation (Doc. #15064)

17.1.590 The EPA has made the claim that agricultural exemptions included in the rule are sufficient to keep Arizona's agriculture unaffected. This is simply not true. The exemptions are narrow, do not apply to many normal farming and ranching activities, only apply to farms and ranches in existence since 1977, and create a regulatory framework for conservation standards previously voluntary. It should be noted that the conservation practice standards of the Natural Resource Conservation Service are Cadillac standards and workable only under Farm Bill programs because there is a cost share available to assist with implementation. (p. 3)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).**

Montana-Dakota Utilities (Doc. #15066)

17.1.591 Montana- Dakota engages in activities on land and water; any change in CWA regulations that would change the scope of federal jurisdiction will have a substantial effect on our ability to finance and develop new projects or perform maintenance to maintain existing infrastructure and facilities. Our construction and maintenance operations often require various permits under the CWA and the agencies' proposed expansion of jurisdiction will result in additional permit obligations for all CWA programs. Montana- Dakota has obtained (and currently holds) permits and realizes the brunt of the requirements will increase time and cost of projects and could impact reliability if projects cannot be reasonably approved and timely approved. These burdens on our system will eventually be realized by our customers.

Montana-Dakota is active in a variety of areas that will be impacted by the proposed rule. Some of these are:

New Activities Impacted by Proposed WOTUS Rule

- Existing and new generating facilities (all fuels including wind and solar)New building sites or equipment storage sites
- New roads or rail extensions
- New gas or oil infrastructure (pipelines)
- Waste disposal areas (new or expanded)
- Increased points of compliance as more water features are deemed WOTUS (e.g., discharge canals, storm drains, storm water management ponds, or other waste treatment)

US EPA ARCHIVE DOCUMENT

- Reclassifications to WOTUS (e.g., raw water impoundments or other water management features)
- Additional spill prevention control and countermeasure (SPCC) planning and implementation requirements as nearby water features become WOTUS

Transmission & Distribution

- Existing and new transmission and distribution facilities
- New transmission towers & pads; distribution poles
- New Rights-of-Way (ROW) access roads for construction, operations & maintenance
- New or expanded substations
- Rights-of-Way Management
- Vegetation Management

Facility decommissioning

- Filling intake and discharge channels
- Grading, material laydown, fencing

Other Impacts

- New regulatory proceedings as state and federal authorities conduct standard-setting efforts for newly classified WOTUS

Activities Requiring Individual (vs. Nationwide) Permits; Long, Expensive Process

- Maintenance, repair, or upgrade of existing transmission facilities (e.g., new substations or switch yards) as a result of exceeding Nationwide Permit (NWP) thresholds;
- New T&D construction for grid hardening, resiliency and connecting new generation sources (e.g., wind, solar or other renewable projects) to the grid. (p. 2-3)

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

US EPA ARCHIVE DOCUMENT

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

American Electric Power (Doc. #15079)

17.1.592 AEP's planned expansion, maintenance and development of its transmission system means that more and more water bodies could be affected by such activities as transmission tower/line installations and necessary maintenance of right-of-way corridors. This rule will also directly affect generation sites, including power plants, fuel procurement locations and renewable energy facilities such as solar and wind farms. Other areas of land used by AEP to provide products and services will also be impacted by the proposed regulation. Permitting and compliance costs to address the proposed rule's regulatory requirements would result in delays to adding new electric power to the grid, which is necessary to meet the electric power needs of a growing population, and to increase the presence of renewable power supplies. (p. 2-3)

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of

US EPA ARCHIVE DOCUMENT

ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

United States Senate (Doc. #15083)

17.1.593 Bias Factor #1: The Obama Administration Claims That the Proposed "Waters of the United States" Rule Responds to Prior Requests for a Clean Water Act Rulemaking.

EPA has repeatedly claimed that the proposed "waters of the United States" rule responds to various requests for the agency to clarify the scope of Clean Water Act jurisdiction. Likewise, the Administration stated last month that the proposed rule "is responsive to calls for rulemaking from Congress, industry, and community stakeholders as well as decisions of the U.S. Supreme Court."[37]

Such assertions are wholly misleading. A request for a regulatory clarification does not provide a license to run roughshod over the property rights of millions of Americans. Yet the Obama Administration has used prior rulemaking requests as an excuse to unilaterally advance a regulatory agenda that defies the jurisdictional limits established by Congress when it enacted the Clean Water Act in 1972.

In fact, the proposed rule would harm the very landowners, small businesses, and municipalities that expressed interest in working with EPA and the Corps to address Clean Water Act jurisdictional issues. Thus, rather than respond to requests for a rulemaking, the proposed rule serves as an example for why so few Americans trust EPA.

Bias Factor #2: The Obama Administration Insinuates That Opposition to the Proposed Rule Is Equivalent to Opposition to Clean Water.

When EPA Administrator Gina McCarthy announced the proposed "waters of the United States" rule last March, she professed that the proposed rule "clarifies which waters are protected, and which waters are not."[38] Similarly, EPA's Office of Water has suggested that those who "choose clean water" should support the proposed rule.[39]

[37] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy re: H.R. 5078 (Sept. 8, 2014).
[38] U.S. Environmental Protection Agency, *EPA Administrator Gina McCarthy Gives an Overview of EPA's Clean Water Act Rule Proposal*, YouTube (Mar. 25. 2014) http://www.youtube.com/watch?v=ow-n8zZuDYc.
[39] Travis Loop, *Do You Choose Clean Water?*, Greenversations: An Official Blog of the U.S. EPA Sept. 9, 2014),

US EPA ARCHIVE DOCUMENT

These statements insinuate that the proposed rule's critics oppose clean water. This is an insulting ploy that belies the numerous efforts made in recent years by agriculture, industry, and local officials to improve water quality throughout the country. It ignores the fact that nonfederal waterbodies are subject to local and state water quality regulations. Moreover, the Clean Water Act's emphasis that "[i]t is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution" negates the canard that choosing clean water requires acceding to unlimited federal regulatory authority.[40]

Bias Factor #3: EPA Has Attempted to Delegitimize Questions and Concerns Surrounding the Proposed Rule.

Administrator McCarthy has described certain questions regarding the proposed rule as "ludicrous" and "silly."[41] Stakeholders have also observed how EPA officials have responded to concerns over the proposed rule with misrepresentations and a "knock on their intelligence."[42]

EPA's disparaging of the proposed rule's critics serves no one. If EPA believes concerns with the proposed rule are unwarranted, the appropriate course of action would be for the agency to respond formally in the context of the notice and comment procedures accompanying the current rulemaking. Belittling the proposal's critics only furthers the impression that EPA has predetermined the outcome of the "waters of the United States" rulemaking.

Bias Factor #4: EPA and the Corps Have Blatantly Misrepresented the Impacts of Increased Clean Water Act Jurisdiction.

EPA and the Corps have attempted to downplay the substantial outcry over the proposed “waters of the United States" rule as well as the prospect of federalizing thousands of ditches, ponds, streams, and other waterbodies. They have done so by claiming that the impacts associated with increased Clean Water Act jurisdiction are insignificant.

For example, EPA claims the proposed rule "would not infringe on private property rights," and that the Clean Water Act" is not a barrier to economic development."[43] The Corps has also stated that "when privately-owned aquatic areas are subject to Clean Water Act jurisdiction . . . [that] results in little or no interference with the landowner's use of his or her land."[44]

---

http://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/.

[40] Federal Water Pollution Control Act § 101, 33 U.S.C. § 1251 (emphasis added)

[41] Chris Adams, *EPA Sets Out to Explain Water Rule That’s Riled U.S. Farm Interests,* News & Observer (July 9, 2014), http://www.newsobserver.com/2014/07/09/3995009/epa-sets-out-to-explain-water.html.

[42] Letter from J. Mark Ward, Senior Policy Analyst and General Counsel, Utah Assoc. of Counties, to Gina McCarthy and Bob Perciasepe, U.S. Environmental Protection Agency (July 18, 20 14), available at http://kfb.org/Assets/uploads/images/capitolgovernment/utahassocofcountiesepa71814.pdf.

[43] U.S. Environmental Protection Agency, Facts About the Waters of the U.S. Proposal, http://www2.epa.gov/sites/production/files/2014- 09/documents/facts_about_wotus.pdf.

[44] *Finding Cooperative Solutions to Environmental Concerns with the Conowingo Dam to Improve the Health of the Chesapeake Boy: Hearing Before the Subcomm. on Water and Wildlife of the S. Comm. on Environment & Public Works*, 113 Cong. 19 (20 14) (Corps response to question for the record, on file with Senator David Vitter).

US EPA ARCHIVE DOCUMENT

These assertions strain credulity. Given the history of regulatory and land use issues associated with the Clean Water Act (including numerous congressional hearings, Supreme Court cases, and real world examples of costs and hardship resulting from affirmative jurisdictional determinations), it is astonishing that any federal agency would claim that a designation of private property as "waters of the United States" does not affect the landowner's property rights.

That such statements have come from EPA and the Corps suggests that the agencies either don't appreciate the real-world impacts of the law they're charged with administering, or they are intentionally trying to minimize the effect of the proposed rule. It is likewise not surprising that SBA, an expert agency charged with representing the views of small entities before federal agencies and Congress, has also critiqued the manner in which EPA and the Corps have estimated the proposed rule's impacts.[45] (p. 2-4)

<u>Agency Response:</u> EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

The agencies updated the economic analysis supporting the rule based on the final rule policies. The agencies evaluated costs and benefits to CWA programs that would result from this rule. The baseline for comparison is 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.

[45] See SBA Letter, *supra* n.1.

US EPA ARCHIVE DOCUMENT

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.

Fresno County Farm Bureau (Doc. #15085)

17.1.594 The Proposed Rule would confer federal control over all but the most remote and unconnected waters-including countless features that are much more like land than water. Neither Congress nor recent U.S. Supreme Court cases give the Agencies that authority.

By expanding the number of waters deemed jurisdictional, more farmers and ranchers may face enforcement and citizen lawsuits. Third-party lawsuits have become the new norm for regulating farmers. Even when farmers protect water quality and comply with the law, they could be forced to defend themselves in court.

Under the Proposed Rule, farmers, ranchers, and other landowners would face tremendous roadblocks to ordinary land-use activities, from building a fence to treating for or pulling weeds to controlling insects. These "roadblocks" are both costly and time consuming. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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 recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this proposal affect private property rights.

State of Missouri (Doc. #15091)

17.1.595 As the Supreme Court explained in *Solid Waste Agency*, Congress intended to preserve the States' historical primacy over the management and regulation of intrastate water and land management when it enacted the Clean Water Act, expressly requiring federal agencies to "recognize, preserve, and protect the *primary responsibilities and rights of States*…to plan the development and use…of land and water resources…" 33 U. S. C. § 1251(b) (emphasis added). The Proposed Rule is inconsistent with Congressional intent and should be revised. (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.**

Harris County Attorney's Office (Doc. #15097)

17.1.596 Since stormwater activities are not explicitly exempt under the Proposed Rule, Harris County is concerned that MS4 ditches could now be classified as Waters of the U.S. Harris County owns MS4 infrastructures including ditches, channels, and storm sewers that flow into a Water of the U.S. and are therefore regulated under the Texas Pollutant Discharge Elimination System Permitting Program, a State of Texas, EPA approved CWA Section 402 stormwater permitting program. (p. 3)

Agency Response: **The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.**

Luminant (Doc. #15100)

17.1.597 As proposed, the Proposed Rule would substantially broaden what constitutes federally protected waters of the United States, potentially changing historically non-jurisdictional surface water to jurisdictional, and would significantly increase the federal government's authority over state and privately held water resources. This would cause significant delays and increased costs of permitting and compliance in all stages of mining and reclamation operations nationwide, as well as the construction and management of water resources for power generation purposes, and therefore carries substantial implications for Luminant's surface coal mining operations and coal-fueled electric generation in Texas, without corresponding environmental benefit. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

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

Coalition of Alabama Waterways (Doc. #15101)

17.1.598 CAWA joins a clear, bipartisan majority of the members of both Houses of Congress in opposing the Proposed Rule in its current form. The agencies' proposal misconstrues the "significant nexus" test articulated in Justice Kennedy's concurring opinion in Rapanos in a manner that impermissibly expands CWA jurisdiction. The Proposed Rule contains sweeping and vague definitions of "adjacent," "tributary," and other terms. In these and other ways, the proposal creates new, overbroad categories of jurisdictional areas that lack a significant nexus to traditionally navigable waters. In so doing, the proposal violates the law as established by Rapanos. (p. 1)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule provides greater clarity regarding what waters are subject to CWA jurisdiction and 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' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features

US EPA ARCHIVE DOCUMENT

not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

Board of Commissioners, Phillips County, Montana (Doc. #15102)

17.1.599 Whereas, County owned and maintained infrastructure such as bridges, roads and ditches will also be negatively affected by the proposed rule change, if adopted. (p. 2)

Agency Response: Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly

US EPA ARCHIVE DOCUMENT

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

Texas Association of Counties (Doc. #15106)

17.1.600 The proposed rule would modify existing regulations, which have been in place for over two decades, regarding which waters fall under federal jurisdiction through the Clean Water Act. Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally regulated and subject to new rules or standards.

The rule proposal could also potentially increase the number of county-owned ditches under federal regulation. It would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.

The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject county governments to increasingly complex and costly federal regulatory requirements under the proposed rule which

US EPA ARCHIVE DOCUMENT

impacts local stormwater and pesticide application programs, state water quality standards designations, green infrastructure and water reuse.

Additionally, key terms used in the proposed regulation-tributary, adjacent waters, riparian areas, flood plains, and even ditch exemptions on uplands and flow-are unclear. It is uncertain how these definitions will be used to effectively implement various CWA programs. (p. 1-2)

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

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

US EPA ARCHIVE DOCUMENT

National Association of State Aquaculture Coordinators (Doc. #15111)

17.1.601 We feel this rule, if implemented as stated, will restrict current operations, prohibit the future growth of the US Aquaculture industry and severely limit all of agriculture. Water is quickly becoming a limited, precious resource, and we agree there is an emphatic need to conserve and protect. However, prohibiting water use will be detrimental to the agriculture community including its economic vitality and that of all support industries which in turn will affect consumers. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Mountain States Legal Foundation (Doc. #15113)

17.1.602 Moreover, MSLF has members in all 50 states. MSLF's members have a tangible interest in the Proposed Rule. Many of these members' livelihoods depend on the continued development of minerals, oil and gas, timber, livestock, agricultural products, and commercial and residential real estate. Many of these activities require the use of water resources that could be impacted by the regulatory authority asserted in the Proposed Rule. The sweeping breadth of the Proposed Rule could impact even those activities that do not directly affect federally regulated waters. Accordingly, MSLF respectfully submits these comments, urging the EPA and the Corps (collectively "the agencies") to abandon the dramatic expansion of CWA jurisdiction asserted in the Proposed Rule. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Northern Colorado Water Conservancy District, Berthoud, Colorado (Doc. #15114)

17.1.603 Colorado and the arid West would be at the center of much of the increase in jurisdiction. We are most concerned with the increased regulatory burdens that this would impose on critical water storage and conveyance facilities that need to undergo construction, repair, maintenance and improvement. Essential water projects have been significantly delayed in Colorado due to NEPA compliance associated with the federal permitting process. The proposed rule would place increased reliance on the use of CWA 404 exemptions and Nationwide Permits to get needed work done. This is not an adequate solution, however. While the CWA 404 exemptions are helpful in allowing

US EPA ARCHIVE DOCUMENT

certain (primarily agricultural-related) work to occur on a timely basis, those exemptions are narrowly construed, do not cover most municipal-related work, and are frequently rendered unavailable due to application of the "recapture" provision under the law that can require otherwise exempt activities to obtain a permit. And while the CWA 404 Nationwide Permit Program is designed to provide a more simplified and streamlined process for certain activities with minor impacts, that program has become more limited and conditioned over time. As such, it not a reliable vehicle to address the long-term concerns of additional costs and delay associated with increased CWA jurisdiction. (p. 10)

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

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

American Petroleum Institute (Doc. #15115)

17.1.604 In May 2011 the Agencies issued a Notice of Availability of a comprehensive guidance concerning the extent of federal jurisdiction under the Clean Water Act (CWA) (76 Fed. Reg. 24479, May 2, 2011). In this Notice of Availability, the Agencies stated the guidance was intended to improve clarity and predictability in making jurisdictional determinations subsequent to two Supreme Court decisions, *SWANCC v. Army Corps of Engineers*[46] and *Rapanos v. United States*.[47] In API's comments submitted in response to the Notice (July 31, 2011 letter to EPA Docket # EPA-HQ-OW-2011-0409), API discussed in detail the unwarranted expansion of federal jurisdiction the guidance would

[46] 531 U.S. 159 (2001)
[47] 547 U.S. 715 (2006)

US EPA ARCHIVE DOCUMENT

constitute and how the guidance, far from affording regulatory clarity added layers of confusion and uncertainty. Moreover API pointed out that if federal jurisdiction under the CWA is to be expanded, the Agencies have an obligation to propose that expansion through notice-and-comment rulemaking rather than through mere issuance of non-legally binding guidance.

In subsequently withdrawing the guidance and issuing the 2014 Proposed Rule, the Agencies have indeed pursued notice-and-comment rulemaking consistent with API's recommendation; unfortunately, the 2014 Proposed Rule is not dissimilar from the guidance, likewise constituting an unwarranted expansion of federal jurisdiction. The 2014 Proposed Rule is confusing and complex to implement, applies many technical terms without regulatory definition, and is apparently arbitrary in its constraints and vague in its exemptions, so that virtually any land feature that retains water for any period of time could be found jurisdictional by its tenets. API does not believe the 2014 Proposed Rule is consistent with either of the two Supreme Court decisions or with the intent of Congress in the CWA. API recommends the Agencies withdraw the 2014 Proposed Rule, address its many deficiencies and ambiguities, and subsequently issue a technically supported rule that does not expand federal jurisdiction and is truly consistent with the constraints on federal jurisdiction imposed by the two Supreme Court decisions. (p. 2)

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

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

US EPA ARCHIVE DOCUMENT

Colorado Wildlife Federation (Doc. #15119)

17.1.605 We view this proposed rule as essential because Colorado's streams are indispensable for providing water for public drinking supplies, irrigation, livestock, industry, outdoor recreation, and fish and wildlife resources. Headwater streams also provide important spawning and rearing habitat for fish and significantly contribute to the water quality downstream. Waterfowl in Colorado rely on wetlands for breeding and during migration. (p. 1)

Agency Response: **Thank you for your support. The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al (Doc. #15123)

17.1.606 In addition to their prevalence and importance as a drinking water source, headwaters are an important economic driver. Each year, millions of people within the Mississippi River Basin pursue water-dependent recreational activities. Protecting small streams and headwaters supports this large sector of the economy. These are two examples from our states:

US EPA ARCHIVE DOCUMENT

- "In 2001, Missouri anglers' retail purchases of fishing-related items totaled $832,776,355. Those purchases helped fund approximately 15,000 jobs in the state. These purchases also generated more than $14,100,000 in state income tax and $57,714,000 in federal income tax revenues. The revenue that Missouri generates from water-related tourism, such as floating, fishing, and duck-hunting, is dependent upon the quality of those waters, which are dependent upon the quality of connected wetlands and the intermittent headwaters that feed them."[48]
- The majority of Tennessee's trout streams are not traditionally navigable streams. In fact, the vast majority of Tennessee's aquatic biological diversity, including state and federally threatened and endangered species, occurs in non-navigable streams as traditionally protected by the Act.[49] (p. 6)

Agency Response: **Thank you for your support. The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems

[48] Missouri Department of Natural Resources, Comments on "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'" Docket ID OW-2002-0050, at p-4 (Mar. 5, 2003).
[49] Tennessee Wildlife Resources Agency, Comments on "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'" Docket ID OW-2002-0050 at p- 2-3 (Feb. 26, 2003).

US EPA ARCHIVE DOCUMENT

that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

Nebraska Public Power District (Doc. #15126)

17.1.607 EPA and the Corps will exercise more regulatory authority over all intrastate waters, including, for example, waters now considered entirely under state jurisdiction. Enormous resources will be needed to expand and defend the federal regulatory program, exacerbating an existing CWA funding gap and leading to longer permitting delays.

Increased delays in securing permits will raise costs of and impede many economic activities including but not limited to: commercial and residential real estate development, agriculture, electric transmission, transportation, and mining all will be affected.

An expanded federal water program would impose an unfunded mandate on States by increasing the number of waters subject to water quality standards, effluent limitation guidelines, the setting of Total Maximum Daily Loads (TMDLs), and expanding the permitting workload under various aspects of state-administered programs. (p. 3)

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

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

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and

US EPA ARCHIVE DOCUMENT

standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

17.1.608 The impact of the proposed rule on NPPD activities relates to Cooper Nuclear Station (CNS). CNS is located within the Missouri River floodplain. Construction activities are already covered by a regulatory program through the floodplain occupancy permit program. If the proposed rule is adopted then any construction activity will be subject to 404 permitting as well. This will cause delays in the completion of construction projects and potentially jeopardize nuclear safety and security. (p. 4)

<u>Agency Response:</u> The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose

US EPA ARCHIVE DOCUMENT

of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information. The rule also does not affect or modify existing statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding practice, these exempt activities do not change the jurisdictional status of the water body as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters.

American Forests et al. (Doc. #15132)

17.1.609 The economic engine of outdoor recreation also results in 6.1 million jobs. The job benefits are felt in each state. For example, 173,400 jobs have been created by travelers to Ohio in 2013 representing 4 percent of the state's total non-farm employment. Over 148,700 jobs were created by travelers to Colorado (7 percent of total non-farm employment), nearly 202,000 jobs in North Carolina (6 percent of total non-farm employment), and 811,300 jobs in Florida (13 percent of total non-farm employment). Travel and tourism generated $2.1 trillion in economic impact in 2013. One out of every nine U.S. jobs is created directly or indirectly by travel, some of which to America's outdoor places.

What fuels this economy – in part – is safe, clean water. (…)

For years the Clean Water Act protected all wetlands and streams that our members and businesses rely on. Congress recognized the interconnectedness of U.S. waters when it passed the act in 1972. It clearly articulated its intent that the tributaries of navigable waters be protected when it stated in a January 1973 report: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."

Now the waters on which paddlers, kayakers, hikers, bird watchers, and businesses rely on are at increased risk and have been for nearly a decade-and-a-half. Supreme Court decisions in 2001 (SWANCC) and 2006 (Rapanos) and subsequent agency actions have created a confusing, time-consuming, and frustrating process for determining what waters are protected under the Clean Water Act and state laws. This threat leaves streams open to pollution and wetlands open to be filled and destroyed.

The irony is that the very waters now at risk because they lack clean water protections are the very ones that scientists say are important to protecting water quality and wildlife habitat. Small headwater and ephemeral streams feed rivers and lakes with the water that

US EPA ARCHIVE DOCUMENT

one-third of Americans (117 million) drink. Wetlands stop flooding by soaking up excess water and prevent algal blooms by filtering pollutants like nitrogen and phosphorus and provide homes for fish, birds, and other wildlife. By keeping these upriver waters clean and clear, downriver waters are protected from the pollution that doesn't aggregate upstream.

The Environmental Protection Agency and the Army Corps of Engineers have proposed a rule that seeks to clarify the scope of the Clean Water Act, which will provide clearer, more predictable protections for many streams, wetlands, and other waters. It will also give greater certainty to the regulated community by providing better guidance to federal and state regulators, which helps streamline the permitting process. The proposed rule only covers water bodies that the Clean Water Act has traditionally covered, such as intermittent headwater streams that have a defined bed and bank and flow to water already covered by the Act. It reiterates existing exemptions for farming, forestry, mining and other land use activities, and very explicitly for the first time excludes many ditches, ponds, and other upland water features important for farming and forestry. The proposal also relies on the best scientific understanding of stream and wetland science to clarify the scope of the Clean Water Act and enhance protection for streams, wetlands, and other waters nationwide.

Equally as important is what the proposed rule does not do. It does not cover any new types of waters that have not historically been covered under the Clean Water Act, such as groundwater. The proposed rule actually applies to fewer waters than were historically covered under the Nixon, Ford, Carter, Reagan, Bush, and Clinton administrations. It doesn't expand coverage to any new ditches or cover any artificial lakes, ponds, and artificial ornamental waters in upland areas or water-filled depressions created as a result of construction activity. It also doesn't cover agricultural practices exempt under current law. (p. 1-3)

Agency Response: **Thank you for your support. The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

US EPA ARCHIVE DOCUMENT

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

Chickaloon Village Traditional Council (Doc. #15137)

17.1.610 Specifically we support the addition of 'tributaries of jurisdictional waters' and 'waters adjacent to jurisdictiona1 waters.' We understand that water systems are often very interconnected. All the way from the headwaters to the ocean, watersheds have complex interconnections between rivers and streams and their adjacent surface waters such as ponds, lakes and wetlands, and ephemeral streams. It is critical to ensure that the entire stream system is protected from pollutants, such as proposed in this rule. (p. 1)

Agency Response: **Thank you for your support. The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117

US EPA ARCHIVE DOCUMENT

million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

American Coatings Association (Doc. #15138)

17.1.611 ACA believes that the proposed rule further complicates CWA jurisdiction with new, vague terms, expands far outside the scope established by Congress, compromises state authority, and could have profound and costly impacts on facilities regulated under federal permits. Therefore, we oppose this revised definition of WOTUS and urge the Agencies to withdraw the proposed rule and begin the drafting process again in consultation with affected entities—particularly states—to come up with a proposal that is clear and reasonable. (p. 1)

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

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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

US EPA ARCHIVE DOCUMENT

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

Sinclair Oil Corporation (Doc. #15142)

17.1.612 Sinclair disagrees with the Agencies' view that the proposed rule provides that clarity or recognizes approp1iate limits on the scope of waters that are properly considered jurisdictional under the CWA. The proposed rule simply does not provide clear definitions supporting categorical jurisdictional determinations appropriately limited to the boundaries of the Agencies' authority under the CWA.

Sinclair is not alone in its assessment that the proposed rule fails to provide sufficient clarity and that the rule exceeds the Agencies' statutory authority under the CWA. Sinclair is a member of American Fuel & Petrochemical Manufacturers ("AFPM") which is also submitting comments on the proposed rule. Sinclair has reviewed these comments and joins in the comments submitted by AFPM regarding the overarching legal and practical deficiencies of the proposed rule. In addition to that joinder, Sinclair is writing separately to raise specific concerns about the reach of the proposed rule relative to its own operations.

Sinclair is concerned that the definitions in the proposed rule may categorize many topographic features in and around Sinclair's refineries in Casper and Sinclair, Wyoming, which have never been considered "waters of the United States," as jurisdictional waters despite the Agencies' assurances that the proposed rule would actually narrow the scope of jurisdictional waters. Once finalized, the language of the proposed rule, not the Agencies' assurances, will govern how the definitions will be applied by personnel at the local and regional levels of the Agencies and third-patties invoking the citizen suit provision of the CWA. Nothing in the proposed rule limits the scope of "waters of the United States" to ensure that the legal limits of the Agencies' authority is respected and that the surface features in and around Sinclair's refineries, including components of the refineries' waste treatment system, will not be considered "waters of the United States." (p. 2)

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United

US EPA ARCHIVE DOCUMENT

States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

One final new exclusion in the rule also relevant to ditches covers wastewater recycling structures, including distributary canals constructed in dry land and used for wastewater recycling. As a result of the aforementioned changes, the agencies do not anticipate increased jurisdiction over ditches or an increase in jurisdictional determinations.

It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

AR Wildlife Federation (Doc. #15143)

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

Agency Response: **Thank you for your support. The agencies agree. 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**

US EPA ARCHIVE DOCUMENT

the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

Lea Soil and Conservation District Board of Supervisors (Doc. #15144.1)

17.1.614 Implications regarding the Endangered Species Act (ESA): The Parties express grave concern regarding the additional regulatory and economic burden that will be placed on our membership in 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 economic harm to our membership and threaten to undermine and potentially eliminate the customs and culture of their rural communities. (p. 6)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period

US EPA ARCHIVE DOCUMENT

have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

This rule does not affect any existing requirements that may apply under other federal statutes, and their applicability will be site-specific.

Council for Quality Growth (Doc. #15147.1)

17.1.615 We are very concerned that the proposed rule would modify existing regulations, which have been in place for over 25 years. Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards. (p. 1)

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

Watershed Watch in Kentucky, Inc. (Doc. #15159)

17.1.616 We are writing to go on record in strong support of the proposed rulemaking. We offer the following basis for our support for the proposed rulemaking.

The proposed rulemaking will help harmonize existing regulatory definitions with the mandate of Justice Kennedy in the US Supreme Court plurality decision in Rapanos v United States, 547 U.S. 715 (2006).

Over 3.2 million people in Kentucky receive their drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral, or headwater streams, and the proposed rulemaking will make source water protection more efficient and more effective.

Much of the geology of the Commonwealth of Kentucky is karst, meaning that connectivity with downstream major rivers is already documented and that the "significant nexus" as defined in the proposed rule corresponds to current actual practices by the U.S. Army Corps of Engineers and the Kentucky Division of Water.

Kentucky farmers are already subject to the requirements of - and entitled to the protections afforded by - the Kentucky Agriculture Water Quality Act. The proposed rulemaking will not alter any of the provisions and safeguards of that Act.

In Kentucky, CWA Section 402 permitting (NPDES) is administered by the Kentucky Division of Water, which is mandated to protect all waters of the Commonwealth, without regard for "connectivity" or "significant nexus." This means that the proposed rule will have no impact on the current NPDES/KPDES program. (p. 2)

Agency Response: Thank you for your support. The agencies agree. 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

US EPA ARCHIVE DOCUMENT

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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

Ohio Coal Association (Doc. #15163)

17.1.617 The Ohio Coal Association is a trade association of more than ninety member companies that represent every facet of the coal mining industry in Ohio (collectively "Ohio Coal"). For decades, our industry has been responsible for keeping Ohioans working in some of the most economically challenged areas of Ohio, and coal has provided the backbone of Ohio's cost-effective electric generation for just as long. Coal represents a critical domestic resource backstop against America's dependence on foreign fuels, and every dollar that is spent purchasing coal mined by Americans in America is another dollar for domestic energy and another dollar that flows back into the towns and counties where the coal is mined.

While the Agencies claim that the purpose of the Proposed Rule is to clarify and simplify what waters will be considered federal jurisdictional waters (i.e. Waters of the United States), the Proposed Rule, in its current form, does no such thing. Instead, the Proposed Rule injects additional complexity into this evaluation, while simultaneously and unlawfully expanding the reach of federal jurisdiction beyond the bounds established by the Clean Water Act and U.S. Supreme Court cases interpreting the same. In doing so, the Agencies' are attempting to replace longstanding state and local control of land uses near water with centralized federal control.

US EPA ARCHIVE DOCUMENT

Coal mining projects in Ohio include the evaluation of waters, both jurisdictional and nonjurisdictional, as part of a complex, multi-year permitting process that involves multiple federal and state regulatory agencies. As such, the Proposed Rule would have a direct, negative impact on our members and would add uncertainty, cost and time to an already unwieldy permitting process. Therefore, Ohio Coal does not support the Proposed Rule as it is currently written and urges the Agencies' to withdraw it in its entirety. Our reasoning is set forth below and, as incorporated by reference, includes the comments made by the National Mining Association, the U.S. Chamber of Commerce, and Murray Energy Corporation to the docket for this rulemaking. (p. 1-2)

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

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this proposal affect private property rights.

Louisiana Department of Environmental Quality (Doc. #15164)

17.1.618 Does not consider coastal wetlands.

Louisiana is comprised of large areas of wetlands. Louisiana is concerned that the broad language in the propose rule will encompass many areas that have been traditionally nonjurisdictional wetlands. Most of the state's land area could potentially be impacted by the "case-by-case" "significant nexus" language included within the proposed rule. This allowance of a case-by-case determination allows for arbitrary decisions pertaining to many areas of Louisiana's land area. (p. 3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

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

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

American Horse Council (Doc. #15165)

17.1.619 The AHC opposes the proposed rule because it will have a significant negative impact on the U.S. horse industry and create new and burdensome regulatory requirements for horse farms, ranches and racetracks. Additionally, we believe the proposed rule exceeds the authority of the CWA as set by Congress and affirmed by the United States Supreme Court. The AHC strongly urges the EPA and Corp to withdrawal the proposed rule. (p. 1)

Agency Response: **The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. The 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Public Works Department, Charleston County, South Carolina (Doc. #15166)

17.1.620 Due to Charleston County being a coastal community and predominately surrounded by water features, over approximately 60% of the County's land mass area is considered wetlands. Therefore, the new definition will adversely affect our ability to

US EPA ARCHIVE DOCUMENT

provide adequate maintenance to existing drainage conveyances and features without the County obtaining the appropriate permits. The amount of time and effort for the County to apply for new permits for activities that the County currently maintains would be detrimental to Charleston County citizens' quality of life from both a safety and health standpoint. (p. 1)

Agency Response: **The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.**

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

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

17.1.621 PIOGA and its members echo the sentiments of IPAA and furthermore submit there is no reasonable or legitimate dispute that the Proposed Rule will significantly expand jurisdiction over WOTUS - and that this expansion is beyond the jurisdiction authorized under the C WA. This expansion will have substantial adverse impacts on the siting, permitting, construction, maintenance and operation of oil and gas facilities in Pennsylvania and throughout the United States. (p. 5)

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

US EPA ARCHIVE DOCUMENT

17.1.622 The delineation of additional jurisdictional waters under the Proposed Rule would result in an increased need for individual Section 404 permitting and increased Corps' involvement under the State's Programmatic General Permit (PASPGP-4), both of which would necessitate significant lead time and increase permitting expenses.

There is widespread agreement among natural gas producers that the significant increase in the number and extent of jurisdictional waters will result in extensive permitting costs and delays. A cursory review of l00, randomly sampled, well sites in the Appalachia Basin (West Virginia and Pennsylvania only), was conducted to evaluate the differences in how the sites would be classified and permitted based on the 2008 Guidance versus the Proposed Rule. The results are as follows:

	2008 Guidance	Proposed Rule	Percent Increase
Percentage of Sites with Aquatic Resources	42	62	47
Percentage of Sites with Impacts	26	42	62
Percentage of Sites Requiring a Section 404 Permit without Pre-Construction Notification	18	25	39
Percentage of Sites Requiring a Section 404 Permit with Pre-Construction Notification	6	12	100
Percentage of Sites Requiring a Section 404 Individual Permit	2	5	150

Based on this review, the Proposed Rule will increase the number of sites with jurisdictional waters within the West Virginia and Pennsylvania Appalachia Basin by more than 50 %. (p. 9-10)

Agency Response: **The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.**

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and

US EPA ARCHIVE DOCUMENT

cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

In the economic analysis supporting the final rule, the agencies estimate the potential increase of the number of new individual and general section 404 permits.

17.1.623 The additional delay associated with obtaining an individual permit can presently be as much as a year or more. With the demand for individual permitting for many industries expected to increase due to the Proposed Rule, delays for permit approvals are likely to increase by an additional six months or more. Such lengthy delays have critical consequences for oil and gas development. For example, leases may expire before a permit is obtained, resulting in the loss of land position, the loss of signing bonuses and lease payments, and the need to re-sign the lessor (or find another tract of land) at potentially higher rates. Further, the inability to meet a rig schedule could result in the possible loss of a rig and/or the significant costs associated with shutting down and starting up the rig.

The expanded scope of jurisdiction would also be costly for state and local government. Permitting delays would result in decreased well development activity which, in turn, would result in decreased tax revenue and impact fee distributions. At the same time, the increased permitting demand for all industries would require staff increases, resulting in greater governmental expenditure. (p. 11)

<u>Agency Response:</u> The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit

US EPA ARCHIVE DOCUMENT

program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.624 In addition to the conflicts with state law and regulation, the reclassification of certain ditches, impoundments and storm water ponds as jurisdictional waters under the Proposed Rule, would severely limit and delay operations, maintenance and future development. Essentially, existing operations would be "fenced in" by jurisdictional waters. If ditches or impoundments are considered to be jurisdictional, they could not be modified, cleaned out, maintained, or otherwise changed without a Section 404 permit. As a result, under the Proposed Rule, either (1) operational processes or timelines would need to be modified to assess the presence of jurisdictional waters and conduct subsequent permitting, or (2) construction techniques would need to be modified to avoid the creation of jurisdictional waters. Construction modifications, such as the installation of underground piping around well pads (rather than gravel ditches) would require increased material and labor costs. It would also require increased engineering efforts. (p. 14-15)

<u>Agency Response:</u> 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.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these

US EPA ARCHIVE DOCUMENT

three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

National Hispanic Landscape Alliance (Doc. #15171.1)

17.1.625 The National Hispanic Landscape Alliance is a member-based trade association that advances the interests of the more than 580,000 Hispanic families in the United States that depend on the landscape industry for their livelihood.[50] The landscape industry in the U.S. accounts for approximately $20 billion of total US Latino household income. Our members don't just care about the environment, they care for it, and make it better every day through responsible landscape design, construction, and management practices. Whether as small business entrepreneurs or as the leaders of large firms, they also bring social and economic value to the communities where they live and work, and their opinions are sought out by policymakers at every level of government.

The NHLA supports the stated purpose of the proposed WOTUS rule, to ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more clear. However, we do not believe the proposed rule will achieve these objectives. (p. 1)

Agency Response: **Thank you for your support. The agencies believe that the Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

[50] United States Department of Labor, US Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, HOUSEHOLD DATA ANNUAL AVERAGES, Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity; http://www.bls.gov/cps/cpsaat18.htm

US EPA ARCHIVE DOCUMENT

The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

17.1.626 The proposed WOTUS rule provides definitional terms, including 'floodplain', 'riparian area', 'adjacent', 'other waters', 'tributary', 'neighboring'. The included definitions are broad and lack needed clarity to delineate which waters will be covered under the proposed rule. Consequently, the proposed definitions will confuse rather than clarify what is and isn't a jurisdictional water, creating confusion and uncertainty. The lack of clear definition will place unnecessary and new burdens on landscape service professionals to determine if CWA permits will be needed to apply fertilizers and plant protectants. Both of which are now responsibly applied by landscape professionals as important factors in establishing and maintaining healthy and performing turfgrass that produces significant environmental, human health, and other benefits. (p. 2)

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other

US EPA ARCHIVE DOCUMENT

waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

17.1.627 As with other components of the proposed WOTUS rule, the NHLA believes that the EPA and Corps failed to assess the impacts of the proposed rule on the social, economic, and environmental benefits contributed by NHLA members working in the landscape services industry. The exclusion and/or elimination of such benefits could have lasting economic, social, and environmental effects. (p. 3)

<u>Agency Response:</u> The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

In the economic analysis supporting the final rule, the agencies estimate the potential effects on the implementation of CWA programs; however, the agencies did not analyze potential impacts to specific industry sectors. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.628 The uncertainty around permitting and compliance requirements under the proposed rule will unduly burden the landscape services industry and increase its operational costs. These adverse effects will diminish the important economic, social, and environmental contributions that U.S. Hispanics make by constructing and caring for managed landscapes. More than 580,000 Hispanic families in the U.S. depend on the landscape industry for their livelihood. The landscape services industry accounts for nearly $20 billion of Latino household income in the U.S. As an organization that helps advance the interests of Hispanics in the landscape services industry, the National Hispanic Landscape Alliance opposes the proposed WOTUS rule and requests that the EPA and Corps withdraw the proposed rule. (p. 3-4)

<u>Agency Response:</u> The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos* v. *United States,* 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

US EPA ARCHIVE DOCUMENT

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

International Brotherhood of Electrical Workers (Doc. #15174)

17.1.629 Waters that were previously considered "isolated" and were beyond the scope of the CWA will now be considered "adjacent" and covered under the CWA. The proposed rule change classification of many wet features that have only remote and insubstantial connections with traditional navigable waters. Such unbounded jurisdiction would have will impacts for countless industrial facilities that rely on industrial ponds for their operations. (p. 2)

Agency Response: **The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.**

Katy Area Economic Development Council, Inc. (Doc. #15182)

17.1.630 In short, we have reviewed the proposed rule and feel that it exceeds the authority given to the United States and is not a reasoned interpretation of the Clean Water Act (CWA). (p. 1)

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

US EPA ARCHIVE DOCUMENT

that the geographic scope of the CWA reaches beyond waters that are navigable in fact.

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

17.1.631 Western Gulf Coastal Plain (WGCP) Isolated Wetlands

In the WGCP setting, two outcome scenarios are clear. First, application of the new rule that includes "similarly situated" wetlands of the WGCP as de facto jurisdictional, will cause lengthy (2-4 years) and costly ($100,000+/acre) permitting efforts in the Houston MSA, which already contains six million people. (p. 2)

<u>Agency Response:</u> The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

US EPA ARCHIVE DOCUMENT

The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.632 We wish to acknowledge and emphasize that environmental quality is of importance to the Katy Area, the Houston MSA and the U.S. as a whole. However, in this case of proposed expansion of the regulatory reach of the CWA, by re-defining "Waters of the United States," we feel that neither the overall public interest nor environmental interests are well served. We believe the expanded jurisdiction as proposed will not significantly improve the quality of navigable waters. Furthermore, expansion of jurisdiction would require federal involvement, at great cost, in local activities without a demonstrated link to the quality of navigable waters. Consequently, neither water quality nor the public interest will be served by this proposed rule. In summary, the rule: (1) expands and extends federal jurisdiction without significant improvement of the quality of navigable waters; (2) does not improve the environment; (3) costs both in terms of dollars and time would be unreasonable and prohibitive to development; (4) is a drain on the local economy; and (5) would further burden the public and commerce with no real result. (p. 3)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.**

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 agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

In addition, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

US EPA ARCHIVE DOCUMENT

Attorney General, Colorado (Doc. #15191)

17.1.633 The efforts of the Environmental Protection Agency and the Army Corps of Engineers to "clarify" the jurisdictional reach of the federal government under the Clean Water Act (CWA) are having the opposite effect. The proposed rule redefining "waters of the United States" not only further clouds the jurisdictional issue; it has alarmed a vast spectrum of American society. Farmers, landowners and water providers to developers, small businesses and local governments all condemn this attempt to expand federal control over land and water by rule and recognize they will bear the burden of greater costs and increased regulations. The extension of CWA jurisdiction to include water with a significant nexus to navigable waters will certainly result in added regulation over actions that have not previously been subjected to regulation. The economic impacts of such a jurisdictional expansion will be very significant for those impacted.

The federal agencies' attempt to clarify the meaning of "waters of the United States" must be governed by the rule of law; not imposed by their federal jurisdictional desires. Under the Clean Water Act, Congress preserves the states' traditional authority to regulate and manage the development and use of land and water resources. The U.S. Supreme Court has thwarted recent attempts by federal agencies to encroach on states' primary responsibilities to protect and manage their water resources. The scientific evidence offered to support the federal position should inform the dialogue; however, such evidence cannot expand federal jurisdiction beyond what Congress intended. The Clean Water Act and relevant case law support a more limited scope of federal jurisdiction than that enunciated in the proposed rule.

Several commenters have suggested the federal agencies put this rule on hold while they engage in a robust stakeholder process with all interested and affected parties. I believe this approach would lead to a more successful outcome than the protracted litigation that would result from adoption of the current proposed rule. (p. 1-2)

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

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n

US EPA ARCHIVE DOCUMENT

determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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. To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.
Board of Supervisors Mariposa County (Doc. #15195)

17.1.634 The County is also concerned that this proposal will have a negative impact on the farmers and ranchers of Mariposa County. It certainly has the potential to limit allowable activities on their own property, which can only result in making it more difficult for these individuals to sustain their way of life.

Finally, this action will make it more difficult for the County 10 deliver services to the public. When ditches, ponds and small creeks become subject to EPA jurisdiction, even the most basic cleaning and/or other road maintenance projects become problematic. The County and other like jurisdictions should not be subject to the federal permitting process in order to deliver basic services. Ultimately, the County is liable for maintaining the integrity of ditches even if federal permits are not approved in a timely manner. (p. 1)

<u>Agency Response:</u> Agency Response:The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly

US EPA ARCHIVE DOCUMENT

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Aquatic Ecosystem Restoration Foundation (Doc. #15204)

17.1.635 The rule as proposed so greatly expands the reach of the NPDES PGP programs that it would cause a cumulative adverse effect on the financial stability of the small businesses operating in this field. (…)

In some situations, it may be difficult to determine if the flow is perennial or not. Reasonable people can and will disagree with these "in field determinations." However, according to the SAB Panel, groundwater flow should also be a determinant in the "waters of the United States" classification and perennial flow should not be the determining factor. According to the SAB Panel "A substantial body of evidence unequivocally demonstrates connectivity above and below ground." There is simply no way a vegetation management specialist can make the "waters of the United States" determination in the field, without access to piezometers readings (groundwater data). Therefore, every prudent pesticide applicators making an application alongside a ditch will apply for coverage under the NPDES PGP program to ensure compliance. This additional (and perhaps unnecessary) burden will further increase the cost of the pesticide application. These prophylactic actions will also increase the number of NPDES PGP applications processed by each and every state. (p. 5)

Agency Response: **The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the**

US EPA ARCHIVE DOCUMENT

application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

<u>American Wind Energy Association (Doc. #15208)</u>

17.1.636 If the proposed definition of "waters of the United States" is finalized as currently written, however, there will likely be a significant impact in increased and unnecessary costs for utility-scale wind projects, leaving the industry an unintended victim of this proposal, thereby negatively impacting the goals of the Administration to reduce carbon and mitigate the effects of climate change. Specifically, due to the expansion of jurisdictional waters, AWEA is concerned that this proposal is merely adding an additional layer of bureaucracy to countless activities that are already sufficiently regulated by state and local governments and would unnecessarily impede the development of wind energy through greater permit application and related costs, compensatory mitigation costs, costs of permitting delays, and greater impact avoidance and minimization costs. (p. 2-3)

<u>Agency Response:</u> 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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

US EPA ARCHIVE DOCUMENT

17.1.637 In addition to the costs from expanded permitting time frames, the resulting back and forth between wind companies, consultants, and Agencies due to increased consultation requirements may proliferate because many more waters are under jurisdiction. With the proliferation of these exchanges, the timelines for developing projects will be delayed even further, which could problematic given states' and EPA's likely reliance upon the wind industry to meet carbon reduction targets set forth in EPA's forthcoming Clean Air Act section 111(d) regulations, among other public policies that are dependent on meeting goals through the use of wind energy. (p. 4)

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

17.1.638 The Agencies' definitions have done little to give any guidance on designation of waters of the U.S. and do little to prevent a continual case-specific designation of protected waters. This case-specific designation of waters leaves considerable uncertainty within the permitting process for wind developers and could potentially slow down the development of broader zero-emission electric generation. (p. 6)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

17.1.639 A proposed rule defining the "waters of the United States" should protect U.S. waters while allowing for the development of inappropriately sited wind energy facility. However, the proposed rule would likely result in the increased need for wind energy projects to complete NEPA analyses, despite those projects' minimal impacts on jurisdictional waters. The small impact of development of tributaries and/or other waters on downstream waters would usually not be enough to provide a "significant nexus" but under the proposed definition, tributaries and adjacent waters are jurisdictional per se, as are "other waters" that don't have a significant nexus to downstream waters on their own. By creating a definition this expansive, as discussed previously, it would likely result in increased costs and time to construct wind energy projects, as well as other clean energy sources, which is counter-productive to President Obama's Climate Action Plan. These sorts of expansive restrictions on project development may be particularly troublesome for states that have aggressive renewable portfolio standards (RPS) or are expected to require greater renewable development in order to meet EPA's forthcoming carbon reduction regulations. In turn, the increased difficulty in securing project funding and permits, and ultimately getting a project built may affect the "[c]ongressional policy to

US EPA ARCHIVE DOCUMENT

reserve the primary responsibilities and rights of states [. . .] to plan the development and use of land and water resources."[51] (p. 7)

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

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

Southern Illinois Power Cooperative (Doc. #15214)

17.1.640 SIPC believes the "waters of the US" rule proposed by the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) is not cost-effective. It will impose significant economic impact on Southern Illinois Power Cooperative and a substantial number of small entities, including electric cooperatives, yet have little, if any, enhanced protection for the nation's waters. (p. 3)

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.641 The proposed rule would necessitate even more permits; both general and individual permits. More permitting, especially more individual permitting, increases uncertainty, delay and ultimately cost. In many cases, increased delay and increased costs can make the difference between proceeding with, delaying, or even cancelling a project.

Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect cooperatives by delaying and increasing the costs for (1) constructing and maintaining power lines; (2) operating and maintaining existing and

[51] 33 U.S.C. § 1251.

US EPA ARCHIVE DOCUMENT

new generation, including generation from both traditional fuels like natural gas and renewables; and (3) decommissioning existing generating facilities. (p. 4)

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

In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. The existing regulations represent one appropriate baseline for comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline.

17.1.642 The proposed expansion of features considered WOTUS will significantly increase the number of substations requiring SPCC plans, especially substations located in arid or semi-arid where any release would be to generally dry land or areas with scarcely more than speculative connections to traditional navigable water. (p. 6)

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

17.1.643 As the electric utility industry brings new generation resources online, older plants are being decommissioned and their sites are frequently remediated for other uses. Such "brownfields" development has been encouraged for years by EPA as well as state and local parties interested in economic development. The proposed rule would hamper efforts to make these sites available for continued, productive use.

> Decommissioning often requires cleaning and filling ditches, canals and treatment ponds on the site, as well as grading and other groundwork. These features often have not been treated as jurisdictional in the past, but might be deemed WOTUS under the proposed rule. Remediation work could require a section 404 permit and compensatory mitigation in essence requiring mitigation for mitigation! Added costs and delays could result in companies electing to mothball rather than restore sites, reducing the sites value and utility for all. (p. 8)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.**

US EPA ARCHIVE DOCUMENT

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary. As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. Also, please see the Exclusions Compendium for other features that are excluded from the definition of "waters of the U.S."

Missouri Farm Bureau Federation (Doc. #15224)

17.1.644 Everyday farming activities such as plowing, planting, discing, fertilizing, insect and disease control, and fence building in or near the proposed "jurisdictional" areas could be a violation of the CWA, triggering civil penalties of up to $37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained.

> The cost of obtaining a permit, which could be tens of thousands of dollars, is beyond the means of most farmers and ranchers—the vast majority of whom are family-owned small businesses.[52] Even those farmers and ranchers who can afford it should not have to wait months, or even years, for a federal permit for routine work. The proposal as written essentially puts EPA and the Corps in the position of regulating whether, when, and how a farmer goes about his/her business of growing food and fiber. (p. 5)

Agency Response: **The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation. If the proposed activity is not exempt under Section 404(f), the work may be authorized under one

[52] As noted in comments filed by the Small Business Administration's Office of Advocacy, EPA and the Corps have failed to take into account small business impacts, including impacts on small business farmers. See, October 1, 2014 letter to Administrator McCarthy and Major General Peabody from Winslow Sargeant, Chief Counsel for Advocacy. Due to this failure, SBA recommends that EPA and the Corps withdraw the rule.

US EPA ARCHIVE DOCUMENT

or more Nationwide General Permits (NWPs), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at: http://www.usace.army.mil/cw/cecwo/reg/ and the RGPs can be found on the local Corps District regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

<u>Humboldt River Basin Water Authority (Doc. #15229)</u>

17.1.645 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 for permitting and development of mining projects on public and private land in the HRBWA area. (p. 4)

<u>Agency Response:</u> 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.

<u>United States Durum Growers Association (Doc. #15232)</u>

17.1.646 USDGA is opposed to the proposed rule as it will:

- Provide overreaching and potentially unlimited jurisdiction by the federal government, which will have economically devastating implications for agricultural producers
- Result in unprecedented federal intrusion in agriculture management and practice through the control of all but the most remote and unconnected waters.
- Increase uncertainty and confusion for the nation's agricultural producers. (p. 1)

<u>Agency Response:</u> 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture

US EPA ARCHIVE DOCUMENT

community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Oregonians for Food & Shelter (Doc. #15239)

17.1.647 According to our regional EPA office, the new definition will include many ephemeral streams regardless of whether they currently have water in them. This could affect all of our members, but it hits our forestry users especially hard. Currently in Oregon, an application to areas where no water is present does not require NPDES coverage. This is important because many forestry herbicide applications occur in the late summer on units with no water present. Most of these units contain ephemeral streams that contain water during our extremely wet Pacific Northwest fall and winter. If buffers were required around those dry streams, or additional permitting was required, this would place an unreasonable burden on these activities. Once again, with no appreciable benefit to clean water. This is a huge potential problem for all Oregon applicators as we have significant differences in where water is present during our various seasons. (…)

Another significant concern for our members is that the expanded scope of the CWA could leave landowners and professionals applying fertilizers and pesticides vulnerable to nuisance third--- party lawsuits. Increasing the number of applications that fall under the CWA requirements increases the number of applications that are subject to third---party lawsuits. This will surely increase activists' activities in Oregon and put our applicators at constant risk of frivolous lawsuits. (p. 1-2)

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

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

US EPA ARCHIVE DOCUMENT

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Sierra Club Kansas Chapter (Doc. #15240)

17.1.648 The Kansas Chapter of the Sierra Club supports the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries and beyond floodplains, including prairie potholes and playa lakes. (p. 1)

Agency Response: The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

National Association of Convenience Stores, et al. (Doc. #15242)

17.1.649 It is important therefore that the final rule be clear regarding the obligations that retailers will face. Without clarity, retailers will not know whether certain conduct – such as purchasing a new retail outlet, or investing in new, state-of-the-art underground storage tanks – trigger obligations under the rule. Therefore, as proposed, those businesses will need to expend capital solely to determine whether their conduct is covered by the rule. If the conduct is covered, there will obviously be additional expenditures necessary to ensure compliance. These variables place additional hurdles in front of – and will serve to discourage – investments that would create jobs and further EPA's objectives under the RFS. (p. 2)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.650 As applied specifically to fuel retailers, the Proposed Rule would disincentivize investments that are necessary for EPA to achieve its objectives in implementing the RFS program. That program calls for an increasing amount of biofuel to be introduced into commerce every year until 2022. Most of the fuel sold in the United States today is blended with 10% ethanol. If 10% ethanol were blended into every gallon of motor fuel sold in the United States, there would be an insufficient volume of renewable fuels to satisfy the RFS mandates. In order to overcome this obstacle – which is known as the "blend wall" – consumers will need to consume higher ethanol blends (such as E15 or E85). Recognizing that this is not tenable at the present time, EPA has proposed to exercise its statutory waiver authority to lower this year's renewable volume obligations. EPA further indicated that it will likely continue to do so every year as long as the market cannot realistically absorb the statutory volume obligations.

In order for retailers to lawfully sell such higher ethanol blends, however, they are required to use equipment that is certified by a nationally recognized testing laboratory as compatible with the fuel the equipment is storing and dispensing. No gasoline dispensers were certified as compatible with blends greater than 10% ethanol until 2010. In terms of underground equipment, because fueling facilities can change hands several times after a tank is installed, owners are often uncertain of the listing status of their equipment. In addition, a significant amount of underground equipment in use today is not certified as compatible with blends greater than 10% ethanol. Many retailers, therefore, would have to replace their underground equipment in order to be certain that it is compatible with higher fuel blends. At the present time, costs for doing so can quickly exceed $100,000 per location, and can be upwards of $200,000 per location.

On top of these capital costs, offering higher fuel blends may expose retailers to liability under the Clean Air Act if customers misfuel their vehicles. Fines under the Clean Air Act can be as high as $37,500 per violation. Further, because many engine manufacturer owner's manuals and warrantees do not authorize the use of E15, the retailer may be subject to liability for engine damage or for selling a fuel that voids the consumer's warranty. This exposure could threaten a facility's economic viability.

US EPA ARCHIVE DOCUMENT

To the extent the final rule imposes additional costs and uncertainty on retailers that are considering investing in equipment upgrades, it would add an additional impediment to the EPA's ability to satisfy its objectives under the RFS program. (p. 3)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act.**

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.651 Nevertheless, the Proposed Rule's revised definition of "Waters of the United States" is both overbroad and ambiguous. If finalized, the Proposal will exacerbate jurisdictional uncertainty. Under the Proposal, virtually every waterway in the U.S. will be subject to CWA jurisdiction or will require an expensive analysis to confirm that it is not subject to CWA jurisdiction. This conflicts with the Agencies' objectives in writing this rule. (p. 3-4)

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

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

Ohio Attorney General (Doc. #15243)

17.1.652 The Supreme Court plurality in *Rapanos* advanced what seems to me a reasonable and workable definition. I encourage the federal Agencies not to discard it, but to incorporate it into rule in place of the current overreaching and yet still amorphous draft formulation. (p. 2)

Agency Response: The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

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

See the Preamble and Technical Support Document for further discussion of the legal basis for this rule.

National Alliance of Forest Owners (Doc. #15247)

17.1.653 The proposed rule will have enormous consequences for private forest owners, including new and expanded permitting obligations, uncertainty over what features are jurisdictional, new requirements to meet water quality standards and total maximum daily loads, and increased exposure to citizen suits. (p. 3)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the

US EPA ARCHIVE DOCUMENT

public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

States typically develop water quality standards for general categories of waters, including wetlands; in addition to creating site-specific standards and more generic standards that can apply broadly. State water quality standards have been in effect prior to and continuing after the *SWANCC* and *Rapanos* decisions. Therefore, requirements for state water quality standards to be consistent with the CWA (designated uses, criteria to protect those uses, antidegradation policies) will likely not require any changes as a result of this rule. What could change is whether or not those standards apply to a specific water. To the extent a state believes there are needs for water quality standards development for specific types of waters, those needs would exist with or without this rule.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

17.1.654 Forestry operations take place across vast areas of land, often in areas where rainfall is abundant and where wetlands, ditches, and ephemeral features pepper the landscape. Under the proposed rule, many previously non-jurisdictional water features will categorically be deemed "waters of the United States" under the new definitions of "tributary" and "adjacent." This categorical assertion of jurisdiction rests heavily on an improper expansion of the significant nexus test, which the Agencies interpret to allow for aggregation of all similarly situated waters. Such sweeping jurisdiction over ditches and ephemeral drainage, in particular, will have significant ramifications for private forest owners. (p. 25)

<u>Agency Response:</u> 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.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical

US EPA ARCHIVE DOCUMENT

indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus affirmative jurisdictional determination has been made in the point of entry watershed, all similarly situated waters in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in a region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination,

US EPA ARCHIVE DOCUMENT

including an explanation of which waters were considered together as similarly situated and in the same region.

17.1.655 Finally, forestry has long been a target of citizen suit litigation such as the lengthy "forest roads" case that was filed by Northwest Environmental Defense Center in 2006, went all the way up to the Supreme Court, and was only recently dismissed by the district court with prejudice on September 5, 2014. The proposed rule would invite similar citizen lawsuits against forest owners seeking to halt operations. Citizen plaintiffs could exploit the many ambiguities in the proposed regulatory text to allege that a given silvicultural activity results in a direct discharge to an ephemeral drain or ditch or to some waterbody that is purportedly located within a floodplain or riparian area or that bears some sort of connection to a jurisdictional water. The possibilities for citizen enforcement claims are virtually limitless. Regardless of their merit, such claims take many years to resolve, are disruptive to forestry operations, and place significant burdens on the resources of litigants, federal agencies, and courts alike. The proposed rule could also result in the proliferation of petitions urging states or EPA to promulgate water quality standards (or more stringent standards) and/or TMDLs for any newly jurisdictional waters. Depending on the dispositions of such petitions, citizen plaintiffs could pursue further relief in federal court. (p. 26)

Agency Response: **Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.**

Union Pacific Railroad Company (Doc. #15254)

17.1.656 The Proposed Rule would have substantial adverse effects on UPRR, national transportation networks and economic interests, would delay important rail improvement projects, and would pose the risk of diverting resources from efforts to continue to advance the efficiency and environmental benefits of rail freight operations. There are currently more than 140,000 miles of rail lines in the United States. These rail lines cross or are adjacent to thousands of rivers, washes, creeks, gullies, ponds, swales, arroyos, ditches, impoundments and potential wetland areas, many of which are intermittent, ephemeral, seasonal or storm-dependent drainages and/or isolated waters. UPRR also maintains approximately 20,000 bridges and 100,000 culverts within its rail system, as well as many other structures and features. Each of these structures and features requires periodic maintenance and repair. In order to maintain safe and efficient operations, UPRR engages in never-ending inspection, maintenance and repair activities of such railroad infrastructure. Clean Water Act ("CWA") jurisdiction over such areas and activities would be significantly expanded if the Proposed Rule were adopted.

The significant increase in the number of jurisdictional waters under the Proposed Rule would result in a corresponding increase in CWA Section 404 permits required for railroad track construction, repair and maintenance, as well as Section 401 certifications,

US EPA ARCHIVE DOCUMENT

areas subject to storm water regulation, and other permitting requirements. An expansion of CWA jurisdiction will also expose UPRR to potential liability for newly identified jurisdictional waters under the enforcement, injunctive relief and penalty provisions of the CWA, including "citizen suit" enforcement, for which a discharge to "waters of the United States" is a jurisdictional prerequisite. Thus, UPRR has a substantial interest in the Proposed Rule. (…)

The Agencies must withdraw the Proposed Rule and work with stakeholders, including States, local governments and regulated entities to develop a revised rule that is consistent with Congressional intent and statutory and Constitutional limitations, supported by science, provides clear standards, avoids unnecessary burdens and serves the public interest. (p. 3-4)

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

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be

US EPA ARCHIVE DOCUMENT

considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

17.1.657 When the Agencies' expansive interpretation of "significant nexus" is considered along with the frequent presumption of jurisdiction and lack of case by case analysis, it is clear that the Agencies have grossly underestimated the areas that will become subject to CWA jurisdiction if the Proposed Rule is adopted.

As noted above, the Proposed Rule would have substantial adverse effects on UPRR, transportation networks, and our nation's economy. There are currently more than 140,000 miles of rail lines in the United States. These rail lines cross or are adjacent to thousands of rivers, washes, creeks, gullies, ponds, swales, arroyos, ditches, drainages and potential wetland areas, many of which are intermittent, ephemeral, seasonal or storm-dependent drainages and/or isolated waters. CWA jurisdiction over such areas would be significantly expanded if the Proposed Rule in its current form.

The significant increase in the number of jurisdictional waters under the Proposed Rule would result in a corresponding increase in CWA Section 404 permits required for railroad track construction, emergency repair and maintenance, as well as Section 401 certifications, areas subject to storm water regulation, and other permitting requirements. An expansion of CWA jurisdiction will also expose UPRR to potential liability for newly jurisdictional waters under the enforcement, injunctive relief and penalty provisions of the CWA, including "citizen suit" enforcement, for which a discharge to "waters of the United States" is a jurisdictional prerequisite. (p. 21-22)

<u>Agency Response:</u> 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.

US EPA ARCHIVE DOCUMENT

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

17.1.658 The Significant Increase in CWA Jurisdiction Under the Proposed Rule will Impair Safe and Efficient Rail Operations and Delay Necessary Infrastructure Construction, Maintenance and Repairs

UPRR and other rail operators are required to maintain thousands of ditches and culverts for roadbed (track and ballast) drainage to ensure safe rail operations. See 49 CFR §213.33.[53] Such ditches and culverts often have little grade and little connection to a surface water, but based on the interstate nature of the rail system and the Proposed Rule's bed, bank and OHWM criteria, many could be identified as subject to CWA jurisdiction, hampering and delaying maintenance operations, threatening emergency repairs and response actions, and adding unnecessary agency review and cost.

Specifically, the increase in the surface features subject to CWA jurisdiction if the Proposed Rule is adopted will result in a corresponding increase in the number of UPRR activities subject to CWA Section 404 permitting requirements. UPRR has approximately 20,000 bridges and 100,000 culverts within its track system, and each of these structures requires periodic maintenance and repair. In order to maintain safe and efficient operations, UPRR engages in never-ending inspection, construction, maintenance and repair activities of railroad infrastructure throughout the 23-state system. Activities that commonly occur in or around potential jurisdictional waters include routine repair, maintenance, and replacement of bridges and abutments, track, piers, foundations, culverts, "shoo-fly" crossings, embankments, dikes, dams, levees, riprap, causeways, ditches, signals, access roads, rights-of-way and other transportation structures. Routine maintenance may include removal or redistribution of accumulated sediment, debris removal, trimming and removal of vegetation, and cleaning out culverts, ditches and channels.

As noted above, the Proposed Rule's expansion of jurisdiction to include ditches would severely impact UPRR and other rail operators. Ditches along rail lines are wide, often have little grade and little or no connection to a surface water, but they often contain

[53] As noted above, 49 CFR §213.33 provides "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned."

US EPA ARCHIVE DOCUMENT

standing water and carry flow – indeed, in rail operations, the purpose of ditches is often to drain water away from the track and ballast. Such ditches are critical to the safety of rail operations, to avoid washouts, subsidence, undermining and sloughing of the roadbed, and uneven trackage that threatens safe train operation. (p. 22-23)

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.**

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

US EPA ARCHIVE DOCUMENT

17.1.659 The Agencies must withdraw the Proposed Rule and work with stakeholders, including States, local governments and regulated entities to develop a revised rule that is consistent with Congressional intent and statutory and Constitutional limitations, supported by science, provides clear standards, avoids unnecessary burdens and serves the public interest. UPRR respectfully requests that the Agencies respond to each of the comments herein. UPRR also joins in the comments on the Proposed Rule submitted by the Water Advocacy Coalition. (p. 24)

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Pennsy Supply, Inc. (Doc. #15255)

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

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Hereford Bed & Biscuit (Doc. #15260)

17.1.661 The undersigned Maryland business supports the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed Definition of "Waters

US EPA ARCHIVE DOCUMENT

of the United States Under the Clean Water Act" to clarify which streams, wetlands and other waters are protected under the Clean Water Act. Clean and abundant water is the most important facet to our businesses, and this action by the Agencies gives us the confidence that our growing businesses need to continue to thrive.

The science is clear that what happens upstream, in small streams and wetlands, impacts the quality and health of downstream tributaries and larger rivers. These waters contribute to our drinking water supplies, support industry and recreational businesses, reduce flooding and property damage. Protecting streams and wetlands s is not only common-sense, it ensures the quality of water used in our manufacturing and production processes.

Maryland businesses have always depended on the availability of clean water for success. EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Food producers, high tech industries, outdoor recreation companies and beer manufacturers are just some of the businesses that rely on clean water to produce high quality and safe products and services.

As business owners, we recognize that plentiful supplies of clean water are as important to our business as the customers that walk through our front doors. This is certainly represented by the true economic impact that we have generated by tapping into strong consumer demand in Maryland and nationally. For example, according to The Brewer's Association, beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion. Small and independent craft brewers contributed $33.9 billion to the U.S. Economy in 2012 and provided more than 360,000 jobs. In Maryland, craft brewers contributed $455.5 million to the economy in 2013 alone. The Agencies' proposal for protecting water resources is critical to the continued growth of industry in Maryland and nationally.

Many of the names of Maryland businesses and locations have their roots in the very rivers, streams or water-bodies that harnessed the abundant water supplies that fueled their local economies. Today many of these locations have transformed themselves into recreation and river tourism areas. A 2011 US Census survey found that 1.6 million residents and nonresidents over the age of 16 fished, hunted, or wildlife watched, generating $1.3 billion in economic revenue for Marylanders.

Clean water is our lifeblood and is inextricably tied to the quality of our products and services. Recognizing this drives us to become better stewards of our water resources, which is why we continue to strive to address water purity, consumption and management concerns. We believe that supporting policies that minimize our impact on water resources is part of being a good corporate citizen and community partner.

American businesses operate best in an environment of regulatory certainty. We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, definition of "Waters of the United States," without delay and reject any efforts to weaken it. (p. 1-2)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

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

17.1.662 A broader application of the CWA could have serious effects on our members. For instance, the siting and modification of landfills could be severely hampered under expanded CWA authority. Currently, when siting a landfill, an owner will work to avoid interfering with any CWA waters, if at all possible, due to the financial and regulatory burden involved. A broad expansion of covered waters could make this almost impossible in some places. For example a public entity may not be able to develop or expand a landfill that they are bound by local statute to create and/or maintain for the benefit of the people, municipalities, and counties of a State. By extending the CWA, the ability of the industry to economically manage municipal solid waste could become compromised

The siting of landfills is just one area of solid waste management that could be greatly affected by an expansion of the CWA. Any expansion of regulated waters would increase the burden for any building or construction activities, including transfer stations, recycling processing centers, community education facilities, storage buildings, maintenance garages, etc. Additionally green energy projects, e.g. landfill gas-to-energy operations, could be curtailed by additional land use limitations. The solid waste industry would also be overly burdened by additional regulatory restrictions on engineered storm water management features, such as stormwater ditches and impoundments, which are commonly utilized in the industry.

The economics of solid waste management, whether done by a public or private entity, is one of small margins. Putting additional burdens on the industry should be done with careful consideration and for the purpose of further protecting human health and the environment. This proposed rule does not accurately account for either the burdens or benefits that will actually result from it. For example, if a landfill cannot be expanded due to the CWA, then the local municipal waste will have to be transported to the closest available facility in the next county or State. Transportation costs are the number one expense in the solid waste industry. These increased costs would be placed on the public. (p. 2)

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

US EPA ARCHIVE DOCUMENT

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Cain, D. (Doc. #15286)

17.1.663 I write because of the concerns I have with the proposed rule and how it could impact my farm. I have a cattle/hay farm in Kentucky that has three streams that run through it. I have my cattle fenced off from the streams, but because I did not go through NRCS cost share programs that would have set parameters as to how fencing systems are built, I am concerned that my fencing, that is effective in keeping my cattle out of the water, may not meet the specs set forth in NRCS standards that are specifically referenced in the proposed rule. I also have two isolated ponds, that could be considered "waters of the US" under the significant nexus standard even though they are not connected to a waterway. But, they are in near proximity (within a mile) of a waterway, and they do occasionally attract waterfowl and amphibians. How would this possibly impact other waters? I am very concerned that the confusion this proposed rule could create will expose me to possible litigation from environmentalist activists simply because they don't feel my fences are up to spec, or my isolated ponds somehow have issues. This is very concerning because I am a small farmer, less than 200 acres, and simply cannot afford the expense of fighting unwarranted legal issues in court, or change my fencing just to meet government specifications. My fences are completely effective in keeping my livestock out of the waterways! Also, this would be a tremendous burden if I had to obtain a permit just to maintain my fencing or put new fencing in, or if I decided to work ground on some part of my farm to reseed pasture or hay fields.

This rule is very confusing and could cause real problems (financial and legal) for small farmers like myself. I urge EPA and the Army Corps to withdraw this rule immediately, and the interpretive rule that came out earlier. Neither rule was very well thought out, and add much confusion rather than clarity. Please withdraw the rule! (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on**

US EPA ARCHIVE DOCUMENT

agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus affirmative jurisdictional determination has been made in the point of entry watershed, all similarly situated waters in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in a region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional

US EPA ARCHIVE DOCUMENT

determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

Automotive Recyclers Association (Doc. #15343)

17.1.664 ARA is extremely concerned that this proposed rule will exponentially increase the regulatory burden on our members and does not believe that the agencies' have provided justification for the need for new definitions of the waters of the US. ARA respectively requests that you withdraw the rule and instead work to include all the facilities that should be permitted to be subject to the NPDES program. (p. 8)

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

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Missouri Coalition for the Environment (Doc. #15344)

17.1.665 The proposed rule would not interfere with traditional farming practices and would support ongoing conservation efforts. If the proposed rule is not adopted, however, our waters will be left vulnerable to large, corporate-controlled, industrial operations that do not share the same respect for our land and water. In order to protect family farms and rural communities, I urge you to support the proposed clarifications in the Clean Water Rule. (p. 1)

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

US EPA ARCHIVE DOCUMENT

final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Environmental Defense Fund (Doc. #15352)

17.1.666 EDF urges the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (collectively referred to as the agencies) to:

1) Finalize the proposed rule as expeditiously as possible after due consideration of public comments (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

17.1.667 1) In light of the need for clarity on the scope of the waters of the U.S., we urge the agencies to finalize the rule as expeditiously as possible. EDF and a broad array of other stakeholders and stakeholder groups—including developers, energy companies, water utilities, agriculture, manufacturing and extraction industries, conservationists and environmentalists, state, local and tribal government officials, and members of Congress—urged the agencies to conduct a rulemaking to provide clarity on the scope of waters of the U.S. in the wake of confusion caused by the Supreme Court decisions in SWANCC and Rapanos.

The current uncertainty threatens to leave many headwater and seasonal streams and wetlands unprotected, thereby crippling efforts to achieve the Clean Water Act goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Like the capillaries in the human body's circulatory system, the vast networks of headwater and seasonal streams comprise the majority of stream miles in this country, and play a critical role in maintaining the chemical, physical and biological integrity of downstream navigable waters. They help regulate flooding and river baseflow, filter and process pollutants, provide food and habitat for aquatic life, and, in many cases, play a critical role in protecting drinking water. More than 110 million Americans rely at least in part on these streams for their drinking water.[54] Many wetlands that are not adjacent to navigable waters protect and maintain the chemical, physical and biological integrity of downstream waters by helping to regulate flooding and river baseflow, recharging aquifers, filtering and processing pollutants, and providing critical wildlife habitat

[54] http://water.epa.gov/type/rsl/streams.cfm

US EPA ARCHIVE DOCUMENT

supporting threatened and endangered species as well as downstream fisheries and shellfish.

In the wake of SWANCC and Rapanos, the CWA permitting programs have become more complicated, resource-intensive, uncertain and slow. Making case-by-case determinations of whether individual waters have a significant nexus to downstream navigable waters is 8 to 10 times more resource intensive than the permitting process was pre-SWANCC and Rapanos. [55] This also has had a significant chilling effect on CWA enforcement. EPA has declined to pursue hundreds of enforcement actions due to "jurisdictional uncertainty."[56]

A further source of urgency for finalizing the rule is the strain and constraints the current uncertainty regarding the scope of waters protected by the Clean Water Act imposes on state water quality programs. A recent study by the Environmental Law Institute reveals that at least 36 states have legal restrictions that could impair the ability of state water quality agencies to protect waters left unprotected by the CWA in the wake of SWANCC and Rapanos.[57] In fact, many states have predicated their state water quality laws upon the federal CWA, providing that the state laws be "no more stringent than" the CWA.

EDF recognizes that the draft rule is of great interest to many, and the agencies will likely receive many public comments. We urge the agencies to expedite consideration of these comments and publish the final rule as expeditiously as possible. (p. 2-3)

Agency Response: **The agencies agree. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

Children's Environmental Health Network (Doc. #15354.1)

17.1.668 With the ubiquity of water sources throughout America and our reliance on it for survival, water pollution has the potential to affect the whole population, whether through drinking, swimming, bathing, or cleaning. Unborn and young children are especially vulnerable to the effects of water pollution. Pollutants absorbed by the mother during pregnancy are absorbed by the unborn child in the womb and can have drastic effects on development. Similarly, because children's bodies are still in a state of development, they require more food and water per pound of body weight than adults, so increased pollutants in water will have pronounced effects in their bodies and on their development.

[55] R. Meltz, C. Copeland, "The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond", at 11 (Congressional Research Service, September 2014) http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf
[56] Id.
[57] "State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act" (An ELI 50-State Study, May 2013), http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf

US EPA ARCHIVE DOCUMENT

Children also spend more time than adults engaged in vigorous activities, which further increases their intake of water.

Thus, CEHN supports and commends the EPA for this proposed rule to define and broaden the scope of what bodies of water are protected under the CWA based on a refined version of the original definition. We believe that this new definition is justified and well-supported by a broad range of studies linking the presence of contaminated waters with poor health outcomes for unborn and young children. In defining whether other waters receive protection when not specifically covered in the proposed definition, their significant nexus to protected waters should be evaluated by looking at the hydrological landscape of the region, and specifically the potential for runoff. Waters are fundamentally connected for the most part, so pollution upstream can have an effect over a large area. We urge the Agency to act expeditiously in adopting these stronger standards. (…)

Furthermore, the increased presence of agrichemicals from fertilizers and pesticides poses a special problem for our nation's waters. This past summer Lake Erie experienced a toxic algae bloom that left many residents near Toledo, OH without clean water for drinking or other household activities. Nitrogen and phosphorous, components of many types of fertilizer, are necessary nutrients for the growth of this algae, and the bloom that happened was fueled by runoff that carried fertilizer into the lake from contaminated tributaries and surrounding farms. Toxic blooms like this one will become increasingly common and leave more individuals and children without clean water unless tributaries are better protected and nonpoint pollution from agrichemicals controlled. (…)

Our children, including those still in womb, are at great risk from pollutants in the nation's waters. According to a New York Times investigative report, roughly 117 million Americans receive their drinking water from a source fed by waters that are in danger of losing protection from the CWA given its current definition. That means about 37% of the population could be affected from increasingly polluted waters due to recent Supreme Court cases which weakened protection to certain waters. Health costs from sickness caused by polluted waters will only increase in the future if this current definition is not refined to restore protection to tributaries, seasonal waters, and wetlands.

This proposed rule to broaden the protection for water sources will help limit the amount of water pollution experienced in the future. The new definition takes into account the need to protect tributaries and seasonal waters that flow into larger sources used for drinking, along with our nation's wetlands. We urge the Agency to use the surrounding hydrological landscape as a way to determine protection for other waters not explicitly mentioned in the rule because of the threat of nonpoint pollution, specifically runoff, to contaminate waters and cause dangerous algae blooms. It is also vital that the EPA resist efforts to weaken or delay this proposal. Every day of delay means that more waters are allowed to be polluted with impunity. (p. 2-4)

Agency Response: **The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, EPA and the Corps have received numerous requests for a rulemaking to provide**

US EPA ARCHIVE DOCUMENT

clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public.

Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. Pollution threatens these economic drivers and we all know the dangers of pollution upstream: water flows downstream and carries pollutants with it. Right now, many streams and wetlands lack clear protection from pollution and destruction. One in 3 Americans, 117 million of us, get our drinking water from streams that are vulnerable. Sixty percent of the nation's stream miles – the vital headwaters that flow downstream after rain or in certain seasons – aren't clearly protected. Millions of acres of wetlands that trap floodwaters, remove pollution, and provide habitat for fish and wildlife are at risk.

To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

Farm Credit Council (Doc. #15355)

17.1.669 Our member lending institutions are deeply concerned that the proposed rule, if implemented, would create additional risks and costs for producers, impacting their profitability (and creditworthiness). In addition, we believe that the rule will create additional, unnecessary uncertainly regarding the ability of some producers to access adequate quantities of water to sustain their operations. This uncertainly is a risk factor that must be considered by our institutions in making credit decisions. (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional

US EPA ARCHIVE DOCUMENT

where they do not have surface connections back into, and contribute flow to, "waters of the United States."

Blue Water Business Consortium (Doc. #15359)

17.1.670 Responsible regulation of water ensures that water stays clean and plentiful for the long run and that there is a level playing field for all.

Recent court decisions have created a confusing and time-consuming process for determining what waters are included under the federal Clean Water Act and state laws. As it stands, many of our small tributary and intermittent streams and wetlands are vulnerable to degradation which ultimately results in polluted rivers and lakes. (…)

Clarifying which waters are federally protected is a sensible way to maintain this investment into the future. For Wisconsin, clarifying the WOTUS rule protects our state's bottom line as well. For example:

- a water-dependent tourism industry that contributed $16 billion to the state's economy in 2013;
- the more than $1.5 billion worth of water-related real estate transactions in 2013; and
- the more than $850 million injected into the economy by the growing craft beer industry. (p. 1-2)

Agency Response: The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The Little River Drainage District (Doc. #15361)

17.1.671 In addition to expanding the jurisdiction of Section 404 of the CWA any federal involvement triggers the federal process which would mean compliance with the long list of other federal jurisdiction items and permitting, including but not limited to, the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), etc. By triggering the federal process both agencies' would have the power to stop or delay nearly any project throughout the country. This will substantially increase the cost of project implementation. The cost benefit analysis provided in the proposed rule significantly underestimates the cost associated with implementation. (p. 2)

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

US EPA ARCHIVE DOCUMENT

In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. The existing regulations represent one appropriate baseline for comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline.

Landmark Legal Foundation (Doc. #15364)

17.1.672 EPA and the Corps propose a breath-taking expansion in the definition of "navigable waters" that renders the term devoid of meaning. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

Arizona State Senate, Legislative District 14 (Doc. #15370)

17.1.673 Congress, not federal agencies, write the laws of the land. When Congress wrote the Clean Water Act, it clearly wrote that the law applied to navigable waters. Is a small ditch navigable? Is a stock pond navigable? Is a puddle in your back yard navigable? These Agencies are not authorized to expand their authority over dry streams and washes. This reflects a concerning trend wherein federal agencies interfere with the property rights, water rights and natural resource industries of rural America. These outrageous federal actions have caused, and will continue to cause, devastating consequences to the livelihoods of the citizens I represent – farmers, ranchers, miners, homebuilders, developers, manufacturers and those in the construction industries – families in Cochise, Greenlee, Graham and Pima Counties. This confusing, unnecessary expansion of the federal government's power must end now. These Agencies should respect the limits set by Congress and honor State's rights.

The proposed rule is sweeping in its scope and has the potential to make virtually any body of water that could eventually flow into "waters of the United States" subject to federal regulation, regardless of how remote or isolated such waters may be from truly navigable waters. As the range of waters that are considered "waters of the United States" increases, so does the outrageous permitting and compliance costs to family farms, ranches, small business and local governments. This extremely cumbersome, time-consuming and abundantly complex process will hinder rural Arizona's economic growth, the backbone of our economy. (p. 1)

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

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to

US EPA ARCHIVE DOCUMENT

understand, more predictable, and more consistent with the law and peer-reviewed science.

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

<u>International Brotherhood of Boilermakers, et al. (Doc. #15373)</u>

17.1.674 While the Boilermakers appreciate the Agencies' attempt to clarify federal jurisdictional waters, we are concerned that the Proposed Rule, if finalized, will adversely affect the construction, maintenance, and expansion of infrastructure projects. The Boilermakers respectfully request that the Agencies reevaluate the Proposed Rule in light of its comments and especially reconsider how the Proposed Rule will impact American jobs. (…)

As an organization representing tens of thousands of skilled workers with a direct interest in the future course of federal environmental and energy policy, the Boilermakers urge the Agencies to take a reasoned and practical approach to defining the scope of "waters of the United States" and the implementation of the CWA. Importantly, the Agencies should not turn this rulemaking into merely what may be theoretically or scientifically plausible but rather remember that the definition of "waters of the United States" will have significant practical implications for the Agencies' regulatory responsibilities and also, importantly, for our economy. (p. 1-2)

<u>Agency Response:</u> 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.

US EPA ARCHIVE DOCUMENT

Alaska Independent Fishermen's Marketing Association (Doc. #15387)

17.1.675 I am confident that commercial fishers in AIFMA and similar organizations understand and support EPA's effort to clarify the scope of the protections afforded by the Clean Water Act.

Unfortunately, some in Congress and even in the agricultural industry misunderstand what EPA is doing. They accuse EPA of expanding the scope of the Act, or of grabbing new jurisdiction where it did not exist before. To an extent, EPA seems to have invited this misperception by referring to the proposed definition of "waters of the United States" as a new definition. The rule is new but the definition simply interprets existing authority as set out by the Supreme Court. EPA's proposed rule does not add to what has always been covered by the Act.

Instead, the proposed rule gives needed guidance to industry and the public so that implementation of the Act will be easier and clearer. For that reason, AIFMA urges you to finalize the rule. We will stand with you before Congress to support what is good for clean water, for our industry and for the common good. (p. 1)

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

National Association of State Departments of Agriculture (Doc. #15389)

17.1.676 The agencies continue to improperly move the regulatory goalposts. Throughout the summer of 2014 and concurrent with the rulemaking comment period the agencies have released a series of communications we believe indicate changes to the regulatory landscape and perhaps the final outcome of the proposed rule. These include public statements made by senior EPA officials in presentations, webinars, and on agency blogs that convey new policy interpretations about key provisions in the proposed rule's language; concurrent work by the Corps to redefine "ordinary high water mark," a critical parameter for defining "tributary" under the proposed rule; release of detailed U.S. Geological Survey maps depicting ephemeral, intermittent and perennial waters in 50 states and territories; and "clarification" of agency intent in the recently published Q&A

US EPA ARCHIVE DOCUMENT

document. We appreciate the repeated extension of the public comment period by the agencies to allow us opportunities to keep up with these 174 ever-changing regulatory goalposts. (p. 4-5)

Agency Response: **The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. This afforded the agencies an opportunity to hear concerns and address potential misunderstandings with the proposed rule.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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.

Weyerhaeuser Company (Doc. #15392)

17.1.677 As noted above, Weyerhaeuser's forestry operations take place across vast areas of land, often in areas where rainfall is abundant and where wetlands, ditches, and ephemeral features pepper the landscape. Under the proposed rule, many previously non-jurisdictional water features could be deemed "waters of the United States" under the new definitions of "tributary," "adjacent" and "other waters." This categorical assertion of jurisdiction rests heavily on an improper expansion of the significant nexus test, which the Agencies interpret to allow for aggregation of all similarly situated waters. Such sweeping jurisdiction over ditches and ephemeral drainage, in particular, will have significant ramifications for Weyerhaeuser and other private forest owners.

For starters, the proposed rule fails to establish reliable, objective criteria for identifying whether a given parcel of land contains jurisdictional waters. For example, how can a forest owner determine whether a seemingly isolated waterbody on its land is located within a "riparian area" of a jurisdictional water? How can that owner confidently distinguish between an excluded erosional feature and a jurisdictional ephemeral tributary? Absent reliable, objective standards, forest owners could be forced to prove that a particular waterbody is not jurisdictional. Such proof would necessarily involve forest owners trying to account for, among other things, extensive tributary systems, riparian areas, floodplains, and the extent of subsurface hydrologic connections that extend far beyond the boundaries of their lands. Even if forest landowners knew the right

US EPA ARCHIVE DOCUMENT

questions to ask, making such a showing would be cost-prohibitive in many cases. This will result in the loss of the ability to manage lands and an incentive for forest owners to seek other economic uses for their land --uses that typically are more intensive and thus less beneficial to water quality and other environmental and conservation attributes. (p. 13-14)

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

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus affirmative jurisdictional determination has been made in the point of entry watershed, all similarly situated waters in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in a region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated

US EPA ARCHIVE DOCUMENT

waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.

Council of Industrial Boiler Owners (Doc. #15401)

17.1.678 While CIBO members support programs and regulations designed to protect and preserve our nation's water, members use water in many energy production systems to produce steam that is used in direct and indirect process applications. This proposed rule creates uncertainty where certainty is essential to navigating the regulatory process associated with these production systems. (p. 1)

Agency Response: The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

East Kentucky Power Cooperative (Doc. #15402)

17.1.679 Implementation of the proposed regulatory interpretation could trigger the need for additional permitting actions that would bring additional costs with no additional environmental benefits. Those costs will ultimately be borne by EKPC's 519,000 residential consumers. (p. 2)

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

US EPA ARCHIVE DOCUMENT

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Wisconsin Electric Power Company and Wisconsin Gas (Doc. #15407)

17.1.680 Any change in CWA regulations that would change the scope of federal jurisdiction will have a substantial effect on our ability to develop new projects and to maintain existing infrastructure and facilities. The agencies' proposed expansion of jurisdiction will result in additional permit obligations for all CWA programs. The proposed rule has a broad-sweeping impact on whether and how We Energies is regulated under multiple programs authorized under the CWA, including:

- CWA Section 402 Permits issued under the National and Wisconsin Pollutant Discharge Elimination System (N/WPDES) wastewater discharge permit programs; and
- CWA Section 404 dredge and fill permits and similar state-level programs. (p. 1)

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

17.1.681 Federal jurisdiction over drainage features will either increase costs and/or require permits for the first time ever to complete projects in locations like storm water ditches. We Energies and its customers will be required to either obtain permits to conduct work in a ditch or increase its construction costs to avoid the impact to the ditch. For example, if horizontal directional drilling (boring) techniques are required to install an underground residential gas service lateral to avoid a storm water ditch (by boring under it), construction costs would more than double. These incremental site-specific costs are borne by the customer. Alternatively, if conventional direct burial trenching techniques are proposed to traverse the ditch, a permit application (with no guarantee of success) will be required at increased costs (for permits) and time delays for the customer. Since We Energies evaluates every project, including residential installations, to determine applicable permits and approvals, proposed rule changes that place ditches under federal jurisdictional will have widespread economic impacts. (p. 4)

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of**

US EPA ARCHIVE DOCUMENT

these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Dow Chemical Company (Doc. #15408)

17.1.682 We appreciate that EPA has specifically included the exemption for wastewater treatment systems covered by a Clean Water Act permit, and we support EPA's decision to propose a rule rather than guidance to clarify the regulations. However, Dow is concerned that the proposed rule does not clarify the current regulation but rather has added new definitions with their own clarification challenges and provided a list of exemptions that will serve to further confuse what falls within the jurisdiction and what does not. EPA and the USACE are proposing a very broad series of definitions and asking for comments on exemptions rather than proposing a set of narrow and carefully tailored definitions that ensure that CWA jurisdiction is clarified, and not expanded.

In summary, Dow believes that as written, the proposed rule fails to "clarify" the jurisdiction of the CWA and instead results in a significant expansion of the rule potentially leading to jurisdiction of all waters. (p. 2)

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

US EPA ARCHIVE DOCUMENT

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

National Association of Manufacturers (Doc. #15410)

17.1.683 The NAM respectfully requests that these comments be considered by the agencies, that they be maintained in the administrative record for this rulemaking, and that after careful consideration of these comments, the agencies withdraw their proposed rule, and revise the proposed rule such that it comports with the United States Constitution and the Clean Water Act, as authoritatively interpreted by the Supreme Court. Finalization of the proposed rule as drafted would not only be unlawful, it would also create a regulatory environment of extreme uncertainty, in which regulated entities, like NAM's members, would have no clear understanding of how to comply with the regulations, leading to unnecessarily high compliance costs and potentially severe economic impacts. Likewise, the proposed rule cannot be finalized as is and must be revised substantially. (p. 1)

Agency Response: The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States,* 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the resulting opinions of the Court can be found in section III.A of the preamble to the final rule.

See the preamble and TSD for additional discussion of the legal basis for this rule.

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

US EPA ARCHIVE DOCUMENT

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.684 The proposed rule is further flawed because of its failure to provide meaningful guidance as to the scope of the jurisdiction that the agencies are asserting by failing to provide clear definitions. As explained below, in several respects, the proposed rule is unconstitutionally vague and creates a risk of arbitrary enforcement by the agency. No regulated party—even if armed with an army of hydrologists—could conclusively determine in advance the full scope of the regulatory authority asserted by the agencies under the proposed rule. (…)

Further, the agencies assert the ultimate right to conduct an open-ended, multi-factor, case-by-case analysis of the jurisdictional status of even waters not covered by their broad definitions of "tributary" and "adjacency" in which no guidance is given as to what factors are most relevant or how they will be weighed. While the agencies assert that the proposed rule will "increas[e] clarity as to the scope of the 'waters of the United States' protected under the Act," 79 Fed. Reg. at 22188, ultimately the agencies' proposed test for what constitutes a "water of the United States" provides no clarity at all and amounts to little more than a statement that the agencies will know a "water of the United States" when they see it. (p. 12-13)

<u>Agency Response:</u> 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 proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional

US EPA ARCHIVE DOCUMENT

navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. When a significant nexus exists between a water(s) and (a)(1) through (a)(3) water, that nexus exists even in absence of a positive jurisdictional determination on the site. When a site specific jurisdictional determination has been done it serves to identify the boundaries of the "waters of the United States." Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For (a)(7) waters, if a case-specific significant nexus affirmative jurisdictional determination has been made in the point of entry watershed, all similarly situated waters in the point of entry watershed are jurisdictional. For (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in a region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

<u>Steel Manufacturers Association and Specialty Steel Industry of North America (Doc. #15416)</u>

17.1.685 In addition to the cooling water retention ponds used to store and treat cooling water, steel mills often have stormwater retention and detention basins to protect downstream waters from runoff. Additionally, steel mills are often situated on large undeveloped parcels that provide neighbors a natural buffer from the industrial processes therein. These undeveloped portions can often include wetlands that are either naturally present or which were developed by the mill operators as a mitigation activity or to create an environmentally beneficial habitat. Many of these on-site water sources would fall within the expansive proposed definition of "waters of the United States," and would introduce overly burdensome new regulations and obligations on mills, with very little environmental benefit. (p. 2)

US EPA ARCHIVE DOCUMENT

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

It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."

Trinity River Authority of Texas, General Office (Doc. #15417)

17.1.686 The Proposed Rule expands the scope of "Waters of the United States" under the Clean Water Act beyond the limit established by Rapanos. The Proposed Rule will require the Authority to both engage in more jurisdictional determinations, on-site mitigation projects and purchases of mitigation credits, without a coordinate improvement in water quality. These costs are passed on to the Authority's customer cities, which in turn pass those costs on to retail water and wastewater customers. The Proposed Rule's misconstruction of Rapanos cannot justify the imposition of those costs. The Trinity River Authority of Texas respectfully urges the agencies to withdraw the Proposed Rule. (p. 3)

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

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the

US EPA ARCHIVE DOCUMENT

downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

City of Monroe, North Carolina (Doc. #15422)

17.1.687 State and local government play an important role in implementation of the Clean Water Act. Since the issuance of our original MS4 permit, the program has become stronger as our citizens are made aware of factors affecting water quality through public education. The City of Monroe is very concerned that the proposed rule will hamper how our MS4 and Stormwater Utility will be able to function on the local level by removing control of our drainage facilities. The City of Monroe strongly recommends that the proposed rule be rewritten to state unequivocally that the definition of tributary does not include MS4 facilities and MS4 facilities are not a water of the US. Doing so now will save time and money for our citizens as we address immediate concerns that directly affect the water quality of our lakes. (p. 2)

Agency Response: The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

Grand Junction Area Chamber of Commerce (Doc. #15425)

17.1.688 According to the proposed Clean Water Act Jurisdiction Rule, known as the Waters of the U.S., all tributary and adjacent waters would be "jurisdictional by rule." This expansion would cause dry washes, roadside ditches, drainage ditches, storm water detention ponds, and many other water bodies to become the subject of federal oversight.

This causes concern for many of our businesses; as in Western Colorado many tributaries to Traditional Navigable Waters (TNW) only have water in them once or twice a year. Currently, these tributaries can be considered jurisdictional, but under the proposed regulations, these tributaries would be considered Waters of the U.S. and these drainages and any impact to them would require permitting. This permitting is onerous, costly and

US EPA ARCHIVE DOCUMENT

time consuming to businesses. Much of the current development that is planned in Western Colorado could be stopped under the proposed rule of Waters of the U.S. (p. 1)

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

The final rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Texas Wheat Producers Association (Doc. #15430.1)

17.1.689 A specific area of concern is the expansion of EPA jurisdiction through several definitions and additions in the proposed rule, including the use of "tributaries", "adjacent waters" and "other waters." We feel that the changes and additions to these provisions expand the scope of the Clean Water Act and will provide unclear, misleading and costly operating conditions for our members. It is clear from our reading of the proposed rule that several areas and ditches that only hold water seasonally or during storms would now be regulated as a "water of the U.S." despite the exemptions for agriculture in the Clean Water Act. (p. 1)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Texas Chemical Council (Doc. #15433)

17.1.690 It is TCC's position that this rule unjustifiably expands the regulatory reach of the agencies and should either be withdrawn completely, or withdrawn, redrafted to comply with standing legal precedent and policy positions, and reproposed with proper notice and comment. (p. 1)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> 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.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.691 TCC requests that the agencies withdraw this proposed rule and reconsider their statutory charge in defining agency jurisdiction. Alternatively, TCC suggests that the agencies incorporate significant changes to the proposed rule that are within constitutional limits, and repropose with proper notice and comment to define what waters authorize the exertion of federal jurisdiction. (p. 2)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

17.1.692 In expounding on these seven categories, the agencies have proposed to incorporate a number of completely new terms that have never before been defined by statute or by the judiciary. These terms include "neighboring," "riparian area,"

US EPA ARCHIVE DOCUMENT

"floodplain," "tributary," as well as "significant nexus."[58] In combination, these terms provide the federal government with potentially limitless jurisdiction under the CWA. (p. 4)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.693 The proposed rulemaking subjects all "adjacent" waters to federal CWA jurisdiction. Under current regulations, only adjacent wetlands are jurisdictional. As proposed, this rule would explicitly extend federal jurisdiction to include "all waters" that are considered "adjacent" to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. This extension of "adjacent waters" represents what the agencies believe is a trade-off for eliminating the "other waters" category under current regulations. Although this shift aims at providing additional certainty by incorporating waters the agencies believe are already jurisdictional under current regulations, it will in effect grab additional waters, as well as lands, that were not before jurisdictional. (p. 6)

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

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters.

See preamble and Adjacency Compendium for further discussion of adjacency.

17.1.694 TCC appreciates the opportunity to provide these comments to the EPA and Corps, and strongly urges the agencies to consider withdrawing and retooling the Proposed Rule to be more explicit and narrow in how it defines "waters of the U.S."

[58] Proposed Rule, 79 Fed. Reg. at 22193.

US EPA ARCHIVE DOCUMENT

under the Clean Water Act. It is paramount to the regulated community, as well as the public, that they have clear and forthright notice as to what waters can be subject to federal regulations, especially in light of the potential far-reaching implications and burdens that could be placed on industry and the state regulatory agency. (p. 9)

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

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Wyoming County Commissioners Association (Doc. #15434)

17.1.695 Mineral extraction in a public lands state like Wyoming is a difficult endeavor in the best of times. The NEPA permitting process is long and arduous, often requiring 5 or more years before the first drop of oil is recovered. Each incremental cost imposed on these industries adds to the pressure already forcing companies to other places in the United States or around the globe where the regulatory burden is not so onerous. (…)

Forcing Wyoming's agriculture producers to navigate and pay for potentially conflicting or duplicative federal permits puts an unnecessary and difficult strain on a major contributor to this small county. (p. 10-11)

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

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

US EPA ARCHIVE DOCUMENT

Natural Resources Defense Council et al. (Doc. #15437)

17.1.696 It is difficult to overstate the importance of the issue this rule addresses. Whereas "waters of the United States" are protected from pollution and destruction by the Clean Water Act's important programs, aquatic features that are not considered "waters of the U.S." lack such protection under the federal Act. Virtually every one of the Act's critical safeguards depends upon the presence of "navigable waters," which the law defines to mean "waters of the U.S.,"[59] including:

- The national goal that pollutant discharges "be eliminated by 1985";[60]
- The absolute prohibition on discharging "any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste";[61]
- The core requirement that if an entity is going to discharge pollutants into waters from a point source, it must first apply for and obtain a permit that limits the pollutants allowed to be discharged;[62]
- The obligation that states develop water quality standards protecting designated uses and that EPA review them to ensure they are adequately protective;[63]
- EPA's review of total maximum daily load cleanup plans to restore impaired waters;[64]
- The requirement to develop water body-specific control strategies to address toxic pollution problems that are not solved by discharge standards applicable to sources of such pollution;[65]
- The obligation that states prepare biennial reports on water quality conditions;[66]
- Protections against the discharge of oil or hazardous substances;[67]
- The bar on a vessel that "is not equipped with an operable marine sanitation device" from operating in protected waters;[68]

[59] 33 U.S.C. § 1362(7) (defining "navigable waters" to mean "the waters of the United States").
[60] Id. § 1251(a)(1).
[61] Id. § 1311(f).
[62] See id. §§ 1311(a) (generally prohibiting the "discharge of any pollutant" without compliance with other requirements of the Act), 1362(12) (defining "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source").
[63] Id. §§ 1313(c)(2)(A) & (c)(4).
[64] Id. § 1313(e)(3)(c) ("The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include . . . total maximum daily load for pollutants in accordance with subsection (d) of this section").
[65] Id. § 1314(l)(1).
[66] Id. § 1315(b).
[67] See, e.g., id. § 1321(b)(3) ("The discharge of oil or hazardous substances … into or upon the navigable waters of the United States in such quantities as may be harmful as determined by the President … is prohibited, except … where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful."); id. § 1321(j)(5) (providing for the development of facility response plans in the case of "[a]n onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.").

US EPA ARCHIVE DOCUMENT

- The directive for states to develop management programs for nonpoint pollution, and the related directive that EPA provide grants to assist with the implementation of such programs;[69]
- The requirement that applicants for federal permits obtain a state's certification that the discharge will comply with various provisions of the Act, including state water quality standards;[70] and
- Restrictions on the disposal of sewage sludge.[71]

Put simply, a water body that is denied treatment as a "water of the U.S." is subject to an assortment of industrial and municipal pollution assaults.

It is likewise hard to overstate the importance of the aquatic resources that are implicated by this proposed rule. The three major categories of water bodies that have been thrown into the most doubt by developments in the law include so-called "isolated" waters; non-navigable tributaries, especially ones that do not flow "relatively permanently"; and waters adjacent to tributaries that are not considered "traditionally navigable." Although the exact extent of these categories is hard to quantify based on currently available information and is subject to interpretation, some statistics will give a rough sense of the scope of the problem. Approximately 20 percent of the roughly 110 million acres of wetlands in the continental U.S. could be considered "isolated."[72] Nearly two million miles of the nation's streams – about 59 percent of the total -- outside of Alaska are intermittent or ephemeral.[73] An estimated 53 percent of the streams outside of Alaska are

[68] Id. § 1322(h)(4).
[69] Id. §§ 1329(a), (b) & (h).
[70] Id. § 1341.
[71] Id. § 1345.
[72] Eric Pianin, Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say, Washington Post, Jan. 11, 2003, at A05 ("The new regulation would shift responsibility from the federal government to the states for protecting as much as 20 percent of the 100 million acres of wetlands in the Lower 48 states, according to official estimates."); Solicitor General Resp't Arg. Tr., Rapanos v. U.S. & Carabell v. U.S. Army Corps of Eng'rs, at 41-42 (U.S. Feb. 21, 2006) ("about 20 percent of the Nation's wetlands are isolated"); Letter from Benjamin H. Grumbles, Acting Assistant Administrator for Water, U.S. EPA, to Anu Mittal, Director, Natural Resources & Environment, General Accounting Office, at 2 (Feb. 4, 2004), reprinted in U.S. GENERAL ACCOUNTING OFFICE, GAO-04-297,WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, appendix IV (Feb. 2004) ("The Continental United States has lost over half of its wetlands since European settlement, with approximately 100 million wetland acres remaining. Of those, some 20% may be wetlands that are less obviously connected to the broader aquatic ecosystem."). Notwithstanding the 100 million acre estimate in some of these prior assessments, the figure is closer to 110 million acres, according to the U.S. Fish and Wildlife Service. See T.E. Dahl, U.S. Fish & Wildlife Serv., U.S. Dept. of Interior, Status and Trends of Wetlands in the Conterminous United States 2004 to 2009, at 16 (2011), available at http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.
[73] Letter from Benjamin H. Grumbles, Assistant Administrator for Water, U.S. EPA, to Jeanne Christie, Executive Director, Association of State Wetland Managers, at 2 (Jan. 9, 2006) (mis-dated as Jan. 9, 2005). Please note that these figures may not be precise; for instance, we are aware that the House of Representatives' Science Committee recently released a set of maps prepared for EPA, and the national map states that there are "7,339,124 miles of linear streams in the U.S. (including Puerto Rico), [of which] 77 percent (5,661,337 miles) are intermittent or ephemeral." Indus Corporation under contract with U.S. EPA Office of Water, Streams and Waterbodies in the United States (Oct. 2013), available at http://science.edgeboss.net/sst2014/documents/epa/national2013.pdf. We are

US EPA ARCHIVE DOCUMENT

"start reaches," making them unlikely to be traditionally navigable. Collectively, these streams have untold acres of wetlands adjacent to them.[74] An estimated 117 million Americans depend on drinking water suppliers that draw at least in part from intermittent, ephemeral, or headwater streams.[75] (p. 1-3)

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

United States Steel Corporation (Doc. #15450)

17.1.697 U. S. Steel supports the numerous concerns outlined below that the WAC has identified with the proposed rule and agrees that the rule, itself, is flawed beyond use, especially when considering that the definition of "waters of the United States" is the very foundation of the CWA. U. S. Steel also agrees that the proposed rule, as written, should be withdrawn and , if it is redrawn using reasoned decision-making and is legally and scientifically justified, re-proposed at a future date. (…)

In summary, U. S. Steel recommends that the agencies withdraw the proposed rule, and develop a new proposal by working with States and stakeholders to develop a proposed definition of "waters of the United States" that is consistent with the CWA, supported by science and Supreme Court case law. (p. 1-2)

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

unsure of the full basis for these estimates, and they seem to include data for Alaska, which are not included in the figures cited above, but the central point is the same – an enormous amount of the nation's water resources are at stake.

[74] Id.

[75] U.S. EPA, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S. (last updated on Oct. 29, 2013), available at http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm.

US EPA ARCHIVE DOCUMENT

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Idaho Association of Commerce & Industry (Doc. #15461)

17.1.698 Jurisdictional determination -While the purpose of the proposed rule was to provide greater clarification, the rule's "other waters" and significant nexus definitions, broaden the interpretation of waters of the U.S. and in many way, brings greater uncertainty especially for non-tributary and non-adjacent waters and wetlands as well as mine features that intercept groundwater. Additional efforts will be required when conducting delineations and the evaluation of waters of the U.S. In addition, challenges to Corps determinations may occur, especially as related to man-made features. (p. 8)

Agency Response: **The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific**

US EPA ARCHIVE DOCUMENT

determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required. The agencies believe that the clarity provided by the rule will make conducting determinations easier.

17.1.699 Third-party involvement - With the broadened definitions; third parties could use the proposed rule to argue that certain waters (including man-made features) or wetlands are jurisdictional and that certain activities should be permitted under the CWA. Potential suits against the federal agencies for not following the rule would result in project delays or cancelations. (p. 10)

Agency Response: **Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.**

17.1.700 Aggregate operations in southwestern Idaho are located within the eastern Snake River Plain, an elongated basin containing sequence of Quaternary and late Tertiary basalt lava flows over three thousand feet thick. The Plain extends across southern Idaho from the Yellowstone Plateau to the Twin Falls area. Between the lava flows lake, stream and windblown sediments were deposited. These deposits provide the bulk of the aggregate resources in the area. Because of underlying geology and the abundance of perched groundwater throughout the Snake River Plain, many of our aggregate operations are located in isolated wetted areas. If wetted aggregate reserves are closed in Idaho, local businesses will be seriously impacted. Calculating the financial impact is more than just the loss of reserves. It would include lost profits from these lines of business, the additional cost to replace the aggregates, the increased cost of doing business with unproven sources, and the impact to competitiveness in the market if the new reserves are further away than current reserves. Loss of these current reserves due to a jurisdictional determination under the proposed guidance would have a financial impact of over $30 million per year.

In summary, expanding jurisdiction to sand and gravel reserves excavated in upland areas due to inconsistencies of interpreting floodplain and groundwater criteria would not protect existing wetlands with bright-line connectivity to traditional navigable waters but would severely hamper the Construction Materials Industry's ability to provide the services and materials critical to maintaining and improving this nation's transportation infrastructure. (p. 13)

Agency Response: **The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also**

US EPA ARCHIVE DOCUMENT

significantly reduces the uncertainty and number of case-specific determinations that will required.

The rule has expanded the section on waters that are not considered waters of the United States, including artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present.

Greater Houston Builders Association, et al. (Doc. #15465)

17.1.701 The GHBA, HREC and HAA wish to acknowledge and emphasize that environmental quality is critically important to the greater Houston region. We are always interested in advancing the cause of improving the environment when results are real, costs are reasonable and efforts are not unduly burdensome to the public and commerce.

However, the proposed expansion of the regulatory reach of the CWA by re-defining "Waters of the United States" does not provide consistency, predictability nor efficiency – all essential to local homebuilding, commercial real estate development and continued economic development.

Further, the proposed rule does not adequately serve overall public interest nor environmental interests and will not significantly improve the quality of navigable waters. Instead, expansion of jurisdiction would require more federal involvement, at greater cost, in local activities without a demonstrated link to the quality of navigable waters.

For these reasons, the Agencies should withdraw the rule and only propose a subsequent rule if Constitutional, judicial, legal, economic, scientific, practical and procedural infirmities have been addressed and rectified. (p. 8)

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on

US EPA ARCHIVE DOCUMENT

clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Cameron Parish School Board (Doc. #15468)

17.1.702 The School Board is the income beneficiary to several thousand acres in coastal areas of southwestern Louisiana. This property was acquired through federal donation under the Northwest Ordinance of 1787 to provide economic support of the schools in the area. It has been an important source of income to the School Board for decades providing income from migratory bird hunting, rice farming, and oil and gas royalties. There is a general concern that the EPA's proposal threatens this income steam and undermines Congress's original intent to provide this support. These new regulations will diminish and possibly destroy interest in the use of low-lying coastal areas through higher regulatory mitigation costs. Even if one assumes that these costs will be borne by the developer, the costs are site-specific, and since the petroleum and agricultural commodity markets are world-wide and must compete on that basis, any regulatory costs will result in lower amounts paid to the School Board for both mineral and farming leases. This will also result in losses to the overall U.S. economy, to farmers, processors, mineral producers and processors, as well as the consuming public. By way of example, all rice land in any state will become subject to these new regulations at a time when California is having to move away from the crop due to lack of water.

Hunting leases could also be harmed if these regulations take effect as proposed. Periodically, permits are currently obtained to clear tranasses which became clogged or silted. This problem occurs naturally, but particularly after hurricanes whose storm surge can roll up the marsh. If the clearing of these tranasses is halted or through regulation, restricted, eventually many pieces of property will be become un-huntable due to access issues. (p. 1)

Agency Response: **Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. Pollution threatens these economic drivers and we all know the dangers of pollution upstream: water flows downstream and carries pollutants with it. Right now, many streams and wetlands lack clear protection from pollution and destruction. One in 3 Americans, 117 million of us, get our drinking water from streams that are vulnerable. Sixty percent of the nation's stream miles – the vital headwaters that flow downstream after rain or in certain seasons – aren't clearly protected. Millions of acres of wetlands that trap floodwaters, remove pollution, and provide habitat for fish and wildlife are at risk.**

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-

US EPA ARCHIVE DOCUMENT

reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

Crook County Land Use Planning & Zoning Commission (Doc. #15471)

17.1.703 These regulations would detrimentally restrict the ability of the individual to manage the seasonal precipitation by delaying his actions by weeks or months if he were to be required to apply for Federal permission before modifying drainage structures/ditches. State and/or local control of these issues would provide for a much faster and individualized response, and is therefore the more desirable option in our opinion. (p. 1)

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of**

US EPA ARCHIVE DOCUMENT

these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. The construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information.

Berns, Clancy and Associates (Doc. #15474)

17.1.704 The proposed rule would significantly expand the scope of navigable waters that would potentially be subject to regulation under Clean. Water Act jurisdiction. Many waters that are intermittent, small or remote would be potentially regulated now and in the future. Many of these "waters" as defined by the proposed rule would not be considered "wet" under any common understanding of that word. It is unthinkable that intermittent flow in a rural roadside ditch or through a grass waterway would now be defined as "Waters of the United States" or for these features to be considered navigable.

The rule indicates that a tributary can be natural, man-altered or man-made. This definition would include such drainage features as subsurface drain tiles with surface inlets and storm sewers. Such a definition is a dramatic increase in the scope of regulatory authority. It is inconceivable that the intent of Congress was to consider such drainage facilities as "Waters of the United States" when the Clean Water Act was adopted. These features are most certainly not "navigable".

Expanding the "Waters of the United States" jurisdiction to ditches and drainage facilities owned and operated by units of local government will unnecessarily increase the cost and delay the completion of routine maintenance. Further, by dramatically expanding the jurisdiction, it would appear that federal permits would be required to construct new components to municipal separate storm sewer systems and rural surface drainage systems. Such requirements would substantially increase the funds required to undertake such improvements and the time required to comply with federal permitting regulations are likely to result in delays in project delivery.

As a citizen and taxpayer whose livelihood is watershed management I strongly support out nationwide efforts to prevent pollution and to promote clean water. However this proposed rule goes much too far, is much too intrusive into the daily lives of citizens, and is an insult to common decency. I strongly object to the heavy handed efforts of the United States Environmental Protection Agency and the United States Army Corp of Engineers to expand their regulatory jurisdiction far beyond that which was granted by Congress. The agencies have overstepped their authority, and are ignoring two (2) Supreme Court decisions which have already confirmed that they cannot and should not do this.

I am very concerned about the impact that the proposed regulations will have upon land use. While I understand that the Clean Water Act does not regulate land, the proposed regulations would require modifications to land use in order to comply with its

US EPA ARCHIVE DOCUMENT

requirements governing discharges into Waters of the United States. This effectively regulates land use! It is a substantial expansion of federal authority. It is my belief that the proposed rules will be harmful to the economy, and are simply too burdensome. The United States Environmental Protection Agency estimates of the potential costs to implement these regulations are grossly underestimated. (p. 1-2)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction.

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule has expanded the section on waters that are not considered waters of the United States, including artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as

US EPA ARCHIVE DOCUMENT

well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information.

City of Fountain, Colorado (Doc. #15478)

17.1.705 Additionally, we are concerned that without modifications to the proposal, infrastructure projects will be delayed and costs will increase due to the need to meet additional permitting requirements. Both small and large infrastructure projects are already expensive and time consuming. If permits are not issued in a timely manner it can cause an economic ripple effect through a community as a consequence of the project delays. The potential complexity in applying for a permit under the proposal, especially with reference to the "other waters" category, coupled with the ambiguity in what type of project will require a permit, will also result in project delays and cost increases that local governments cannot afford.

Like many local governments in the West we move water through ditches in order to meet water supply needs. This is oftentimes accomplished in coordination or partnership with agricultural water suppliers. The narrow scope of the proposed ditch exemption will mean that most ditches will be considered jurisdictional, as they are not excavated wholly in uplands and drain areas other than uplands. Hence, this proposal will increase the burdens associated with both meeting future water supply challenges and maintaining and replacing existing ditch structures. (p. 2)

Agency Response: **The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information.**

The agencies have not considered water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion

US EPA ARCHIVE DOCUMENT

in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Oregon Water Resources Congress (Doc. #15488)

17.1.706 [I]t could be implied that because only two types of ditches are specifically excluded from jurisdictional coverage, all other types of ditches can and will fall under the definition of WOTUS. In addition to irrigation ditches and canals, water storage ponds and reservoirs could also be considered jurisdictional waters under the proposed rule. Rather than providing clarity for our members, this places the burden on them to prove that their ditches or reservoirs are exempt under the rule if the agency or a third party asserts that they are for some reason jurisdictional. This lack of clarity will cause unnecessary delays in projects and significant increases in legal and permit costs for irrigation districts and the farms and other water users they serve. The proposed rule will also be detrimental to Oregon irrigation districts and their water users who are actively pursuing water conservation, efficiency, and storage projects that often have a water quality component as well as other benefits. In some cases, these delays and increased costs could cause a project to lose time limited grant or loan funding or be shelved altogether. (…)

Moreover, coupled with the previously stated permitting issues, the expansion would disproportionately burden farmers and other agricultural water users who supply the food and fiber we all depend upon. (p. 3-4)

Agency Response: **The rule does not shift the burden of proof; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.**

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

US EPA ARCHIVE DOCUMENT

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

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

State of Indiana Office of the Governor (Doc. #15493)

17.1.707 We firmly believe that solutions to the challenges we face will most effectively emanate from our state capitals, not Washington, D.C. In Indiana, we are growing our economy, creating jobs, and feeding the world by eliminating bureaucratic red tape and reducing the size of government. We believe that Indiana knows best how to protect its waters, and we believe that the proposed rules inhibit Indiana's ability to manage its own affairs. (p. 2)

Agency Response: The agencies will continue to work closely with the states to implement the final rule. 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.

Kentucky Coal Association (Doc. #15498)

17.1.708 KCA urges EPA to proceed with extreme caution as it considers the WOTUS issue in view of the serious harm that would flow from even an inadvertent expansion of Clean Water Act jurisdiction. Such an expansion would cast doubt on the adequacy of present state laws and regulations under which most Clean Water Act programs are currently administered and almost certainly necessitate action by state legislatures and state regulatory agencies to accommodate the change in Clean Water Act jurisdiction. Since such statutory and regulatory changes would have to be approved by EPA, the

US EPA ARCHIVE DOCUMENT

limited resources presently available for Clean Water Act implementation would be needlessly further diminished.

From the standpoint of the regulated community, any change in Clean Water Act jurisdiction would raise the specter that ongoing activities, thought to be operating with all necessary environmental permits and approvals, would be found to lack necessary permits to conduct such operations. In such instances the operators could be required to discontinue the unpermitted activities or be subject to punitive sanctions merely because of EPA's misguided effort to "clarify" Clean Water Act jurisdiction.

As previously stated, KCA is strongly of the opinion that the proposal to define WOTUS should be withdrawn. In the event that the agencies decide to proceed with their proposed regulation, KCA suggests that the agencies avoid any potential for inadvertent expansion of Clean Water Act jurisdiction by explicitly stating in the text of the regulation itself that the regulation shall not be construed to expand the scope of Clean Water Act jurisdiction beyond that which existed on the date of promulgation of the regulation. (p. 2)

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

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The agencies will continue to work closely with the states to implement the final rule. 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.

La Jolla Community Fireworks Foundation (Doc. #15500)

17.1.709 Many community fireworks displays and other local events, particularly in California but also in other parts of the United States, take place near, but not directly in or over, coastal waters or lakes, rivers, or other bodies of waters. As noted above, many of these near-water lands were subject to a case-specific analysis of whether they fall under the jurisdiction of the Act, which allowed for some opportunity for a fair and reasoned analysis with respect to the unique facts of each case. However, if federal jurisdiction under the Act is expanded as proposed, litigious activist groups and attorneys, under the cloak of the public interest, will have greater ability to sue local communities, local community organizations, small businesses, and even private landowners. Using the citizen-suit provisions under the Act (and other laws), these groups will be able to target a

US EPA ARCHIVE DOCUMENT

community or landowner who is planning to hold a community event - no matter how small and even if on land - if that event has any connection to the per se jurisdictional waters as defined the Proposed Rule, or if that event is near any such arguably water-related lands, under a theory that a discharge of fireworks in the air may be deposited into jurisdictional waters or water-related lands. The likely result of the Proposed Rule, particularly as it pertains to the California coast and very likely as to other areas of the United States, is an increase in threatened and actual litigation. Communities and organizations will be more vulnerable to this threatened litigation if federal jurisdiction is suddenly expanded in a way that does not allow for a case-by-case review of the facts. The Proposed Rule will only serve to give such groups greater incentive to initiate such litigation.

The Proposed Rule will thus exacerbate a problem already faced by local communities and non-profit organizations in California - vexatious litigation by overzealous activists. Many local organizations in California communities, like elsewhere in the country, traditionally hold annual Fourth of July fireworks displays, which serve, among other things, to bring the community together and support local businesses. But over the past ten years, these activist groups have consistently threatened local communities and organizations with litigation, including Clean Water Act litigation, claiming that annual fireworks displays pollute local beaches and bays. These concerted efforts to cancel fireworks displays persist every year despite the fact that environmental studies in different areas routinely show that such small-scale, occasional events have no adverse effect on water quality.[76]

Unfortunately, such actual or threatened litigation forces many communities and organizations to choose between undergoing an extensive and expensive environmental review and permitting process for each and every event contemplated, engaging in years of costly litigation, and/or paying a settlement to these activists ' groups, or, more likely, canceling the shows entirely. Unfortunately, an environmental review process is prohibitively expensive in most cases for non-profit, community-funded events. For example, the Foundation's fireworks display at La Jolla Cove is a modest community event with a $30,000 to $40,000 annual budget from community donations. It simply does not have the budget to undergo a full Environmental Impact Report under the California Environmental Quality Act, as an activist group contended was required in order to evaluate (among other things) the impact of the annual, 20-25 minute fireworks display on marine life and water quality. Similar litigation threats have caused many small, local community fireworks shows to cease to exist entirely, such as the now-cancelled community fireworks show near Lake Murray in San Diego and others as shown in the attached Exhibit A. (p. 2-3)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of

[76] Robert, Howard, Jeffery Carlin, and Taiga Takahashi, *Goodbye Fourth of July: Are Fireworks Displays Now Subject to CWA Regulation?* 43 Envtl. Law Rptr. 10537, 10539 n. 24 (July 2013), *available at* http://elr.info/news-analysis/43/10537/goodbye-fourth-july-are-fireworks-displays-now-subject-cwa-regulation (list of recent water quality monitoring studies showing that occasional community fireworks shows have no appreciable effect on water quality, consistent with other findings of older studies).

US EPA ARCHIVE DOCUMENT

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

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier. A JD is a Corps' determination that jurisdictional waters are either present or absent at a site, and can be used by the landowner if a CWA citizen suit is brought against the owner. While the JD would not be binding on the third party, we believe the Corps' expert opinion, and the landowner's reliance on the Corps' expert opinion, would be important factors to which any Court hearing such a suit would give substantial weight.

Idaho Power Company (Doc. #15501)

17.1.710 The SPCC Rules are not jurisdictional when it has been determined, based on natural, unaltered topography, that there is not a likelihood, or pathway, of a spill reaching a WOTUS. However, the current proposal would require IPC to either reassess those facilities or determine they are jurisdictional based on a significant nexus of features, such as manmade ditches or other ephemeral features that were previously not WOTUS but may be deemed jurisdictional by the Agencies where they discern a bed, bank, and ordinary high water mark (OHWM) or, in the absence of such, whether the feature is a wetland, lake, or pond and contributes overland or subsurface flow. The cost impact of creating and maintaining additional plans based on current estimates of these activities is projected to be at least $750,000 upfront and $150,000 annually. This is a limited analysis based on a single utility, and costs are likely to be higher. When extrapolated for each industry in Idaho, as well as nationally, the cost impact is significantly greater than imagined by EPA.

IPC also is required to obtain permits under section 404 of the CWA whenever it engages in dredging or filling activities within the ordinary high water mark of a WOTUS. Currently, much of the work can be done under Nationwide Permits because of the nature of the work and limited extent of the impact. Because of the uncertainty of whether currently non-jurisdictional waters and ephemeral features will become jurisdictional under the significant nexus definition of the proposed rule, IPC will be required to engage in additional permitting, including acquiring Individual Permits, and mitigation that would not be necessary under the existing definition of WOTUS.[77] Individual Permits are

[77] Nation Wide Permits are limited in scope and geographic impact and are designed for commonly occurring , smaller projects with well-defined impacts. Individual Permits are necessary when the acreage of impacts is larger

US EPA ARCHIVE DOCUMENT

often complicated and expensive because they require consultation with multiple state and federal agencies, along with acquiring associated 401 permits. The cost of obtaining a Nationwide Permit can vary from $10,000 to $40,000, while the cost of obtaining an Individual Permit is substantially higher, ranging from $100,000 to $500,000, depending on the complexity of the project. With an expansion of waters that are considered jurisdictional, many projects that would not require an Individual Permit today will require one under the proposed definition. Therefore, contrary to the Agencies' claim, the cost impact to the regulated community will be significant.

To emphasize this point, much of the proposed rule's impact on electric utilities occurs during activities that preserve electric reliability and protect national security. Transmission and distribution corridors, substations, and new generation facilities are, and will continue to be, a critical component of preserving electric reliability to customers, including important national security functions through that reliability. The delivery of electricity to support these critical functions requires the construction, expansion, operation, and maintenance of transmission and distribution line infrastructure, which often cross hundreds of miles of land in remote areas. Because of the geographic extent of these lines, there are numerous opportunities to cross or run adjacent to waters that are jurisdictional under section 404. Under the proposed rule, entire floodplains, streams, ephemeral features, ditches (per se jurisdictional under the proposed rule) , "similarly situated waters," among numerous others, and waters adjacent to them would be considered WOTUS and may require an Individual Permit, rather than the more cost-effective Nationwide Permit. If the cost of obtaining the Individual Permit, including associated mitigation, is prohibitive, important infrastructure upgrades and new construction will not occur or will be delayed, leading to reliability and national security risks.

For example, Nationwide Permit 12 for utility lines authorizes ground disturbances of only ½-acre per project. Under the proposed rule, as previously discussed, the Agencies may assert jurisdiction over such features where they determine the existence of a bed, bank, and OHWM, or other flow contributing features regardless of a bed, bank, and OHWM. Of course, this is inherently a highly subjective and inconsistent practice, which is not remedied by the Agencies' unsuccessful attempt to clarify some terms.[78] Thus, although each crossing of a WOTUS is a separate project, if a line continuously crisscrosses a feature deemed jurisdictional, it may be considered a single impact of more than ½-acre. As a result, the existing Nationwide Permit for transmission lines may be rendered inoperative because the Agencies may determine a much greater impact to WOTUS based on an expanded conception of jurisdictional waters. The proposed rule is silent on how it would ensure a consistent application of the proposed rule, other than treating virtually all "waters" as WOTUS. (p. 4-6)

<u>Agency Response:</u> 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

(e.g., transmission line construction).

[78] Rapanos, 547 U.S. at 734. Justice Kennedy discusses the ambiguity of terms that are not sufficiently detailed to provide appropriate jurisdictional limits.

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

This action would not require facilities that have prepared SPCC plans to update these plans.

The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Izaak Walton League of America (Doc. #15503)

17.1.711 The destruction of over 50% of our nation's wetlands continues to be costly to our nation, resulting in greatly increased flooding, topsoil losses, and degraded surface and groundwater resources. Wetland loss has also contributed to the decrease of biodiversity and sustainability. The League believes the proposed rule frames a modest set of regulations and properly maintains the exemptions outlined in the original Clean Water Act. (p. 2)

Agency Response: **The agencies agree. 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

US EPA ARCHIVE DOCUMENT

Oklahoma Panhandle Agriculture and Irrigation Association (Doc. #15506)

17.1.712 We believe the proposed rule defining "Waters of the United States" dramatically changes individual land and water owners' motivations toward responsible use practices. The proposed rule changes Oklahoma land and water owners from today's accepted practice of working with the State of Oklahoma and the Natural Resource Conservation Service (NRCS) to one of feeling policed by Federal regulatory bodies. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

Association of Nebraska Ethanol Producers (Doc. #15512)

17.1.713 Many interested parties in the proposed rulemaking process have expressed concern that the proposed rulemaking substantially increases the scope of jurisdictional waters and potentially provides authority to USEPA and the Corps over virtually all state and local waters, no matter how far removed such waters are from truly navigable waters. Despite USEPA's assurances to the contrary, ANEEP echoes these concerns as expressed in this Docket by a letter from members of the United States Senate. Simply put, USEPA has little credibility and members of the regulated community and the general public have no real faith in the Agency's assurances that the rule is necessary and would only implement current Agency practices and policies. (p. 2)

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

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.

Illinois Coal Association (Doc. #15517)

17.1.714 Regrettably, rather than respond openly and directly to the public's growing concerns, the EPA has been on a public relations tour in an attempt to push back and

US EPA ARCHIVE DOCUMENT

quell those concerns, as evidenced by the EPA's PR campaign "Ditch the Myth." This PR campaign appears exclusively focused on persuading the agricultural sector that farmers will not be harmed by this rulemaking. And the campaign is aimed at responding to some of the more fringe "myths," such as "whether a permit is needed for walking cows across a wet field or stream." This campaign has done very little to address the reality of the breadth and ambiguity of the Proposal and, in fact, has created greater cynicism regarding EPA's actions and underlying motivation. If there is any clarity at all with this Proposal it is that the federal government has every intention of expanding jurisdiction to waters never before regulated.

Despite the EPA's and Corps' dogged efforts to dispel widely held concerns - what the agencies' have broadly castigated as myths, misperceptions, and misinformation - the Agencies have failed to address legitimate concerns. That is, the proposed language and ambiguity in new teD11S and definitions creates enormous uncertainty in the scope and reach of the CWA program. It is abundantly clear that the Proposal will establish jurisdiction over many isolated waters, such as those at issue in SWANNC, as well as expand jurisdiction to even more "adjacent wetlands" such as those at issue in Rapanos. Despite repeated requests to the Agencies whether tills Proposal would cover waters at issue in SWANCC and Rapanos, the regulated community has yet to get a response. So, we are left to reach out own conclusions.

Rather than harmonize the opinions of Justice Kennedy and the plurality who all agreed in the decision in Rapanos and the government's overreach - a decision that clearly limited the government's jurisdiction - the Agencies have engaged in head counting, cobbling together a proposal based on the rationale of Justice Kennedy and the four dissenting justices (which the EPA disingenuously refers to as the "more narrow reading"). The result of the Proposal is that most, if not all, isolated wetlands and wetlands adjacent to ditches or streams, no matter how remote they are to traditional navigable waters, could be deemed jurisdictional. Given the ambiguities of the text and enOD11OUS discretion of the field personnel in making jurisdictional decisions, we remain very concerned about the implications of this Proposal.

A common refrain of EPA leadership in defense of the Proposal is that it "does not protect any types of waters that have not historically been covered under the CWA and specifically reflects the Supreme Court's more narrow reading of jurisdiction." (emphasis added). There have been other unsupported assertions including, for example, that the Proposal "does not broaden coverage of the Clean Water Act" or "expand jurisdiction over ditches." These assurances ring hollow in light of the actual language of the Proposal. And, while the Proposal may not regulate new "types of waters", it will in fact result in the regulation of many more waters and water features. For example, EPA's claim that the Proposal does not expand Clean Water Act coverage is patently inconsistent with the preamble, which clearly indicates the Agencies intent to expand coverage to isolated waters, such as prairie potholes, which now under the concept of "fill and spill" would be subject to coverage. Proposed Rule at 22208, 22241, and 22249. In addition, the Agencies' assertions that the Proposal does not expand jurisdiction over ditches is equally vapid, because the vast majority of ditches serve as hydrological connectors conveying water, either directly or indirectly, to jurisdictional water bodies. Thus, the Agencies' claims regarding ditches is of little comfort. Additionally, until this

US EPA ARCHIVE DOCUMENT

Proposal, at no time had the Agencies ever regulated wetlands adjacent to other wetlands adjacent to tributaries. This longstanding restraint, however, would be jettisoned under the Proposal, thereby increasing the amount of regulated waters deemed "adjacent" (Id. at 22209).[79] So the oft repeated claims that jurisdiction will not be expanded simply fail to square with the facts.

Unfortunately, the Agencies have taken advantage of the confusion created by a 4-1-4 Supreme Court decision and offered a Proposal that will expand jurisdiction according to any historical measure. And given the enormous subjectivity of the Proposal, the confusion will only be compounded by the various interpretations and field applications by the ten EPA regional offices and 43 Corps district offices. The result will be untenable. (p. 3-4)

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

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. Under paragraph (a)(7), prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters in these subcategories are not jurisdictional as a class under the rule.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency.

[79] The Agencies propose deleting the parenthetical from the existing "adjacent wetlands" regulatory provision because, according to the Agencies, "in practice some wetlands that were indeed adjacent to a tributary were found to not meet the definition of "adjacent" simply because another adjacent wetland was located between the adjacent wetland and the tributary."

US EPA ARCHIVE DOCUMENT

The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

Club 20 (Doc. #15519)

17.1.715 It is unclear when permits may be required with regard to reservoir releases; water transfers via ditch or pipeline; naturally occurring hot springs and other water ground water collection. (…)

EPA claims that there will be less than a 3% increase in streams and other water bodies classified as WOTUS, are inconsistent with the new proposed definitions including "tributary," "riparian areas," "floodplain," "adjacent" and other terms. This along with the confusing language regarding exemptions and categories of WOTUS, most surely will result in very significant increases in the streams and water bodies classified as WOTUS. One could take from the proposed rule that every drop of water that falls in the United States could ostensibly be consider WOTUS resulting in regulations that will strangle our economies, our communities, our agriculture producers, and our homeowners. (p. 2-3)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a

US EPA ARCHIVE DOCUMENT

water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

Georgia Farm Bureau (Doc. #15527)

17.1.716 Georgia Farm Bureau believes this proposed rule will infringe on private property rights by negatively impacting the way landowners use their private property. It will lead to additional Clean Water Act permits for land use on all but the most remote and unconnected waters. Rather than clarify jurisdiction, this proposed rule will bring less clarity and more subjectivity for the regulated community. The rule is based on a "significant nexus" statement by a single Supreme Court Justice in a single case in which the plurality decision of four Justices described as a "gimmick."

We believe this proposed rule will bring harmful and significant negative consequences to our members. The result will be additional lawsuits - exactly the opposite of what the agencies noted as one of their goals. (p. 3)

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

The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States,* 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the resulting opinions of the Court can be found in section III.A of the preamble to the final rule. See the preamble and TSD for additional discussion of the legal basis for this rule.

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Washington County Water Conservancy District (Doc. #15536)

17.1.717 The WWG's members are concerned that the Agencies' broad definition for "tributary" could result in an attempt to regulate certain off-river storage facilities, such stock and farm ponds, construction ponds, and storage ponds for pumped hydropower and other energy facilities, as "impoundments" of a tributary. When coupled with a narrow interpretation of CWA permit exclusions, the broad definition for "tributary" could burden WWG members with new permitting requirements. For example, in the

US EPA ARCHIVE DOCUMENT

case of stock ponds, the Agencies or third-parties asserting claims in citizen suits could argue that an irrigation canal is a "tributary," that a stock pond built in a gully that drains into the canal is an "impoundment" of that "tributary," and that the permit exemption for stock ponds does not apply to such a feature, resulting in the regulation of a stock pond as a jurisdictional impoundment.[80] Such a result would be inconsistent with Congress' clear intent in adopting the CWA's permit exclusions for agricultural activities. (p. 16)

<u>Agency Response:</u> The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

The fundamental premise of the final rule is that for a water to be a "water of the United States" it must have a significant effect on the chemical, physical or biological integrity of a traditional navigable water, an interstate water, or a territorial sea, which are (a)(1) through (a)(3) water respectively. All other categories of the rule are based upon a significant nexus with these three types of waters, whether determined to be jurisdictional in all cases meeting the defined criteria (such as sections (a)(4) through (a)(6), or subject to a case-specific analysis (such as sections a(a)(7) and (a)(8). The agencies believe this approach is consistent with the CWA as interpreted by the Supreme Court. See the Technical Support Document for the agencies' legal interpretation.

17.1.718 Energy Transmission and Distribution Facilities.

Activities related to the transmission and distribution of energy may now require federal permits under the Proposed Rule, resulting in uncertainty, delay, and additional costs. For example, the development of transmission and distribution facilities could be negatively impacted if traditional transmission/distribution rights of way are now to be considered waters of the United States under the Proposed Rule. These rights of way often include ditches alongside roadways that may not fall within the two narrow exclusions proposed by the Agencies. The lack of guidance about what types of areas would constitute "uplands" adds additional uncertainty, delay, and costs to the process for siting and constructing these facilities. In addition, utilities that operate substations along transmission routes are required by EPA regulations to have Spill Prevention Control and Countermeasure (SPCC) Plans in place. The increased scope of CWA jurisdiction under the Proposed Rule would require utilities to incur additional costs to expand these SPCC plans to take into account the areas not currently considered waters of the United States. The challenges facing transmission facilities also apply to the construction of new

[80] As the American Farm Bureau Federation has stated: Through guidance and enforcement actions, the [Army] Corps has interpreted the farm pond exemption narrowly and applied the so-called "recapture" provision broadly. If construction or maintenance of the pond results in earth-moving activities that reduce the reach or change the hydrology of a water of the U.S., the [Army] Corps takes the position that the "recapture" provision applies and the discharge is unlawful without a permit. In the [Army] Corps' view, impounding a jurisdictional feature is an unlawful "dredge and fill" discharge, and the resulting impoundment is itself "waters of the U.S." . . . . In the experience of many farmers, where wetlands or non-navigable "tributaries" are involved in farm or stock pond construction, the recapture provision essentially swallows the exemption.

US EPA ARCHIVE DOCUMENT

generation. This is especially true for natural gas plants that require pipelines to transport gas to any new natural gas electric generating facility. The siting and permitting of new natural gas pipelines may be delayed further by the Proposed Rule. The Agencies should avoid needless adverse impacts to energy projects by revising and clarifying the rule as discussed in this letter. (p. 31-32)

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

This action would not require facilities that have prepared SPCC plans to update these plans.

U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Business Council of Alabama (Doc. #15538)

17.1.719 The Proposed Rule's scope is truly breathtaking. The Rule introduces terms such as "tributary," "riparian area," and "flood plain" and then defines these terms extremely broadly, in order to declare that large amounts of intrastate land and waters are always within the Agencies' authority. The Rule then pairs that already capacious coverage with a virtually limitless catch-all such that almost no water or occasional wet land is ever safe from federal regulation. The Rule seeks to bring within the Agencies' power every water and land that happens to lie within giant floodplains on the supposition that those waters and lands may connect to national waters after a once-in-decade rainstorm. It sweeps in roadside ditches that are dry most of the year so long as those ditches have a bank and a minimum amount of water flow at some points in the year. It captures little creeks that happen to lie within what the Agencies may define as a "riparian area" and covers many little ponds, ditches, and streams. And it gives farmers and homeowners no certainty that their farms and backyards are ever safe from federal regulation. (p. 1-2)

US EPA ARCHIVE DOCUMENT

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

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters.

The fundamental premise of the final rule is that for a water to be a "water of the United States" it must have a significant effect on the chemical, physical or biological integrity of a traditional navigable water, an interstate water, or a territorial sea, which are (a)(1) through (a)(3) water respectively. All other categories of the rule are based upon a significant nexus with these three types of waters, whether determined to be jurisdictional in all cases meeting the defined criteria (such as sections (a)(4) through (a)(6), or subject to a case-specific analysis (such as sections a(a)(7) and (a)(8). The agencies believe this approach is consistent with the CWA as interpreted by the Supreme Court.

East River Electric Power Cooperative (Doc. #15539)

17.1.720 Under the proposed rules, many of our existing and future facilities, including lines, substations, and buildings of all sizes, will be subject to a new level of scrutiny that will increase costs, delay needed projects, and invite spurious legal challenges while yielding no tangible benefits that already are not achieved through our own good business practices and current regulations. In the end, the added level of oversight will have one indisputable impact: higher electricity rates for consumers. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly

US EPA ARCHIVE DOCUMENT

articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

ProGrass Lawn and Ornamental Care (Doc. #15563)

17.1.721 Pesticides and fertilizers are important tools in maintaining green spaces and protecting people and property from pests, such as ticks and rodents that can carry diseases. They are also used to control weeds that can exacerbate allergies. Unfortunately, the use of these beneficial products may be limited under the proposed Waters of the U.S. regulation. The rule could also impact my ability to install trees, grass, and other plants that play a vital role in reducing runoff and erosion, filtering groundwater, and sequestering carbon dioxide.

The proposed rule will expand the scope of waters subject to the Clean Water Act (CWA) regulation well beyond the law's intent. Under the proposed rules definition of a tributary, many additional natural and man-made water bodies, including residential lakes, ponds, fountains, golf course water hazards, ditches, and areas that are only wet during rainfall events, could be subject to federal regulation. The new designations will create confusion for lawn care and landscape professionals like myself and make it more difficult to maintain my customers property. (p. 1)

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

The fundamental premise of the final rule is that for a water to be a "water of the United States" it must have a significant effect on the chemical, physical or biological integrity of a traditional navigable water, an interstate water, or a territorial sea, which are (a)(1) through (a)(3) water respectively. All other categories of the rule are based upon a significant nexus with these three types of waters, whether determined to be jurisdictional in all cases meeting the defined criteria (such as sections (a)(4) through (a)(6), or subject to a case-specific analysis (such as sections a(a)(7) and (a)(8). The agencies believe this approach is consistent with the CWA as interpreted by the Supreme Court.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States.

South Carolina Association of Counties (Doc. #15573)

17.1.722 The proposed "Waters of the U.S." regulation from EPA and the Corps could have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction. (p. 4)

US EPA ARCHIVE DOCUMENT

Agency Response: **Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.**

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Iberia Parish Farm Bureau (Doc. #15585)

17.1.723 While we remain a strong advocate of ensuring the health of our water resource3, we believe that this expansion has been developed without adequate input from industry, state, and local officials and that it will have an unjustifiably negative impact on our economy. (p. 1)

Agency Response: **This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.**

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.

Pitts, B. (Doc. #15615)

17.1.724 This rule greatly expands the authority of the Agencies beyond the boundaries of the law and will have a significant negative impact on businesses' ability to operate, maintain and expand their facilities. This rule will create unnecessary delays and costs for businesses of all sizes and in virtually all sectors as well as create additional permitting burdens and expenditures for the State of Tennessee. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation.**

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions. The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, Final Summary of the Discretionary Consultation and Outreach to State, Local, and County Governments for the

US EPA ARCHIVE DOCUMENT

Revised Definition of Waters of the United States is available in the docket for this rule.

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 Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Staker Parson Companies (Doc. #15618)

17.1.725 In summary, expanding jurisdiction to sand & gravel reserves excavated in upland areas due to inconsistencies of interpreting floodplain and groundwater criteria would not protect existing wetlands with bright-line connectivity to Traditional Navigable Waters but would severely hamper the Construction Materials Industry's ability to provide the services and materials critical to maintaining and improving this Nations transportation infrastructure.

In closing, we urge EPA and the Corps to withdraw this proposed rule and work with our industry and other stakeholders to craft a rule that is clear and that does not impose an undue economic burden on our industry or the economic prosperity of America. (p. 3)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The final rule includes several changes to provide additional clarity. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The rule has expanded the section on waters that are not considered waters of the United States, including artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land.

US EPA ARCHIVE DOCUMENT

Salinas Valley Water Coalition (Doc. #15625)

17.1.726 As an example of the nonsensical nature of the review by the USEPA and USACE, the Proposed Rule proposes to use the National Wetlands Inventory Maps (among others) to determine "whether groups of' other waters would be subject to their jurisdiction. The National Wetlands Inventory Maps are not even relied upon by the originator, and its website contains numerous disclaimers and cautionary language. The U.S. Fish & Wildlife Services website, at the National Wetlands Inventory Page, at the Wetlands Data tab, on the Geodatabase User Caution page (http://www.fws.gov/wetlands/Data/Wetlands-Geodatabase-User-Caution.html), states, in relevant part, the following:

- The map products were neither designed nor intended to represent legal or regulatory products.

Its National Wetlands Inventory Data Limitations, Exclusions and Precautions page (http://www.fws.gov/wetlands/Data/Limitations.html) states, in relevant part, the following:

- The maps are prepared from the analysis of high altitude imagery. Wetlands are identified based on vegetation, visible hydrology and geography. A margin of error is inherent in the use of this imagery; thus, detailed on-the-ground inspection of any particular site may result in revision of the wetlands boundaries or classification established through image analysis.

  Wetlands or other mapped features may have changed since the date of the imagery and/or field work. There may be occasional differences in polygon boundaries or classifications between the information depicted on the map and the actual conditions on site.

Its disclaimer page (http://www.fws.gov/wetlands/Data/Disclaimer.html) states, in relevant part, the following:

- The use of trade, product, industry or firm names or products is for informative purposes only and does not constitute an endorsement by the U.S. Government or the Fish and Wildlife Service. Links to non-Service Web sites do not imply any official U.S. Fish and Wildlife Service endorsement of the opinions or ideas expressed therein or guarantee the validity of the information provided. Base cartographic information used as part of the Wetlands Map has been provided through a license agreement with ESRI and the Department of the' Interior. Yet, the Proposed Rule includes National Wetlands Inventory Maps as a source of reference for determining jurisdictional waters. (p. 3-4)

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.**

US EPA ARCHIVE DOCUMENT

National Barley Growers Association (Doc. #15627)

17.1.727 Increased federal regulation of water management in connection with farming, particularly regulation that creates doubt about the boundaries of federal jurisdiction, will likely have a negative impact on barley production in this country. Barley is a short-season, early maturing crop that is produced in a variety of climates in both irrigated and dryland production areas. Despite barley's ability to thrive in adverse conditions, which makes it a suitable crop where other high-valued commodities fail to thrive, and notwithstanding the record-high number of permitted breweries in this country, annual U.S. production of barley used for malting is declining. The declines will increase, not abate, if EPA and the Corps impose unclear regulations and costly and unnecessary federal water management practices on barley-planted acreage. (p. 3)

Agency Response: The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

The agencies recognize of the vital role of farmers and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).

17.1.728 NBGA believes the Proposed Rule should be withdrawn as it fails to provide even a minimal level of clarity to American businesses. The agencies should then enter into a meaning dialogue with states, local governments, manufacturers and businesses. The agencies should then re-propose the rule in a way that truly provides clarity on the scope of the Clean Water Act requirements while not expanding the definition of "waters of the United States" in any respect. The agencies should also include an express statement that nothing in the rule is intended to expand federal jurisdiction, regulate waters not previously regulated (in actuality, not theory), or change other aspects of the Clean Water Act or the National Pollutant Discharge Elimination System (NPDES) permit program, especially with respect to the storm water program. Finally, EPA and the CORPS should defer to State and Local governmental water resource management, to the greatest extent possible. (p. 7)

Agency Response: This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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

US EPA ARCHIVE DOCUMENT

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Iowa Farm Bureau (Doc. #15633.1)

17.1.729 The preamble indicates that the Agencies prefer to use mapping and desktop analysis to determine whether a water of the U.S. is present.[81] Although the EPA contracted to have a set of maps prepared during the development of this rule, the EPA has not included these digital maps in this rulemaking. While the EPA has blogged that the maps do not represent those waters as jurisdictional under this rule,[82] the maps provide insight into what the Agencies considered during rule development and what is likely to be covered by this rule.

Using this federal data set to make desktop analysis determinations is problematic as the data does not properly designate streams as perennial, intermittent or ephemeral and they classify soil and water conservation features, such as grassed waterways in fields, as tributaries. Except for very large grassed waterways, these features have not historically been considered jurisdictional by the Agencies. (p. 3-5)

Agency Response: **While the preamble addresses the use of remote sensing and mapping to assist in establishing the presence of water, such tools include the USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling. These sources of information can sometimes be used independently to infer the presence of a bed and banks and another indicator of ordinary high water mark, or where they correlate, can be used to reasonably conclude the presence of a bed and banks and ordinary high water mark. The agencies have been using such remote sensing and desktop tools to delineate tributaries for many years where data from the field are unavailable or a field visit is not possible. However determinations of jurisdiction are done on a case by case basis based on the best information available, which often includes a mix of different remote sensing and desktop tools and a field visit. It is beyond the scope of this rulemaking to make any specific jurisdictional determinations and beyond the**

[81] 69 Fed. Reg. 22202, 22214.
[82] http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/

US EPA ARCHIVE DOCUMENT

resources of the agencies to make jurisdictional determinations for all waters within a state at any one time.

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.

Corn Producers Association of Texas (Doc. #15638)

17.1.730 If the rule is changed, we feel it will put a strain on our producers and will cause a negative impact on their operations while burdening them with expanded regulatory powers that will impact the economic viability of their operations. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Board of County Commissioners, Klickitat County (Doc. #15648)

17.1.731 Klickitat County supports comments on the proposed rule submitted by the National Association of Counties. The proposed rule would impact county-owned and maintained roadside ditches, flood control channels, drainage conveyances, and stormwater systems. Additionally, the proposed rule may negatively affect municipal and industrial facility discharges currently covered under the Washington State permit programs. These programs are well established and already provide the necessary level of protection for waters of the state. Creating additional requirements for counties, municipalities, and privately owned businesses where appropriate state and local programs are in place would be redundant, burdensome and very costly with no measurable benefit! Klickitat County has no confidence that the proposed rule will "improve efficiency, clarity and predictability for all land owners including the nation's farmers, as well as permit applicants, while maintaining all current exemptions and protecting public health, water quality, and the environment." (p. 1)

Agency Response: The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not

US EPA ARCHIVE DOCUMENT

considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

West Central Cooperative (Doc. #15659.1)

17.1.732 These policies are also likely illegal and will lead to litigation against farmers and ranchers, creating risks and costly liabilities and further bad policy. Clean Water Act citizen suits have led to the terrible policy of certain classes pesticides needing a federal Clean Water Act permit to be applied according to their already of federally approved label. Suits like that using the same logic will be brought against farmers' use of pesticides and fertilizers when they are used on farms with dry drainage features that are now jurisdictional. Such suits will undermine and basically make meaningless the statutory agricultural stormwater exemption from Clean Water Act permitting You must not create policies that set the stage for this to happen. (p. 1)

Agency Response: The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water

US EPA ARCHIVE DOCUMENT

Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Jo Daviess County Board (Doc. #15661)

17.1.733 1. We object to the increase in jurisdiction of water of the US because of the poor definition of which ditches and what criteria will be used for the USEPA and USACE to take jurisdiction.

2. We object to the establishment of jurisdiction over man-made features created for the purpose of land drainage that comprise a significant and connective piece of the existing public drainage infrastructure in highly productive agricultural regions.

3. We object to the use of natural stream geomorphologic conditions, including bed and bank and the regulatory descriptor Ordinary High Water Mark, to establish federal jurisdiction of a man-made drainage feature.

4. We object to the attempt to establish jurisdiction of upland drains because they discharge to waters of the U.S.

5. We object to the potential for jurisdiction to be extended to ditches that are ephemeral or intermittent.

US EPA ARCHIVE DOCUMENT

6. We do object to the definition of waters of the U.S. that does not specifically exclude stormwater management facilities and man-made conveyances created for the purpose of preventing, limiting or controlling flooding.

7. We are concerned that the already tedious, time consuming and expensive process of establishing jurisdiction will become less defined by the proposed rule and open Jo Daviess County to potential litigation in order to maintain or improve the county highway system.

8. We are concerned that a number of county-owned and maintained ditches will fall under the jurisdiction of the Clean Water Act.

9. We are concerned with the considerable financial burden of the additional regulatory processes necessary to maintain the existing county-owned ditches to improve the roadway system. (p. 2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.**

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.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly

US EPA ARCHIVE DOCUMENT

states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits. Landowners may request a jurisdictional determination (JD) from the Corps. The agencies believe that the clarity provided by the rule will make conducting determinations easier

Martin, J. (Doc. #15669)

17.1.734 I am particularly concerned about the negative impact the rule could have on our groundwater recharge operations. 40,000 people in our water district receive pure drinking water without the expense of a water treatment plant because we are able to produce sufficient high-quality groundwater through our recharge and recovery program (conjunctive use). We import California State Water Project water and spread that water in recharge basins adjacent to dry streambeds, within some dry streambeds directly and within catchment basins of flood control projects. These types of facilities should be exempt from the proposed definition of Waters of the U.S. (p. 1)

Agency Response: **The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the**

US EPA ARCHIVE DOCUMENT

United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Anonymous (Doc. #15683)

17.1.735 The rule will require EPA permits for virtually all pesticide sprayers in Iowa, overlapping the regulations already being administered. The rule will slow the installations of conservation structures and adoption of environmental practices needed to demonstrate environmental progress. And finally, the rule will greatly hinder the progress of Iowa's production agriculture and the work organizations, such as FC and ACWA, are already doing to preserve our clean waters. (p. 1)

Agency Response: The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement.

Anonymous (Doc. #15691)

17.1.736 It would be a detriment to agriculture and to practices already in place if the rules became so stringent and too costly to implement. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Chartwell Golf and Country Club (Doc. #15701)

17.1.737 The rule as presently published, could have a devastating economic impact on the golf course industry, potentially threatening to economically weaken, if not eliminate,

US EPA ARCHIVE DOCUMENT

golf facilities which are 95% small businesses. It would include almost every river, stream, creek, wetland, pond, and ditch in the United States under the jurisdiction of the CWA. Golf courses that have these waters on or near them would now be required to obtain costly, federal permits for any land management activities or land use decisions made.

Further, we would face an uncertain business environment where many of our now routine activities (such as fertilizer and pesticide applications) would require a permit before we would be able to proceed. Most important, there is no legal right for a permit for either of these activities nor any deadline on EPA's process to issue a permit. Permitting could take months or even years, or permits may simply be unavailable. This could halt operations on golf courses or even cause them to shut down altogether.

Golf facilities could be required to get permits for all activities in or near WOTUS and that will mean a substantial increase in costs to our small businesses for permits, mitigation, monitoring and assessments as well as increased costs for permit review and issuance to be borne by state governments. It also increases our liability to manage the property due to the threat of citizen action lawsuits.

The golf industry is made up of committed environmental stewards who already protect the quality of these waters by applying physical, agronomic and environmental Best Management Practices (BMPs), such as correct mowing, Integrated Pest Management/nutrient management and other environmental practices. Subjecting golf courses to an expensive and unpredictable federal permitting process will threaten all of this. (p. 1)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

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 fundamental premise of the final rule is that for a water to be a "water of the United States" it must have a significant effect on the chemical, physical or biological integrity of a traditional navigable water, an interstate water, or a territorial sea, which are (a)(1) through (a)(3) water respectively. All other categories of the rule are based upon a significant nexus with these three types of waters, whether determined to be jurisdictional in all cases meeting the defined criteria (such as sections (a)(4) through (a)(6), or subject to a case-specific analysis (such as sections a(a)(7) and (a)(8). The agencies believe this approach is consistent with the CWA as interpreted by the Supreme Court.

Indiana Manufacturers Association (Doc. #15704)

17.1.738 The IMA shares the concerns of many in the business community with respect to the proposed rule change. The Proposed Rule is based on a series of flawed premises that form an invalid foundation for a remarkable expansion of federal authority. In sum, the proposed rule is not supported by the statute, Supreme Court precedent, or the scientific

US EPA ARCHIVE DOCUMENT

studies referenced by the agencies. In fact, the proposed rule is without rational basis. Accordingly, rather than adding clarity the proposed expansion has caused great uncertainty and confusion. The result will be increased costs and litigation and reduced economic activity.

The EPA and Army Corps of Engineers have proposed expansion of federal regulatory jurisdiction under the Clean Water Act. The proposed rule may impact the ability of businesses to maintain drainage and maintain land use. The proposed regulation excludes waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. (p. 1-2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." In addition, this rule also does not change the longstanding regulatory exclusions for wastewater treatment systems designed to meet the requirements of the CWA.

Upper Trinity Regional Water District, Denton County, Texas (Doc. #15728)

17.1.739 The potential area of impact on Upper Trinity would be on vital water and wastewater projects that are necessary to protect public safety and the environment - - and on construction projects such as interpreted or implemented in ways to require applicants for a 404 permit to address an ever creeping set of impacts in a wide range of biological communities, groundwater recharge, and water availability. (…)

Storm water management is already complicated, and would become more so under the proposed rule, especially because it is unclear whether or not components such as drainage ditches and retention ponds are WOTUS. A determination that these components are WOTUS would make them subject to compliance with water quality standards. This could have significant impact on economic development with respect to land use types and densities.

New development in areas currently not subject to 404 permitting could become subject to 404 permitting - - additional burden, without commensurate benefit. If these new permits are required to address considerations such as the impact of impervious cover on

US EPA ARCHIVE DOCUMENT

movement of waters into shallow groundwater strata or disruption of habitats for the range of animals/birds/insects currently existing on the proposed development site the action will have a significantly negative impact. Specifically, the result will be substantially more expensive development, unnecessarily delaying public benefits and loss of economic value to the community. (p. 2-3)

Agency Response: **This rule does not modify nor affect the current implementation of CWA programs such as the regulation of discharges under Section 402, including stormwater, and Section 404.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Anonymous (Doc. #15736)

17.1.740 In my state, regulations that would protect downstream waterways have been blocked by upstream industrial agricultural practitioners as too burdensome, resulting in substantial burden to the people, wildlife and habitat downstream. The purpose of regulation is to balance conflicting interests and to protect that which cannot protect itself. In the absence of clear and actionable regulation, an imbalance inevitably results, favoring those with a pecuniary interest in resource exploitation. (p. 1)

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

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife.

Haase, D. (Doc. #15756)

17.1.741 …I am afraid the proposed rule, if adopted, would have a significant impact on me and my family.

This proposed rule would swell considerably the scope of waters subject to Clean Water Act jurisdiction. Small, isolated, or even sporadic waters many of which would not be considered waters under any common discernment of the word should not be subject to

US EPA ARCHIVE DOCUMENT

the federal Clean Water Act and a subsequent permitting process. I have a farm that during a significant rainfall event of a relatively short duration storm water will flow from neighboring farm land and drain across this field. This ephemeral stream occurs infrequently often times not even every year. When Congress wrote the Clean Water Act, unmistakably, it wrote the law utilizing the discriminating term navigable to avoid inclusion of such waters.

To think that because of this transient occurrence, I would need to obtain permits to do routine things on this farm like apply fertilizer or mechanically remove weeds permits that are far from guaranteed is nonsensical. Furthermore, this proposed rule would make these and many other routine farming and ranching activities susceptible to lawsuits brought by environmental interest groups, threatening exorbitant federal penalties that could be levied daily. Other landowners, too, will face permitting roadblocks and potential liability for things they want to do, such as building a house or planting trees. It is clear from the language of the Clean Water Act that Congress did not intend for the law to extend federal regulations to such small, remote waters and land features; otherwise, Congress would not have used the term navigable.

EPAs belief that only the federal government is capable of protecting small bodies of water is not supported by science or by facts. The EPA certainly has not provided any evidence to support this view. For many states, however, county-level zoning laws, conservation districts and water conservancies manage water quality and, therefore, ensure the integrity and quality of ditches and erosional features to manage flooding. That is where government action concerning farming and other land uses belongs, at the local level, just as envisioned by the Clean Water Act. All states have to protect waters and they do so by adopting tactics that suit the needs of the state and its citizens.

The proposed rule, in effect, would give EPA authority to micromanage or even prohibit a farmers or ranchers practices that are critical to the ability to operate even if those practices have little or no actual effect on water quality. If this rule as proposed were to be finalized, my own farm would be negatively impacted. I currently have significant financial challenges in the operation of my farm due to changing market prices. This rule would make it more difficult to farm and negatively impact my ability to remain competitive and even profitable. (p. 1-2)

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

The EPA and Army are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

US EPA ARCHIVE DOCUMENT

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Worley, S. (Doc. #15764)

17.1.742 Erosion problems can crop up quickly and must be dealt with quickly and efficiently if soil is to be kept where it belongs and out of the creeks and rivers. If we are required to get permits for all these activities conducted on these areas that are almost always dry but still qualify as water of the U.S. under the proposed rule, it will be impossible to get the required work done in a timely and cost effective manner. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional.

City of Jackson (Doc. #15766)

17.1.743 The City has a direct and substantial interest in the proposal because the rule, as proposed, would have a substantial negative impact on our City and its government, citizens, businesses, and taxpayers, as well as our local economy and public safety. Designating what "waters'9 and ditches fall under federal laws is a complex undertaking and has implications for cities like Jackson that have a stake in ensuring clean water while protecting and maintaining critically needed public safety infrastructure such as drainage ditches. Indeed, the implications are particularly significant for Jackson because the City is largely covered by roadside ditches and other drainage features that could be adversely impacted by the proposed rub. If the new definition of "waters of the United States" expands the range of "waters" that fall under federal jurisdiction, it would impose potentially onerous and unnecessary costs by subjecting much of our City to unwarranted Clean Water Act ("CWA") scrutiny. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

17.1.744 At its heart, the proposed rule and its practical impacts are directly at odds with the fundamental purposes of drainage ditches, i.e. to protect and promote public safety by expeditiously and efficiently capturing and conveying water away from roadways, appurtenances, and nearby residences and businesses, and to prevent flooding. Ti-consuming regulatory delays place an enormous obstacle in the way of a city's ability to carry out such responsibilities effectively. Not only does this new burden create risks for the safety of citizens, but it could also inflict additional liability on a city or other local government in the form of citizen suits. Ultimately, a state or local government may be found liable for maintaining the integrity of its ditches, even if needed federal wetland and other permits are not a p e d in a timely manner. For example, in *Arreola v Monterey*, a state court found a county liable for not maintaining a levee that failed clue to overgrowth of vegetation, even though the county argued that the Corps permitting process did not allow for timely approvals. *Arreola v. Cnty. of Monterey*, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (2002). Even if the Agencies do not initially plan to regulate t h e projects as "waters of the United States," cities and counties may be forced to treat them as such due to exposure to possible citizen suits, unless an explicit exemption is provided. These unnecessary risks should take precedence over the Agencies' desire to regulate ditches indiscriminately under the CWA. (p. 3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.**

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Walter Development Corporation (Doc. #15768)

17.1.745 As a rancher owner with lands in Texas, we believe the proposed rule, drawing from isolated judicial opinions based on particular facts and circumstances, proposes vast and unworkable changes in the regulation of agriculture in America. As proposed, the rule would intrude EPA into agricultural practices that were never contemplated by

US EPA ARCHIVE DOCUMENT

Congress and would be completely impractical. The suggestion that Congress intended for EPA to delve into the details of agricultural practices throughout this vast country, when it adopted the Clean Water Act so many years ago, is contrary to our democratic process. Comprehensive and intrusive regulatory changes should be adopted only if expressly authorized by Congress after debate and hearing from constituents, not by a distant bureaucracy discovering major new powers in an old statute. (p. 1)

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

In addition, this rule neither modifies nor creates new regulatory requirements under the Clean Water Act or any other statute, including requirements to obtain permits to implement erosion control measures.

National Association of State Conservation Agencies (Doc. #15778)

17.1.746 Unfortunately, the proposed rule, as currently drafted, fails to provide this clear, concise, comprehensive language.

Our members work with all conservation stakeholders, from landowners to regulators. We have determined, through discussions with a plethora of stakeholders, that there is not a clear nor concise understanding of this proposed rule among members of the conservation community. It appears this lack of understanding extends to some in your own agency and to the U.S. Army Corps of Engineers (USACE). (p. 2)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

Leigh Hanson, Inc. (Doc. #15781)

17.1.747 The rule as proposed will greatly expand the permitting jurisdiction of both the EPA and Corps as a direct result of increasing the scope of what would presumptively be considered "waters of the United States" (WOTUS)" This increased jurisdictional scope and uncertainty will negatively impact discharge permit requirements and new permitting applications, and impose significant costs to our U.S. operations that we believe far exceed the environmental benefits. (p. 1)

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

US EPA ARCHIVE DOCUMENT

17.1.748 Finally, we believe that the proposed rule could actually have a net negative effect on environment and safety. In certain cases, primarily related to sand and gravel sites, reclamation could be substantially impacted. Many sand and gravel deposits mined by suction or ladder dredges are converted to ponds, lakes etc. at the end of the mine life. If these structures are considered jurisdictional, it could prevent the development of future uses for parks, flood control, water reservoirs, recreational or residential purposes. Most "waters" created through mining and reclamation could be subject to development restrictions to the detriment of local communities and the mine operator.

For the reasons stated above, Lehigh Hanson respectfully requests that the EPA and Corps consider these negative impacts to our operations. We recommend that the proposed rule be withdrawn and the agencies re-propose a rule which is clear, legally valid within the objectives of the Clean Water Act and court decisions, and does not impose an undue economic burden on our company and industry. (p. 5-6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule has expanded the section on waters that are not considered waters of the United States, including features such as artificial lakes and ponds created in dry land and water-filled depressions incidental to mining or construction.**

Council of Alaska Producers (Doc. #15782)

17.1.749 The EPA website promotes the proposed rule to reduce confusion and save businesses time and money, but the language is insufficiently clear and could result in litigation, delays and costs. Clarifying the language so it specifically excludes currently non-jurisdictional water features and on-site treatment systems from the definition of "waters of the United States" would help avoid regulatory confusion and costly administrative or judicial reviews. (p. 1)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The rule has expanded the section on waters that are not considered waters of the United States, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

US EPA ARCHIVE DOCUMENT

White, K. (Doc. #15790)

17.1.750 I am a landowner, with ties to local agriculture. Our local farmers go through great lengths to protect and maintain their land resources, hoping to pass their properties on to their prodigy. I feel that this proposed rule could be hurtful for those that are working so hard to protect the environment already. It seems to force more regulatory guidelines to be met by those individuals, in addition to guidelines already in force. If this rule is implemented, I fear that it could negatively hurt these farmers/landowners, which would then impact the local economy and the community as I know it. (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Dillon, L. (Doc. #15791)

17.1.751 I am greatly concerned about the extent of power over waters that are not part of the Navigable water system. By changing the terminology to Significant Nexus, it would be possible for any water on my property to be deemed a possible regulated body of EPA jurisdiction. Even though it is only wet during heavy rain events. My cattle operation is very small. And would not be able to survive a added cost, burden, and headache from someone's narrow minded view of a puddle. (p. 1)

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

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters is critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and

US EPA ARCHIVE DOCUMENT

biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present.

Finally, the final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

Chavez, J. (Doc. #15817)

17.1.752 Now with this proposed rule labeled "waters of the U.S." ALL of my farm land will be considered "navigable waters" because of the temporary formation of puddles on parts of my properties where it takes time for the water to drain after such floods, and also because MRGCD uses ditch irrigation to water crops. Furthermore it will hurt my business drastically if I expand to new properties and have to go through government channels in order to use land management practices that are extremely beneficial for the land, neighbors, my business, and our state. (p. 1)

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

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

Lowell, J.D. (Doc. #15834)

17.1.753 As a property owner, cattle producer, and American citizen, I am deeply concerned for my rights as the Environmental Protection Agency and the Army Corps of Engineers attempt to federalize more and more land across the country. The new Waters of the United States proposal subjects nearly all waters in the country to regulation, subsequently giving them control over all land near or connected to that water. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated.

Kentucky Corn Growers Association (Doc. #15836)

17.1.754 Impacts to farmers as a result of the rule will be substantial. As already stated, the uncertainties raised by the proposed rule will cause Kentucky's corn farmers confusion and doubt; adding to the problem is the fact that there is no appeals process in the proposed rule. The farm community needs clear, easily understood pathways for designation of Waters of the U.S. and, if they disagree with the Agencies, a clear pathway to get the disagreement resolved. It is important to provide an appeals process in the rule. (p. 2)

Agency Response: The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding which waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

This rule only affects the definition of "waters of the United States." There are no changes in the implementing regulations to the process to conduct jurisdictional determinations and/or seek appeals remained in 33 CFR Parts 320-332 and as such are outside the scope of the rule.

Maryland Chapters of NAIOP (Doc. #15837)

17.1.755 While current regulations have resulted in inconsistent determinations, we are concerned that the subjective nature of the proposed language will not result in improved results. We expect that local reviewers will have difficulty consistently interpreting poorly defined terms and concepts such as "significant nexus", "floodplain", "tributary", "insubstantial", "sufficiently close" which cannot be precisely defined. (p. 2)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

Yazoo Valley (Doc. #15838)

17.1.756 I am a Field Engineering Coordinator with Yazoo Valley EPA in charge of Rights of Way clearing and clean water is very important to me. Your proposed rule is a significant expansion of the Clean Water Act that will affect every American, and have a significant impact on my business and community due to the proposed increased jurisdiction over all waters. The definitions provided in the proposed rule are very broad and do not provide clarity to which waters could be considered "waters of the U.S." under CWA jurisdiction. Due to the proposed rule's complexity and lack of clarity, I request the proposed rule is withdrawn. (p. 1)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Anonymous (Doc. #15840)

17.1.757 The City of Colorado Springs currently demands the use of stormwater BMPs, including retention/detention facilities, to minimize erosion and control stormwater flows, with such activities usually occurring in locations where excess runoff naturally occurs, i.e. swales, normally dry arroyos, washes, ditches, ephemeral or intermittent streambeds, etc. There is no stormwater exemption included within the proposed changes. We are concerned that the time and costs associated with regulatory permitting of both the construction and maintenance of stormwater facilities would increase significantly.

Additionally, to the extent that isolated waters, intermittent or ephemeral streams, or all tributaries become jurisdictional, it will impede the ability to timely respond to the devastating impacts of forest fires that occur in the arid areas of the western United States. The proposed rule would further complicate the permitting and approval process, negatively impacting the ability of jurisdictions to timely and cost effectively respond to those challenges. (p. 1)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in

US EPA ARCHIVE DOCUMENT

combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Rooks, S. (Doc. #15882)

17.1.758 This over reaching policy would completely put these ranches out of business leaving families that run them with no source of income and the land would be left standing completely non productive. (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Anonymous (Doc. #15910)

17.1.759 By requiring a large number of water/land permits the EPA will have a detrimental effect on our ability to farm productively and efficiently. We raise crops to feed the United States and our world and we do it well. This unnecessary governmental burden cannot be allowed to be implemented because it will affect a stable food supply. (p. 1)

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

US EPA ARCHIVE DOCUMENT

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Anonymous (Doc. #15921)

17.1.760 As a small Rancher/Land owner this rule could have a very negative effect on the small rancher/ farmer. This rule would burden the private land owners/ tax payers. I believe the individual states should have the authority to govern land use practices. (p. 1)

Agency Response: Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Anderson D., (Doc. #15943)

17.1.761 Small family farms such as ours, have been operating since the 1800's and this would likely put some of them out of business.

We are very concerned about the farm tributaries. Ditches and draws in the pastures are part of the landscape that was created at the beginning of time. Terraces and waterways have been built to control crop land. (p. 1)

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

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

US EPA ARCHIVE DOCUMENT

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

Townley, N.J. (Doc. #15945)

17.1.762 The proposed rule does not provide clarity. It is only certain that under this rule it will be more difficult to farm or make changes to the land even those which provide protection. Fencing, pruning, spraying and pulling weeds, insect control and brush hogging will be affected. Farmers cannot wait for permits and are unable to pay fees from EPA involvement. We do not have time for that and there is no need for such federal control. (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Westrich, K. (Doc. #15948)

17.1.763 Presently none of the land I operate borders any stream designated as navigable. Under the proposed new rule most of these acres will be impacted, as they are drained by ditches and small creeks that are dry unless moderate to heavy rainfall is occurring. (p. 1)

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

US EPA ARCHIVE DOCUMENT

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

Tunget, B. (Doc. #15951)

17.1.764 If this rule is adopted it would cause economic hardship on the ag. operators by creating field work delays to get required authorization or permits and would lead to litigation. (p. 2)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Keller, J. (Doc. #15952)

17.1.765 My fear is that the over-reach of the "clarification" of WOTUS could have such an unnecessary negative impact on all types of farming that many will be forced to quit or pay astronomical fines for something they have no control over (rain). Buying permits is already required and in place. This description of WOTUS goes far beyond what Congress intended, and what the U.S. Supreme Court had decided. The USEPA/Corps want to extend their jurisdiction to apply to seasonal and rain dependent streams, adjacent streams and wetlands, and isolated wetlands or "other waters" giving them control over all farming and land use. This "clarification" actually makes the definition murkier and leaves the interpretation to the whim of whoever is serving on the USEPA or Corps!

My crops and pasture land would be unnecessarily, severely impacted by this proposed rule because the only thing certain is that it will be more difficult or impossible to farm or

US EPA ARCHIVE DOCUMENT

make changes to the land - even if those changes would benefit the environment. This proposed rule doesn't clarify anything. It just gives the USAEPA/Crops the right to interrupt everything from mud puddles to dry ditches to rain water as under their rule. (p. 1)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

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 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.

Bushfield, M. (Doc. #15953)

17.1.766 These policies are also likely illegal and will lead to litigation against farmers and ranchers, creating risks and costly liabilities and further bad policy. Clean Water Act citizen suits have led to the terrible policy of certain classes pesticides needing a federal Clean Water Act permit to be applied according to their already of federally approved label. Suits like that using the same logic will be brought against farmers' use of pesticides and fertilizers when they are used on farms with dry drainage features that are now jurisdictional. You must not create policies that set the stage for this to happen. (p. 1)

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

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by

US EPA ARCHIVE DOCUMENT

permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Kosters, K.A. (Doc. #15954)

17.1.767 This proposal would cause significant hardships to local farmers and ranchers by taking away local control of the land uses. The costs to the local agricultural community would be enormous. This would lead to food and cattle prices increasing significantly. The effects will continue to magnify from there. The overall costs to the counties, municipalities and ultimately the taxpayers will be detrimental. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Wittenborn, D. (Doc. #15958)

17.1.768 I fear this proposed rule change! If this rule is put in place, will I need individual permits each time I repair one of my constructed waterways? How about when I need to spray or re-spray my corn or soybeans or wheat with an herbicide? Will I be subject to a massive daily fine if I do these things without a required permit? How about the possibility of massive fines even if I do have a permit (to spray or till or reshape a waterway) and mistakenly do something deemed outside of the permitted activity? The idea of potential fines of thousands of dollars per day scares me and every farmer I talk to. In the way this proposed rule change is worded I would be fearful of continuing my normal farming operations without real clarification of the true intent of the USEPA and the Corps of Engineers. (p. 2)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from

US EPA ARCHIVE DOCUMENT

agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Esplin, T. and J. (Doc. #15976)

17.1.769 I am a farmer, rancher, private property and small business owner, and the proposed rule has the potential to impact every aspect of my life. My concerns are as follows:

* Farmers and ranchers are stewards of the land and care about the environment and water quality. But this rule is confusing. Regional offices would be left to interpret and apply the regulations to farms on an inconsistent basis. Farmers know the ground they farm and should have clear guidance about how to comply with the law. (…)

* Under the proposed rule, farmers, ranchers and other landowners would face a tremendous roadblock to ordinary land-use activities, from building a fence to treating for or pulling weeds to controlling insects. (…)

* Getting a permit to plant grapes, build a fence or clear out brush is not a simple task. It could require consultation with state and federal agencies, hiring consultants and waiting for approvals. If the permit is obtained, it often includes paperwork and reporting requirements in addition to any requirements aimed at protecting water quality. Farmers just want to continue to farm and be stewards of the land, leaving it in better shape for future generations.

* Violations of paperwork or reporting obligations carry the same potential penalties as unlawful discharges to waters of the U.S.—up to $37,500 per violation per day.

* The proposed rule would include many, if not most, smaller waters and even dry land in the definition of "waters of the U.S. Clean Water Act permit requirements that apply to navigable waters would also apply to most ditches, drains, small ponds—and even depressions in fields and pastures that are only wet when there is rain. This means a farmer or rancher would likely have to obtain a permit prior to conducting activities such as spraying for weeds or insects, disking, or pulling weeds. Permits are far from guaranteed, may take months to obtain and often include paperwork, consultation with other agencies and reporting requirements in addition to any requirements aimed at protecting water quality. Not only that, but permits are costly: An individual Section 404 permit application for dredge-and-fill activities costs $62,166, plus $16,787 per acre of impacts to "waters of the U.S." (…)

* This proposed rule would have an adverse economic impact, particularly in the western United States, where it would add additional regulations and burdens in order to provide water to our local communities and local economies. (…)

* The City will have to shoulder the burden of proving it is meeting federal standards in order to avoid a permit or payment of costly fines and civil penalties of $37,000 per day for each violation. (…)

US EPA ARCHIVE DOCUMENT

* The proposed rule would set the stage for the City to be sued by citizen groups.

* Every low spot would be subject to regulation, which would make permits necessary for road construction and many other activities no reasonable person would expect to seek a permit for, thus criminalizing the everyday behaviors of ordinary Americans. (…)

* If this proposed rule is not withdrawn, water users, family farmers, ranchers, agriculture, private property owners, and just about everyone in the US will find themselves at the "mercy of the regulatory whims of the federal government."

* This proposal will hurt agriculture, industries and small businesses and the increased regulatory burden will ultimately be felt by the American consumer. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated.**

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land. In addition, the final rule adds an exclusion for puddles.

The maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming,

US EPA ARCHIVE DOCUMENT

silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Heggedahl, L. (Doc. #15977)

17.1.770 I firmly believe that there is no such need for the Environmental Protection Agency or the Army Corp of Engineers to be involved in my operation or that of other farmers and ranchers when there are state and local provisions for such oversight. (p. 1)

Agency Response: Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule.

Boca West Country Club (Doc. #16119)

17.1.771 The definitional changes contained in this rule constitute an overreach of statutory authority, broadening federal control of land and water resources in the U.S. and triggering punitive regulatory requirements for our industry and others. We firmly believe that federal agencies should consult with state and local officials to identify which waters should be federally regulated and which should be left to the states. This proposed rule hinders the industry's ability to move forward toward even stronger best management practices. (p. 1)

Agency Response: For this rule, state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

US EPA ARCHIVE DOCUMENT

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to complement statutes that protect the navigability of waters, such as Rivers and Harbors Acts. The CWA is the nation's single most important statute for protecting America's clean water against pollution, degradation, and destruction. State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Finally, CWA Section 404(g) establishes a provision whereby states may assume the Section 404 program.

Kentucky Farm Bureau Board of Directors, and Courtney Farms (Doc. #16123)

17.1.772 Reading through the proposed rule, we are more confused than ever about what exemptions farmers like us, and those we represent would have. It bothers us that for a document that is supposed to add clarity to the Clean Water Act will probably result in us having to meet more regulatory guidelines, face more restrictions on how we can farm our land, and probably forces us to spend more of our hard earned dollars just to continue farming! Our farmers go to length to protect their land resources and the environment with the goal to eventually pass the farm on to a future generation. They understand the value of protecting this resource, but this rule would penalize the very folks working hard to protect the environment for our future generations! (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Anonymous (Doc. #16128)

17.1.773 The impacts of this proposal will also affect our coastal community, a home too many water and natural resource based businesses, but will also ripple throughout the region. These new regulations will impact land use decisions, increase project costs, and

US EPA ARCHIVE DOCUMENT

lengthen permit review times and mitigation requirements. These regulations will increase the cost of operating many of our local businesses making it tougher for local citizens and consumers. From a regional and national perspective it will adversely affect our international competitiveness. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

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.

Association of Illinois Electric Cooperatives (Doc. #16168)

17.1.774 The AIEC has significant concerns with the proposed rule, especially the expanded universe of features that would become "waters of the US" (WOTUS). This expansion in federal CWA jurisdiction presents significant challenges to all co-ops as they strive to provide their member-owners with reliable and affordable energy. Operating under the not-for-profit business model, any increased cooperative operating costs are borne by the co-op's member-owners, not shareholders, and many of member-owners already live under challenging economic circumstances.

Several activities associated with the transmission, distribution, and generation of energy require federal Clean Water Act (CWA) permits. The proposed rule would necessitate even more permits -- both general and individual. More permitting, especially more individual permitting, increases uncertainty, delay and ultimately cost. In many cases, increased delay and increased costs can make the difference between proceeding with, delaying, or even cancelling a project.

Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect cooperatives by delaying and increasing the costs for (1) constructing and maintaining power lines; (2) operating and maintaining existing and new generation, including generation from both traditional fuels like natural gas and renewables; and (3) decommissioning existing generating facilities. (p. 3)

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

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have

US EPA ARCHIVE DOCUMENT

no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 12 ("Utility Line Activities) may specifically apply to the circumstance described.

17.1.775 To maintain the reliable delivery of electricity, cooperatives also have to maintain rights of way, keeping them clear by controlling vegetation which may include the use of herbicides. In addition, cooperatives must also control vegetation around generating facilities and substations. Permits are currently required under the Federal Clean Water Act for the application of herbicide in a cooperative vegetation management program. An expansion of WOTUS as described in the proposed rule will also increase the requirement for vegetation control permits, and will result in a direct increase in costs for AIEC member co-ops.

As UWAG explains in their comments, an individual permit can be expected to cost ten times as much as a general permit, and take twice as long to obtain. As noted above, coops are small businesses and their operating costs must be largely borne by their member-owners. The economic challenges faced by so many cooperatives and their member-owners underscore the importance of a cost-effective regulatory program. We would respectfully suggest that a ten-fold increase in cost of permitting to construct and maintain critical infrastructure with no appreciative environmental benefit is not cost effective. (p. 4)

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

The agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. See the Economic Analysis for further discussion of the costs and benefits assessment.

17.1.776 As we look to bring new sources of generation on line, we are concerned that the siting and permitting of new natural gas pipelines will be further delayed. (p. 6)

Agency Response: **The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

17.1.777 Decommissioning often requires cleaning and filling ditches, canals and treatment ponds on the site, as well as grading and other groundwork. These features often have not been treated as jurisdictional in the past, but might be deemed WOTUS under the proposed rule. Remediation work could require a section 404 permit and compensatory mitigation in essence requiring mitigation for mitigation. Added costs and delays could result in companies electing to "mothball" rather than restore sites, reducing the site's value and utility for all. (p. 6)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule has an expanded section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Pesticide Policy Coalition (Doc. #16169)

17.1.778 If the proposal were to be implemented as drafted, many state waters that have been adequately regulated, monitored and protected for years would become federalized. Federal agency policies, burdens and additional costs would be imposed on public and private land use activities and natural resource management activities adjacent to such waters. State pesticide programs would be adversely affected. Moreover, land owners, farmers, ranchers, foresters, and private and commercial pesticide applicators would face confusion and potential legal uncertainties as they work to control pests on crops, forests and other areas. (p. 3)

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

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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.

17.1.779 Confusion and hesitation over potential legal vulnerability could paralyze pest-control decision making, as operators and landowners struggle to: (1) determine if the manmade ditches on millions of acres of land they maintain are regulated or exempt as "wholly in uplands;" (2) locate and map ephemeral and intermittent flows potentially subject to jurisdiction of this rule; and (3) locate and map any indirect or adjacent connections that could occur during a growing season. Pesticide users in all sectors likely will have to wait months for the agencies to apply their "best professional judgment" to determinations of if potential "significant nexus" may influence their pest control plans or where the jurisdictional boundaries of encountered floodplains may be. This confusion and indecision will produce massive, ongoing economic turmoil for the pest control

US EPA ARCHIVE DOCUMENT

efforts of agriculture, forestry and other critically important economic sectors, because year-to- year changes in climate, hydrogeology, and land use patterns will alter the occurrence and significance of ephemeral and intermittent flows, setting up a repeating pattern of annual delays and burdens. (…)

The likely confusion and additional burdens associated with the proposed rule would interfere with planning, decision making, and the timely control of weeds, insects, diseases, invasive species and mosquitoes by states, municipalities, and private entities. This will surely translate to increased compliance and financial burdens, and increased legal uncertainty for all involved, factors the agencies have not considered in their WOTUS proposal. (…)

It would be especially difficult for pilots to recognize newly-jurisdictional "waters" from aircraft flying over farm fields or forests at speeds of 100 to 150 mph, and completely impossible when such pesticide applications must be made before dawn or after dark for protection of pollinators. Even ground-rig pesticide applicators would be challenged to recognize jurisdictional conveyances that are covered by vegetation or are dry at the time of application. (p. 5-6)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Colorado Association of Commerce and Industry (Doc. #16172.1)

17.1.780 As the voice of business and as Colorado's Chamber of Commerce, we believe this rule inappropriately and greatly expands the authority of the Agencies, beyond the boundaries of the law, and will have a significant negative impact on business and manufacturers' ability to operate, maintain and develop their facilities.

US EPA ARCHIVE DOCUMENT

In Colorado, we value our innovative business spirit, stewardship of the land and our ability to turn ideas into benefits for the economy and our state. It is with this understanding and pro-business environment that we say this rule creates unnecessary delays, costs and roadblocks for manufacturers of all sizes and in virtually all sectors of the nation's economy - not just Colorado and not necessarily to the benefit of our water resources. (…)

However, rather than providing clarity, the proposed rule instead expands the authority of the Agencies in a way that is both unclear and inconsistent with current regulations, and instead creates instant and lingering uncertainty for businesses.

Furthermore, we have serious concerns that the Agencies proposal is a solution in search of a problem, where research has been both limited in scientific scope and without consideration for economic impacts. (…)

Aside from lack of scientific standing, this proposed rule would force companies whose business focus is unrelated to water and who do not rely on water for their business to succeed-- to perform a comprehensive and costly evaluation of their operations to determine if the manner in which they deal with water issues, including such things as ditches and stormwater runoff, would now be regulated and therefore permitted under the new rules. (…)

Based on the above-mentioned points, we believe this proposed rule is not the right avenue for our country. More specifically, the proposed rule has the potential to prevent needed economic recovery by curtailing new construction and expansion activities, adds uncertainty to the market through red tape and places expansive new permitting costs on the shoulders of businesses small and large. (p. 1-2)

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

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity.

The rule has an expanded section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land.

US EPA ARCHIVE DOCUMENT

In addition, the agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Gotschall, E. (Doc. #16196)

17.1.781 I do not think this proposed rule is a good rule. It will expand the E.P.A.'s control over waters that they are not authorized to govern. It could affect many parts of my operation such as grazing cattle, fertilizing hay meadows and harvesting my hay. We already have too much oversight. We take care of our land as it is our livelihood. (p. 1)

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

Anonymous (Doc. #16241)

17.1.782 I am concerned that under this new proposal I will not be able to maintain these beneficial waterways and small streams. I would appreciate a reassurance that we can all work together to improve the quality of water for everyone in the future. (p. 2)

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

The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water.

Cain, L. (Doc. #16242)

17.1.783 The consequences of this proposed rule is anything but providing clarity. It will create confusion among not only farmers, but the regulators themselves, and will not be uniformly administered across the country. This will clearly lead to activist groups seizing the opportunity created by the confusion to file lawsuits against farmers. I cannot protest the impact I see this proposed rule causing strong enough! (p. 1)

Agency Response: The agencies intend to develop further guidance and conduct trainings following the rule's promulgation.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly

US EPA ARCHIVE DOCUMENT

articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Hecht, M. (Doc. #16263)

17.1.784 The proposed rule would vastly increase federal regulatory power over private, state, and locally owned property and trigger issues and results that the Agencies have not even considered. If implemented, the impacts could prove devastating to economic development, the housing industry, and state and local governments across Louisiana and the United States.

Perhaps most alarmingly, the proposed rule could severely impact Louisiana's efforts to protect and restore our fragile coastline and to build much needed flood control projects. Louisiana is facing a coastal land loss crisis, and this proposed rule could severely extend the permitting process and drive up costs for restoration projects included in Louisiana's Coastal Master Plan. This consequence is unacceptable. Every hour, we lose a land area the size of a football field due to erosion and subsidence. Through Louisiana's Coastal Master Plan, we are combatting that crisis and building land. This proposed rule puts our ability to rebuild land at risk, which will further expose Louisiana to hurricanes and storm surge and put coastal communities and our economy and that of the nation at risk. Greater New Orleans, Inc. fully supports the comments submitted by Louisiana's Coastal Restoration and Protection Authority and urges the Agencies to respond to their concerns in detail. (p. 1-2)

Agency Response: **The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.**

Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain

US EPA ARCHIVE DOCUMENT

interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. As recommended by the public and informed by science, the agencies defining limits for "neighboring" are primarily based on the reliance of a 100-year floodplain. The agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain.

The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

Anonymous (Doc. #16275)

17.1.785 This will drive a large number of farmers out of business & the results will be disastrous for our already "burdened" economy. This will also be disastrous for other industries as well. Please stop these new rules from being implemented! (p. 1)

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Oswald, J.C. et al. (Doc. #16279)

17.1.786 This rule will be especially bad for small businesses, families, and farmers and could have severe consequences for these groups. It will impose an overwhelming number of new regulations and harsh penalties that will be too costly, time-consuming, and burdensome. Furthermore, these new regulations are not necessary as issues are already being addressed under present regulations.

US EPA ARCHIVE DOCUMENT

South Carolina farmers cannot operate without clean water and are already at the forefront of conservation efforts, already having made great strides here in keeping our environment clean. (p. 1)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

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.

Anonymous (Doc. #16290)

17.1.787 In conclusion, the new proposed rules are unnecessary and will just retard efficient food production and raise costs for farmers, consumers and the federal government. (p. 1)

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

Wyoming Ag-Business Association (Doc. #16300)

17.1.788 While we have signed on to substantive comments, if brief we urge EPA to withdraw the proposed rule, and submit a proposal that conforms with the statutory language of the Clean Water Act, and decisions of the U.S. Supreme Court. (p. 1)

Agency Response: **The agencies' rule reflects the Supreme Court decisions in SWANCC and Rapanos regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in Rapanos. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The**

US EPA ARCHIVE DOCUMENT

agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

Anonymous (Doc. #16324)

17.1.789 The regulations would extend regulation towards areas on my farm that only hold water for short periods of time during heavy rainfall. These regulations would greatly restrict my ability to manage my farming operation in way that is both profitable and kind to the environment. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

In addition, ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F).

Wabash Valley Power Association (Doc. #16336)

17.1.790 In addition, so that WVPA and its members can continue to invest in a cleaner electric generating future, whether it be new natural gas or renewable energy facilities, the installation of adequate natural gas infrastructure to feed new electric generating facilities or to move electricity from these facilities could be further delayed with each crossing of a `waters of the US' that would require additional Section 404 permitting requirements. It appears that the number of additional permitting submissions to the USACE as a result of this proposal will greatly increase and, therefore, we are concerned that the USACE may not have adequate resources to issue these permits in a timely manner.

Finally, in order to maintain the reliable delivery of electricity, co-ops must maintain rights of way to keep these areas clear by controlling vegetation that may include the use of herbicides. Our member co-ops must also control vegetation around generating facilities and substations. Permits are required if herbicides may reach a 'waters of the US', so an expansion of this definition as described in the proposal could also increase the need to obtain vegetation control permits. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

The rule would not change existing CWA permitting requirements regarding the application of pesticides. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States.

US EPA ARCHIVE DOCUMENT

17.1.791 Potential changes to the point of compliance at existing facilities.

Electric utilities rely on networks of ditches to manage stormwater. Consistent with our comments above, the proposed rule could result in reclassification of industrial water features from non-jurisdictional to jurisdictional and would alter the point of compliance, possibly before the water is sent to the treatment system designed to treat the water, at which any technology or water quality-based limit must be met. Several on-site water treatment ponds could be considered a water of the US.' Would the cleaning of these treatment systems, to remove sediment or scale that is considered a water treatment practice, be considered 'dredge' or would modifying water treatment equipment be considered 'fill'? This proposal would affect our ability to manage waters, including waste-, storm-, and cooling waters, at our facilities. (p. 2)

Agency Response: **The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for waste treatment systems designed consistent with the requirements of the CWA has been moved to (b)(1) and remains substantively and operationally unchanged.**

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

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Dominion Resources Services (Doc. #16338)

17.1.792 Through the definitions of "tributaries", "adjacent waters" and "other waters", the proposed rule would expand jurisdiction over features that are not currently jurisdictional. We are concerned that this expansion in jurisdiction will result in delays and increased costs for project planning and permitting for a range of infrastructure projects including natural gas transmission and distribution, electric transmission and distribution, as well as traditional and renewable electricity generation development.

While the agencies intend to provide clarity, in practice the proposal would increase uncertainty regarding jurisdiction. We are concerned that this uncertainty will result in inconsistent application in the field. This uncertainty is a risk to the timing, cost and eventual development of our new infrastructure projects (e.g., natural gas transmission lines and renewable generation). The proposal also could result in uncertainty regarding requirements for existing facilities such as the point of compliance with discharge requirements for existing electricity generating stations and our electric and natural gas transmission and distribution facilities. (p. 2)

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

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"),

Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Chickasaw Pointe Golf Club (Doc. #16350)

17.1.793 The rule as presently published, could have a devastating economic impact on the golf course industry, potentially threatening to economically weaken, if not eliminate, golf facilities which are 95% small businesses. It would include almost every river, stream, creek, wetland, pond, and ditch in the United States under the jurisdiction of the CWA. Golf courses that have these waters on or near them would now be required to obtain costly, federal permits for any land management activities or land use decisions made.

Further, we would face an uncertain business environment where many of our now routine activities (such as fertilizer and pesticide applications) would require a permit before we would be able to proceed. Most important, there is no legal right for a permit for either of these activities nor any deadline on EPAs process to issue a permit. Permitting could take months or even years, or permits may simply be unavailable. This could halt operations on golf courses or even cause them to shut down altogether.

Golf facilities could be required to get permits for all activities in or near WOTUS and that will mean a substantial increase in costs to our small businesses for permits, mitigation, monitoring and assessments as well as increased costs for permit review and issuance to be borne by state governments. It also increases our liability to manage the property due to the threat of citizen action lawsuits. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many golf course water features, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.**

Sunflower Electric Power Corporation (Doc. #16352)

17.1.794 Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect Sunflower and Mid-Kansas by delaying and increasing the costs for 1 constructing and maintaining power lines and operating and maintaining existing and new generation facilities. As coops across the nation increase generating capacity to meet growing demands of our members and to invest in generation from other fuels (including renewables), we will need to build new transmission and distribution infrastructure. This is particularly relevant in Kansas which is rich in wind energy resources. (…)

US EPA ARCHIVE DOCUMENT

Sunflower and Mid-Kansas are especially concerned about the potential impact of the proposed rule on our operations. Specifically:

- Our ability to maintain – including repair – our existing power lines
- Our ability to construct new power line – especially lines related to newer generation
- Our ability to manage small, de minimis, spills along our rights of way
- Our ability to manage waters – including wastewater, stormwater, and cooling water – at our current generating plants
- Our ability to site and construct new generation – including new renewable generation (p. 2)

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

The rule has expanded the section on waters that are not considered waters of the United States, including artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for waste treatment systems designed consistent with the requirements of the CWA has been moved to (b)(1) and remains substantively and operationally unchanged

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Tester, R. (Doc. #16355)

17.1.795 I write to express my grave concerns regarding the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers proposed Definition of Waters of the United States Under the Clean Water Act. Although the agencies claim this rule simply clarifies which areas may be jurisdictional under the act, I understand it will actually broaden their regulatory authority and place significant burdens on state and local governments, business owners, and private landowners burdens that are neither warranted nor reasonable. Because of the severity of these impacts and the lack of regard for the

US EPA ARCHIVE DOCUMENT

jurisdiction of the individual states, I respectfully request that the proposed rule be withdrawn.

As a private citizen and County Commissioner in Washington County, TN, I am concerned with this rules significant expansion of federal authority. In general, government is always best when it is as small and close to the people as possible. It seems this rule would hamper the ability of state and local governments to make reasoned decisions regarding their land use and water resources, and impose new federal regulatory burdens extremely difficult for these entities to bear. For example, as I understand it, the proposed rule would extend federal jurisdiction to ephemeral drainages, ditches, and isolated features not previously regulated as waters of the United States. States would be forced to set water quality standards, monitor and report on the status of these waters, and take action if they are not clean enough. This is particularly troubling given that many of these newly claimed waters only flow in response to rainfall or snow melt.

Equally problematic, if not more so, is that if these waters are deemed jurisdictional, state and local governments, business owners, and citizens will be required to obtain federal permits to construct and regularly maintain infrastructure, storm water management facilities, roadside drainage ditches, and other features that may encroach upon these areas. Many of these features have been installed for the very purpose of meeting the goals of the act.

As you are aware, state and local government budgets are particularly constrained these days. Unfortunately, the proposed rule would hamper our ability to prioritize our efforts and activities. If finalized, the rules increased burdens would take away resources from other beneficial water quality projects and remove the flexibility we need to address our most pressing priorities.

No one needs to tell a state or locality of the importance or value of their natural and water resources. Congress recognized under the Clean Water Acts Section 101(g) the primacy of states to allocate and manage water resources within their borders. Hence, we have historically embraced our stewardship responsibilities and oftentimes are on the front lines to protect and preserve what, in many instances, is a driver of our economies. I understand some states already regulate more categories of waters than are encompassed by the current federal definition of waters of the United States, require extensive buffer areas or mitigation for impacts to these areas, or promote voluntary conservation as a way to meet their goals. Given these extensive existing efforts, it is not clear what specific benefits this expansion of federal authority could bring.

It appears this rule attempts to regulate all waters across the country. Given this overreach and the challenging impacts that would accrue, I urge you to withdraw the proposed rule and go back to the drawing board to develop a proposal that adheres to the limitations laid out by the U.S. Constitution and the jurisdiction of the individual states, follows recommendations developed through consultation with state and local governments and other affected entities, and relies on a sound economic and scientific basis. (p. 1-2)

<u>Agency Response:</u> The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of

US EPA ARCHIVE DOCUMENT

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements are only triggered when a person discharges a pollutant to the covered water. In the absence of a pollutant discharge that would pollute, degrade, or destroy a covered water, the CWA does not impose permitting restrictions on the use of such water. In addition, States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA.

Ditches have been regulated under the Clean Water Act (CWA) as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but

US EPA ARCHIVE DOCUMENT

rather exempted specified activities taking place in them from the need for a CWA section 404 permit. In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. In addition, the final rule contains an expanded section on waters that are not considered waters of the United States.

Martin Marietta (Doc. #16356)

17.1.796 As a company, we control over 250,000 acres with some of our larger sites encompassing tracts greater than 1,000 acres. Securing and holding these properties is crucial to the existence of our business and for the growth of this country. The scope of the Clean Water Act is vital to our company. It impacts where we are allowed to access a natural resource, how long it takes to permit a new site or expand an existing facility, the costs of planning and site development, and it can often dictate the life of an operation.

This proposed rule has been advertised as a way to clarify matters. Clarity should be able to be presented efficiently. That is not the case here. The September 2013 draft report by the EPA entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" is over 330 pages. The April 21, 2014 Federal Register entry on the Definition of the "Waters of the United States" under the Clean Water Act is 88 pages in length. As a member of the regulated community, I can tell you that the simple task of understanding what is a Water of the United States has grown into an extremely technical, confusing, and costly topic. (…)

The proposed rule also lacks any "grandfathering" provision. Our mine plans often call for long-term, phased mining which depend on regulatory certainty to make sound business decisions. Without clear grandfathering language, our mine plans are now at risk of being subject to new and expansive jurisdictional determinations.

There is no doubt that the expanded scope of this rule would directly impact our operations. As explained, among the impacts would be increased costs, delays in permitting, reduction in access to a necessary natural resource with a direct impact on our ability to provide needed materials for roads, bridges and construction projects.

We urge the EPA and the US Army Corps of Engineers to withdraw this rule as proposed and work with all stakeholders to develop a rule that efficiently clarifies the definition of "Waters of the United States". (p. 1-2)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.

With respect to grandfathering, under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies do not intend to reopen existing approved jurisdictional determinations unless requested to do so by the applicant.

Associated Builders and Contractors, Inc. (Doc. #16358)

17.1.797 The CWA imposes substantial permitting and regulatory requirements on projects near waters covered by the act. The proposed rule, however, does not adequately define "waters of the United States" and other key concepts under CWA programs. As a result, the regulations fail to provide the information companies need to comply with the law. Inevitably, this will lead to a flood of unnecessary and excessive permitting requests with associated and equally unnecessary project delays and increased costs.

The uncertainty surrounding what will actually be considered "waters of the United States" under this proposal, coupled with the EPA's and Corps' broad authority to make determinations, could chill any construction near waterways that could conceivably be covered by the rule. This will almost certainly lead to fewer projects overall and negatively impact job creation in the construction industry.

For the reasons outlined above, we urge EPA and the Corps to withdraw the proposed rule. In addition, the undersigned organizations share the concerns and recommendations provided in comments filed to this docket by the Waters Advocacy Coalition, and incorporates them into this letter by reference. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Delaware County Department of Public Works (Doc. #16362)

17.1.798 The proposed rule would potentially enact regulations that would impose further financial and administrative burdens on our local municipalities, taxpayers, and businesses, while discouraging economic growth in our already struggling communities. (p. 1)

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

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

Terrebonne Levee and Conservation District (Doc. #16365)

17.1.799 WHEREAS, the current delays in the regulatory process are preventing critical projects defined by the Louisiana State Master Plan and other public projects from reasonable implementation; and

WHEREAS, any delays to the implementation of coastal protection and restoration projects will adversely affect the intent of the Clean Water Act by increasing the loss of coastal wetlands, and

WHEREAS, any delays affecting the implementation of public works projects such as drainage maintenance, flood control, and mosquito control will endanger the public and cause substantial financial burdens to the local, state and federal agencies. (p. 1)

Agency Response: The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding which waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

US EPA ARCHIVE DOCUMENT

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

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify

Airports Council International - North America (Doc. #16370)

17.1.800 Notwithstanding the many unanswered questions related to the jurisdictional reach and the related effects of the Proposed Rule, there are a number of significant impacts on the Aviation Industry that would result from the Proposed Rule.

The Proposed Rule represents a significant regulatory threat to ongoing airport construction and related activities that have to be carried out in a timely fashion in order to satisfy requirements for funding eligibility and compliance with certain Federal Aviation Administration (FAA) safety requirements. It will have significant impacts on the time required for, and the cost of, construction projects. The Proposed Rule also raises questions with regard to the FAA's ability to accept an airport Master Plan and meeting the permitting process requirements of the Clean Water Act. (…)

For example, in case of non-exemption, airports will have significantly more CWA permitting burdens when conducting stormwater management pond work while having to meet standards in the ponds given their change, under the Proposed Rule, from treatment areas to receiving waters. Under the Proposed Rule most, if not all, collection infrastructure on airports consisting of open ditches and canals (representing perennial, intermittent and ephemeral storm flows) could be considered WOTUS if they have a permeable bed and banks and an ordinary high-water mark.

As a result, airport-related permitting and mitigation burdens under the CWA will increase, project costs will increase, and timelines will be further delayed. As stormwater infrastructure must necessarily meet the design needs of existing and planned development, any new development of infrastructure on airports that would trigger a re-alignment or re-structuring of the stormwater collection system to meet those regulatory design needs would incur an additional regulatory burden under the Proposed Rule. New stormwater ditches constructed to meet development design criteria would presumably in turn become WOTUS and represent an additional future regulatory burden to the airport sponsor who must comply with applicable CWA permits.

The designation by rule of any and all stormwater collection systems that meet the revised definition of WOTUS and "tributaries" to WOTUS potentially imposes an additional regulatory burden on airports to comply with the FAA-mandated need to address hazardous wildlife attractants on airports. Moreover, isolated wetlands and even ditches that are not jurisdictional now may become WOTUS under the Proposed Rule.

US EPA ARCHIVE DOCUMENT

This could cause additional problems of special concern to airports as an industry. As stormwater collection systems consisting of open ditches, canals and ponds on airfields often develop into waterfowl attractants, airports are commonly required to modify/mitigate such features as part of the airport safety requirements detailed under 14 CFR Part 139.

This substantial extension of regulatory jurisdiction from traditional "waters" to include riparian transition zones and areas within floodplains that could be assessed for a significant chemical, physical, or biological nexus as "a single landscape unit" is profound. In addition to increasing the scope of regulatory jurisdiction by including riparian and floodplain areas, the inclusion of a "shallow subsurface hydrologic connection" metric will likely effectively remove the current exclusion from the Corps jurisdiction of "isolated wetlands," given that the sub-surface hydrology and geologic structure of the historically filled floodplain will have a significant impact at some U.S. airports. (p. 7-8)

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

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

Finally, the exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

South Dakota Soybean Association (Doc. #16371)

17.1.801 South Dakota farmers are concerned that the proposed changes will harm the sustainability of a significant number of farm operations, particularly family farms, while at the same time producing no significant benefits to the environment. The rules and regulations, will expose farmers to greater liability and increased personal expense with no method of recovering costs. We are concerned that the exclusions for agriculture will provide little protection.

SDSA is very appreciative of the outreach by EPA and the Corps of Engineers in sharing information and addressing our concerns about the rule changes. Particularly, the meetings and communication with Rebecca Perrin, EPA Region 8 Agricultural Advisor. It is our hope, that in the future, EPA and the Corps of Engineers will consult with private citizens before establishing proposals of great significance in an effort to gain an understanding of how changes impact citizens, and how to work cooperatively to achieve shared goals.

SDSA wishes to express its opposition to the proposed changes, and urges EPA and the Corps of Engineers to withdraw their proposal. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. The agencies appreciate SDSA acknowledgement of this effort.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

National Wildlife Federation, et al. (Doc. #16377.1)

17.1.802 We commend your administration's proposed Clean Water Act rule for the protections it restores to headwaters streams and adjacent wetlands, and ask that the final rule offer similar protections for other important yet presently unprotected waters. We also support your administration's efforts to preserve longstanding Clean Water Act

exemptions for farmers and foresters that encourage wise stewardship of land and water resources.

The current rulemaking is our best chance to restore protections for streams, wetlands and other waters critical to our hunting and fishing traditions and outdoor economy. We look forward to working with your administration to finalize and implement the Clean Water Act rule. Our economy and way of life depend on it. (p. 1-2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.**

Meeteetse Conservation District (Doc. #16383)

17.1.1 [T]he Meeteetse Conservation District requests the EPA and Army Corp withdraw the rule so that adequate state and local government consultation can occur and any further executive overreach will be halted. The custom, culture and economic stability of the Meeteetse community and the constituents we represent are now and historically have been firmly rooted in both farming and ranching. This industry has locally remained viable, due in part, to its ability to utilize the water resources in a variety of manners. It would not be inaccurate to say that the existence of the town itself relies upon the ability of the farmer and rancher to remain in business. We assert that if not withdrawn, the proposed WOTUS rule would result in devastating economic impacts to our local ranching and farming industry due to additional and substantial regulatory costs associated with changes in jurisdiction and increased permitting and compliancy requirements. (p. 2)

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

US EPA ARCHIVE DOCUMENT

The agencies recognize the vital role of farmers and ranchers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses and communities depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

17.1.803 Impacts to MCD Community

We have had many producers in our district come to us with questions and concerns over the proposed definition. As a district we are concerned that farmers, ranchers and other landowners within our jurisdictional boundaries will face roadblocks to ordinary land-use activities like fencing, spraying for weeds or insects, disking or even pulling weeds. The need to establish buffer zones around grassed waterways, ephemeral washes and farm ditches could make farmlands a maze of intersecting "no farm zones" that could make farming impractical. The new rule puts more farmers in jeopardy by again regulating isolated waters. Our district is comprised of many agricultural producers, including those with cash crops and livestock. (…)

We feel that this unjust overreach will undoubtedly be a burden to our district and all of the producers within our boundaries. Again, we urge you to withdraw this proposed WOTUS rule. (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements.**

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries,"

US EPA ARCHIVE DOCUMENT

including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

Anonymous (Doc. #16384)

17.1.804 These changes pose a threat of federal regulations to Iowa farmers or any property owner whose land with areas, that puddles or pond after rains being defined as ?Waters of the US?. For farms with low area that catch water, waterways and even ditches which only serve as a means of drainage to foster crop production will be defined as ?Waters of the US". These areas will be defined this way even though they are far for the nearest navigable water. It has been said that farmers are protected by exemptions from these rules but this is hard to believe. There is only a narrow exemption to protect farmers and their activities and they only apply to one aspect of CWA, the dredge and fill permit program. With this farming activity could fall under this proposal if the land holds rainwater or contributes to stream flow. Further there is nothing stopping EPA or Army Corps from removing these exemptions without public notice. (p. 1)

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

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the

US EPA ARCHIVE DOCUMENT

minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

McPherson Law Firm, PC (Doc. #16397)

17.1.805 On November 5, 2014, the EPA's Local Government Advisory Committee (LGAC) presented more than 50 recommendations to the EPA in a 105 page report. I have read those recommendations and strongly encourage the agencies to implement them. (…)

Due to these extremely onerous remedies, and the EPA's history of using them, I strongly encourage the agencies to prioritize certainty over maximizing Commerce Clause jurisdiction. (…)

In my opinion, this draft rule is not intuitive, it is not obvious. It lacks moral support. For these reasons, if adopted in its present form it will not produce the compliance desired by the agencies. It will only produce more fines and fees on those unlucky enough to get caught. (p. 1-2)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding which waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Anonymous (Doc. #16400)

17.1.806 The Clean Water Act; Definitions: Waters of the United States will really hurt many farms and ranches. There are puddles that happen in large rain storms and can sit in the fields or pastures for a couple days to a couple weeks and forcing us to regulate puddles is frustrating. We already live in a heavily regulated business and you keep making it harder and harder to comply we try our best but some of these regulations are becoming ridiculous. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

Anonymous (Doc. #16402)

17.1.807 I am a private landowner and my family has been on the family ranch operation for over 100 years in Wyoming and this rule will impact the operation and financial management of my business. I have worked with agencies and their personnel in Wyoming for years to maintain clean water and believe that they have a better working knowledge of the issues than the more distant federal agencies.

Today normal farming and ranching practices are exempt from the Sec. 404 permitting process. Now you propose to exempt only a list of some 56 practices meeting the Natural Resources Conservation Service (NRCS) standards. This approach significantly narrows the current exemption and imposes a set of standards that were developed solely for the purpose of federal cost-sharing. You are effectively causing NRCS to become a regulatory agency. In addition, this exemption has already been implemented through your interpretive rule that became effective without any opportunity for input from the agriculture industry. I am requesting that this interpretive rule be withdrawn immediately. (…)

Finally, the inclusion of all tributaries of a traditional navigable or interstate water, including lakes; ponds; ditches; ephemeral, intermittent, or perennial streams and adjacent waters would include virtually all waters on my private lands. This is a huge expansion of federal authority that infringes on both private property rights and Wyoming's jurisdiction over water within its boundaries. (p. 1-2)

Agency Response: **The Interpretive Rule was on public notice from April 21, 2014, and was extended until July 7, 2014. Since the close of the public comment and, as directed by Congress, the Interpretive Rule was withdrawn on January 29, 2015.**

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f, which has not changed as a result of the rule. In addition, there is no change in the treatment of NRCS determinations. There is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule. The Joint Guidance

US EPA ARCHIVE DOCUMENT

from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands, nor in any way change the tools used for delineating wetlands.

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

The final rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

Anonymous (Doc. #16407)

17.1.808 As I am a rancher and farmer, I am opposed to this overreaching proposed rule that will have a huge negative impact on my business, as well as the rest of the farmers and ranchers and landowners throughout our country. Please do not accept this new rule. (p. 1)

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

The agencies recognize the vital role of farmers and ranchers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Anonymous (Doc. #16409)

17.1.809 What a burden this would be for my farming operation and unlike other businesses we are unable to just "pass on" this cost as some other segments of the economy like manufacturing can do. We do NOT set our own price for commodities and are subject to market forces. Common sense tells me to take care of the land and it will

US EPA ARCHIVE DOCUMENT

take care of me. My ancestors were farmers as well so care if the land was instilled in my actions early in life. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Waterkeeper Alliance et al. (Doc. #16413)

17.1.810 The importance of maintaining a broad definition of "waters of the United States" under the CWA cannot be overstated. In the simplest terms, if a waterbody is not included within the definition, it cannot be protected from pollution or destruction under the CWA, and failure to protect a waterbody from pollution or destruction will adversely impact downstream waters and water users. It has been well known for decades that if we want to control water pollution, we must control pollution at its source. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are traditionally navigable. This concept was firmly established with the passage of the CWA in 1972 and in agency definitions of "waters of the United States" in 1973 (EPA) and 1975 (Corps).

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain polluted, and by some indications pollution appears to be increasing. For example, while water quality in a large percentage of our nation's waters has not been assessed, the most recent available date from EPA shows water pollution in assessed waters has impaired 558,999 river/stream miles, 12,197,097 lake acres, 26,120 sq. miles of estuarine waters, 7,204 miles of coastal waters, and 53, 270 sq. miles of the Great Lakes.[83] By comparison, EPA's 2004 CWA Section 305b Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.[84] As noted in the 2013 Draft Connectivity Report and the 2014 Science Advisory Board ("SAB") Review of that Report, there is strong scientific evidence to support the conclusion that ephemeral streams, intermittent streams, perennial streams,

[83] EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, available at http://ofmpub.epa.gov/waters10/attains_nation_cy.control.

[84] EPA, Findings on the National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, available at: http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_05_20_305b_2004report_report2004pt3.pdf

US EPA ARCHIVE DOCUMENT

flood plain wetlands, non-floodplain wetlands, and other waters are either connected to downstream waters or sustain the physical, chemical, and/or biological integrity of downstream waters.[85]

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

At the same time, we are greatly concerned by, among other things, the agencies' decision to narrow the class of tributaries and impoundments that have been historically given categorical protection, the agencies' removal of the broader interstate commerce grounds for protection of tributaries, adjacent waters and other waters, and the addition of new categorical exclusions for waters that have been covered historically and can have a significant impact on downstream water quality.

In recent years, the EPA and the Corps have implemented guidance documents that have reduced protections for our nation's waters by limiting jurisdiction in a manner that "was not justified by science or law."[86] If we can ever hope to restore the chemical, physical and biological integrity of our nation's waters as envisioned and required by the CWA, it is essential that the definition of "waters of the United States" under the CWA protect traditionally navigable waters, interstate waters, tributaries, adjacent waters, wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes, lakes, estuaries, and other waterbodies that either provide important functions themselves or have an influence on downstream waters. (p. 4-6)

Agency Response: **The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

[85] 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 -EPA/600/R-11/098B (Sept. 2013) (hereinafter "Connectivity Report"); U.S. Environmental Protection Agency, Science Advisory Board, Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA-SAB-15-001 (Oct. 17, 2014) (hereinafter "SAB Report"). Both available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/Watershed%20Connectivity%20Report?OpenDocument

[86] Congressional Research Service Report R43455, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States" (June 10,2014). p. 6.

US EPA ARCHIVE DOCUMENT

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making case-specific determinations. Significant nexus is not a purely scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA. Science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

17.1.811 We urge the agencies to strengthen and clarify the final rule in line with our more detailed comments below, and to revise the preamble and Proposed Definition so that it protects the broadest category of waters allowed under the Commerce Clause, Article 1, Section 8, Clause 3 of the U.S. Constitution, as intended by Congress. Among other things, we urge 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. While we agree that waters with a "significant nexus" to Traditional Navigable Waters, Interstate Waters and Territorial Seas should be jurisdictional, we do not agree that these are the only "other" waters that should be protected under the CWA. (p. 8)

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

US EPA ARCHIVE DOCUMENT

reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

See the preamble and Technical Support Document for further discussion of the legal basis for this rule.

Anonymous (Doc. #16415)

17.1.812 If this rule were to pass future environmental improvements to our property would probably not happen. The paper work for permits would be too expensive and would take too long to get. We would also be regulated on how to do the improvements by people who do not know our land. This would be a major mistake that would affect future generations very negatively. (p. 1)

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

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures.

Anonymous (Doc. #16424)

17.1.813 My ranching operation would be adversely affected and the verbal assurances that most agricultural operations would be exempt is in no way reassuring. Regulatory agencies and the Federal Government are notorious for talking out of both sides of their mouths. (p. 1)

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

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

Dyrdal, D. (Doc. #16426)

17.1.814 Permits are time consuming and that is time we do not have during our short growing season. I certainly don't feel we need any more oversight from these organizations. Forget trying to gain complete control over the landowners and focus on

US EPA ARCHIVE DOCUMENT

the destruction of the land that is taking place by those who really DO NOT CARE about what happens to our lands. As long as the pipeline companies get their construction permits and get whatever else they need to push through our private lands; they care nothing of the destruction left in their wake. That is the only agenda they care about, while the E.P.A. and the A.C.O.E "turn a blind eye" when real life issues confront us. (p. 2)

Agency Response: **The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

With respect to permits, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

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

17.1.815 EPA has recently imposed, and is proposing additional, new, more stringent air emission limitations on AECT's members that produce electricity. These new and more stringent air emission limitations in some cases will entail the need to add new emissions control equipment that may impact land or water features that would be defined as WOTUS under the Proposed Rule but not under existing rules. Thus, the Proposed Rule would add yet another regulatory challenge to AECT's members in meeting the obligation to provide electricity to Texas residents, business, and industry in compliance with EPA's regulations.

Direct impacts of the Proposed Rule's enlarged regulatory requirements on the electric industry will have an economic ripple effect since the generation, transmission, and distribution of electricity to homes, health care facilities, schools, businesses; and industrial operations is vital to health and safety, and to the economy. The additional costs and delays that would be imposed by the Proposed Rule would threaten the viability of a project that would be needed to provide basic electric service and/or would result in increases in the costs of electricity. (p. 3)

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

George Transmission Corporation (Doc. #16439)

17.1.816 GTC is concerned about the potential impact of the proposed rule on our operations. Specifically regarding our ability to construct and maintain transmission facilities as well as our ability to manage small, de minimis, spills at these facilities. (p. 1)

US EPA ARCHIVE DOCUMENT

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

This action also would not require facilities that have prepared SPCC plans to update these plans. The owner/operator of a facility that has an SPCC plan in place has already determined that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b).

In addition, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

League of California Cities (Doc. #16442.1)

17.1.817 Cost to comply should be taken into consideration. If the changes to the proposed rule expand the number of water bodies under federal jurisdiction, as many believe, the costs to comply with the Clean Water Act could be significant for cities. Currently, many cities in California struggle to find the needed resources to comply with MS4 permit requirements. Two provisions of the California Constitution require voter-approval to increase fees or taxes to support a whole host of activities, including stormwater management. Increasing the number of water bodies subject to the Clean Water Act will only increases these costs and exacerbate the problem. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses and communities depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

US EPA ARCHIVE DOCUMENT

Ouray County, Colorado (Doc. #16444)

17.1.818 In particular, Ouray County is concerned that the proposed definition would include naturally flowing hot springs, ditches that carry water for both municipal and agricultural users, storm water retention ponds, storm water ditches, depressions and culverts, arroyos that flow intermittently, isolated ponds and water gathering depressions, and areas in which water collects during limited times of the year or after limited or seasonal weather events. To include these waters as "tributary" or otherwise connected to continually flowing streams and wetlands will result in additional permitting burdens, including Section 404 permitting for construction and road maintenance activities. Similarly, to require discharge permits for waters that naturally flow from the ground, including the various hot springs with their unique characteristics and natural constituents, in an unwarranted exercise of regulation that will alter the important place that these hot springs enjoy in our tourism economy. The burdens of additional federal permitting include undue delays as well as out-of-pocket costs affecting agricultural and municipal users, as well as the County in its normal course of business. We do not believe there is a corresponding benefit that justifies this additional regulatory burden and expense. (p. 2)

Agency Response: **The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).**

A new exclusion in the rule also relevant to ditches covers wastewater recycling structures, including distributary canals constructed in dry land and used for wastewater recycling. As a result of the aforementioned changes, the agencies do not anticipate increased jurisdiction over ditches or an increase in jurisdictional determinations.

It was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using

US EPA ARCHIVE DOCUMENT

jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

Basin Electronic Power Cooperative (Doc. #16447)

17.1.819 This expansion would have a significant negative effect on the Basin Electric's ability to site and develop new infrastructure and to maintain existing facilities. Safeguards for protecting wetlands are already in place, ensured by the missions of the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (Agencies). (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

17.1.820 This will leave Basin Electric and the rural agricultural and energy industries that Basin Electric serves with a rule that will result in litigation and potential delays of projects in its service territories that are essential to providing low-cost power to our member owners, and will interfere significantly with the smooth and efficient functioning of those agricultural and energy industries. (p. 3)

Agency Response: Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Building Industry Association of Greater Louisville (Doc. #16449)

17.1.821 The Building Industry Association of Greater Louisville requests that the United States Environmental Protection Agency (USEPA) and the United States Army Corps of Engineers (USACE) consider the Land Development Committee concerns regarding the April 21, 2014 proposed rulemaking (79 Fed . Reg . 22188) that redefines "waters of the United States." The BIA Louisville Land Development Committee respectfully requests that the proposed rule be withdrawn or amended to provide protections against egregious cost increases to land development and home building, and general economic development in Greater Louisville. (…)

The Building Industry Association of Greater Louisville represents approximately 1900 businesses in the building industry in a seven-county jurisdiction around and including

US EPA ARCHIVE DOCUMENT

Louisville. Our Association is concerned that the expansion of definitions as proposed would significantly add cost to the development and building process, which is already burdened and over taxed by federal, state, and local agencies. These increases continue to make housing less affordable and push the American Dream out of reach for more and more families. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses and communities depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Cambridge Brewing Company et al. (Doc. #16452)

17.1.822 In order to produce high-quality, safe beer, brewers must have access to an ample amount of clean water. Dirty water produces dirty, undrinkable, unsellable beer.

We, the undersigned breweries of Massachusetts, urge the agency to finalize guidance and institute a formal rulemaking process in order to remedy the current situation in which water supply is inadequately protected. (p. 1)

Agency Response: **The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.**

Clark County Department of Environmental Services (Doc. #16455)

17.1.823 Governmental Agencies that have MS4 permits have become fodder for a cottage industry of lawyers seeking to abuse the Clean Water Act's provisions on strict liability for personal profit. Clark County has had to endure years of litigation stemming over how to discharge stormwater runoff. While there was never one discharge that was claimed to have caused damage to the Waters of the U.S., and not one iota of evidence outside of speculation of potential damage, the people of Clark County were exposed to potentially tens of millions of dollars in fines. Eventually the County was compelled to settle for

US EPA ARCHIVE DOCUMENT

$3.6 million tax payer dollars. One sixth of hat money went directly into the pockets of the lawyers.

Under the proposed rule stormwater conveyances that outfall into a manmade stormwater area may be deemed as discharging into the Waters of the U.S. since there is a nexus from the stormwater holding and treatment site to Waters of the U.S. This would then compel all MS4 permitees to absorb the costs and burden of meeting additional water quality standards for discharging into those preexisting manmade facilities. Our jurisdiction simply cannot afford this additional unfunded mandate from EPA and the Corps of Engineers.

This proposed language appears to be an attempt to undo the Supreme Court's ruling regarding jurisdictional reach for Waters of the U.S. in the Rapanos case.

Clark County Department of Environmental Services is concerned that there has been no consideration given in the rulemaking process in how to protect governmental MS4 permitees from the liability exposure the current rulemaking language creates and that the rulemaking has been developed with no consideration for the unreasonable financial burden being placed upon the MS4 permitees. (p. 1-2)

Agency Response: **The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).**

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

Although the EPA cannot preclude litigation pursuant to the Clean Water Act's citizen suit provisions nor challenges to permits, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

US EPA ARCHIVE DOCUMENT

Dairy Cares (Doc. #16471)

17.1.824 Dairy operations and facilities may have the potential to impact the functions of surrounding waters either directly or indirectly through shallow aquifers underlying many parts of California's Central Valley where a large amount of dairies are located. Based on the Proposed Rule, entire dairy operations and farms could be found jurisdictional under the "other waters" category despite being already subject to stringent regulatory standards under other environmental laws. Given the broad and expansive nature of the "other waters" category and its potential to adversely affect the economic productivity of dairy operations, Dairy Cares requests the Proposed Rule be revised to eliminate the Agencies' regulatory authority to assert jurisdiction over waters that are similarly situated at the ecoregion level. Instead, Dairy Cares requests the Agencies continue to follow Justice Kennedy's guidance and assert CWA jurisdiction over waters on a case-by-case basis only after performing a significant nexus test to determine the presence of a significant chemical, physical, or biological effect. (p. 6)

Agency Response: **The agencies' rule reflects the Supreme Court decisions in SWANCC and Rapanos regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in Rapanos. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.**

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. However, it was never the Court's intention that every determination be made on a case-by-case basis. The proposed rule provided for case-by-case determinations for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

US EPA ARCHIVE DOCUMENT

The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial. The agencies have also determined that the single point of entry watershed is a more reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard than ecoregions. Additionally, the agencies may amend the rule as part of the rule-making process if evolving science and the agencies' experience lead to a need for action to alter the jurisdictional categories.

Under paragraph (a)(7), prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters in these subcategories are not jurisdictional as a class under the rule. However, because the agencies determined that these subcategories of waters are "similarly situated," the waters within the specified subcategories that are not otherwise jurisdictional under (a)(6) of the rule must be assessed in combination with all waters of a subcategory in the region identified by the watershed that drains to the nearest point of entry of a traditional navigable water, interstate water, or the territorial seas (point of entry watershed).

See the preamble and TSD for additional discussion of the legal basis for this rule.

Minnesota Chamber of Commerce (Doc. #16473)

17.1.825 Many of our members, including but not limited to those in the energy, mining, agriculture, manufacturing, and pulp and paper industries, stand to be affected by the Proposed Rule. Some Chamber members own and operate facilities located on or near rivers, lakes, streams, ponds, wetlands, ditches, and swales. Others have facilities located in floodplain or riparian areas. Still others depend upon ditches, stormwater ponds, cooling water ponds, fire water ponds, ash ponds, tailings basins and other on-site water features to manage water use, storage, and treatment. The ever-evolving jurisdictional scope of the CWA has long been a frustration for these members, who have had to deal with the regulatory uncertainty regarding which activities may be subject to National Pollutant Discharge Elimination System (NPDES), Section 404 "dredge and fill," or other CWA permitting programs.

We thus commend EPA and the Corps (Agencies) for seeking to clarify which waters are, and are not, "Waters of the United States," subject to federal jurisdiction under the CWA. We also commend the Agencies' publicly expressed intent that the Proposed Rule not expand the existing jurisdictional reach of the CWA. However, we are concerned that the Proposed Rule, as written, will do just that. In addition, although t he Proposed Rule creates clarity in some area s, it leaves other issues as unsettled, if not more unsettled, than they currently are. As a result, our members face the prospect of increased regulation and increased regulatory uncertainty-a toxic combination for Minnesota businesses- with no apparent environmental benefit. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

17.1.826 The Proposed Rule would create an unwarranted expansion of the Agencies' regulatory reach over Minnesota's mining operations, intrude upon areas of traditional state jurisdiction, and create regulatory uncertainty. In particular, the Minnesota Chamber is concerned that the Proposed Rule would (A) result in miles of stormwater and other mining-facility ditches becoming newly subject to federal jurisdiction, (B) assert federal jurisdiction over mine ponds, holding basins, closed-loop systems, and other on-site water management features traditionally and effectively regulated under non-federal, state-only permits, and (C) create other impediments to the efficient operation of mining facilities. (p. 2-3)

Agency Response: **The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.**

17.1.827 The Minnesota Chamber is concerned that the Proposed Rule is written so broadly that it may result in these mining-related water-management systems being newly deemed "waters of the United States," adding a burdensome layer of federal regulation to an already highly regulated industry. (…) In this way, almost any body of water in Minnesota could be deemed "adjacent" under the Proposed Rule and thus jurisdictional. Such a large expansion of EPA's jurisdiction over bodies of waters not previously subject to federal jurisdiction is unwarranted by the CWA. (p. 5)

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

The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area, but instead provides distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

US EPA ARCHIVE DOCUMENT

17.1.828 The Minnesota Chamber is concerned that under the Proposed Rule's broad definition of "significant nexus," the sumps could be deemed jurisdictional as "other waters" on account of their interaction with other waters flowing into the sump. Operation of open-pit mines would become significantly more difficult and expensive if dewatering activities in sumps were subject to 404 permitting requirements. (p. 7)

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

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

Thelma Worick Revocable Trust (Doc. #16476)

17.1.829 If Congress intended to expand the CWA jurisdiction of the E.P.A. (and the U.S.A.C.E.), it would have increased or changed the governing language, beyond "navigable waters" to include "neighboring or other waters." This re-definition problem is not a problem; it is a matter of unnecessary expansion of plain-meaning statutory language.

We entreat the Environmental Protection Agency and the U.S. Army Corps of Engineers to leave our farms alone, free from unnecessary and unwarranted governmental intrusion in private and state law matters. We hereby request the withdrawal of this proposed re-definition of "Waters." (p. 1)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n

US EPA ARCHIVE DOCUMENT

determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

Board of County Commissioners, Fremont County, Colorado (Doc. #16479)

17.1.830 The Board of Commissioners is also greatly concerned about the impact the proposed rule would have upon our constituent ranchers and agricultural producers in Fremont County. The jurisdiction will result in severe restrictions on farming and ranching—or even prohibiting farming or ranching activities in any area the government determines to be adjacent waters; waters that are "next" to any tributary including all waters in a floodplain and riparian area. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation.

To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or

US EPA ARCHIVE DOCUMENT

ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

In addition, for purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency for floodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters.

South Metro Water Supply Authority, Colorado (Doc. #16481)

17.1.831 Because of the proposed rule's expansion of Federal Jurisdiction it will significantly increase time and cost for the construction or modification of infrastructure required to operate a water supply system to meet customer needs without adding any environmental benefits.

- Under the expanded Federal Nexus, nearly all water, wastewater, and stormwater projects will trigger permitting and regulatory processes that were not applicable prior to the proposed rule, placing enormous and unwarranted financial burdens on water providers and ultimately their ratepayers and taxpayers.
- Expanding the scope and length of jurisdictional waters will limit the utilization of nationwide 404 permit provisions.
- Reuse, holding, and recharge facilities that are an essential part of many water providers' supply systems in the Colorado will not be treated as exempt, thus facing new regulatory restrictions.
- Lagoon treatment technology that discharge to isolated ponds will now be considered jurisdictional, increasing treatment requirements and costs.
- As monitoring, permitting, and regulations see increased utilization due to increased jurisdictional determinations, state agency budgets may be inadequate.
- As jurisdiction under the proposed rule will be established for an entire category of "similarly situated waters," it will be necessary for our member water utilities to monitor and actively participate in each jurisdictional determination in every basin they have or may have interest in because of the risk that the entire region or basin will be determined jurisdictional and the impacts that determination will have on the utility.
- Ditches used for water rights delivery, exchange, or sharing between agricultural and municipal users will meet rigid and narrow exemption language, making transactions and regular ditch operations (including construction, maintenance, upgrades, and repair of ditches and infrastructure) increasingly costly and will dramatically extend the timeline that these repairs and improvements can occur, impeding the regular ditch operations and hampering innovative solutions to our region's water supply challenges. (p. 3)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> 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 agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

<u>Louisiana Landowners Association (Doc. #16490)</u>

17.1.832 Of course, the practical effects of the proposed Definition are even more egregious where the EPA and Corps would be vested with unprecedented control over all U.S. waters and de facto control of nearly all U.S. land. See, e.g., Belle Co. v. Corps of Engineers, 761 F.3d 383 (5th Cir. (La.) 2014)(affirming trial court's dismissal of landowner's suit challenging Corps' jurisdictional determination designating private property as wetlands under the Act). This cannot be characterized as anything other than a plenary power grab and could have disastrous economic implications for our country. For example, the U.S. food and fiber system employs over 24 million workers and depends on a cost efficient development of U.S. lands in order to provide our citizenry with agricultural and other products. Any impact on this system is multiplied by its links to a variety of industries such as machinery, chemicals, seed, feed, labor, financial services, exports, and others. Thus, the heightened regulatory compliance costs and

US EPA ARCHIVE DOCUMENT

unknown risks associated with an unchartered expansion of the Act's application to private lands could essentially grind this system to a halt and, with it, a great many other interrelated industries upon which our nation's economy relies. See e.g., David Sunding, The Brattle Group, Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States. (…)

Several specific provisions within the proposed Definition demonstrate that the EPA and Corps are unwilling to recognize congressional limits imposed on their authority under the Act. These provisions include a categorical regulation of irrigation and stormwater ditches and the EPA's and Corps' unlimited aggregation approach, which, if approved, will have catastrophic economic implications for landowners, builders, farmers, ranchers and many others who depend on the economic development of U.S. lands. (…)

While the EPA and Corps maintain that the purpose of the proposed Definition is to clarify the SWANCC and Rapanos decisions and increase predictability as to the Act's jurisdictional scope, the only certainty achieved will be a greater intrusion into individual and States' rights. The LLA has every belief that the EPA and Corps will rely on the proposed Definition to further their goal of expanding their jurisdiction over the waters and lands of the United States to the detriment of private landowners' property rights. See Belle, 761 F.3d 383 (5th Cir. (La.) 2014). For all of these reasons, the LLA — individually and on behalf of all Louisiana landowners — requests the proposed Definition be withdrawn. (p. 2-3)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502.**

In addition, the rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making case-specific determinations. Significant nexus is not a purely scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA. Science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

US EPA ARCHIVE DOCUMENT

W. E. Walpole Farms (Doc. #16508)

17.1.1 We care enough about our land and the rivers that we live on to spend our own money to protect them. Please, do not take away our freedom that was granted by our forefathers to own and operate our farms and ranches with this unneeded overreach of Government into our private lives. If this Rule passes, our livelihoods are at stake, jobs will be lost, and the Safest supply of food and fiber produced in the world will be at risk due to unnecessary regulations. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses and communities depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Farm Credit of New Mexico (Doc. #16511)

17.1.833 Within the proposed rule to define "waters of the United States", EPA has stated that it is clarifying the scope of the CWA. However, this clarification is also a broad expansion of the types of waters and lands that would be subject to federal permit requirements on farming, ranching and other land use practices. (…)

Farm Credit of New Mexico, a member of the Farm Credit System, strongly urges you to consider the consensus of the farmers and ranchers across the nation and withdraw this proposed rule. (p. 1)

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

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

US EPA ARCHIVE DOCUMENT

Texas Association of Builders (Doc. #16516)

17.1.834 As the housing industry in Texas and the rest of the nation recovers and begins to expand, certainty and fairness in regulations are paramount to the health of our industry. Unfortunately, the proposed rule creates and exacerbates regulatory confusion. The proposal's ambiguous terms, ill-defined limits, and assertion of federal jurisdiction over waters that exhibit little or no connection to traditional navigable waters will only create more, not fewer, questions. The Agencies' claim that the proposed rule creates clarity and certainty is a fallacy because it only does so by illegally asserting jurisdiction over every possible wet feature.

For years, landowners and regulators alike have been saddled with continued uncertainty regarding the scope of federal jurisdiction under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Again, such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural, and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives.

The CWA and its associated permitting scheme must be consistent, predictable, timely, and focused on protecting true aquatic resources. It must also honor Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts and heed the limits of federal jurisdiction recognized by the Supreme Court in both SWANCC and Rapanos. Unfortunately, the proposal fails to adhere to these tenets and rulings.

In conclusion, TAB appreciates the opportunity to comment on this important issue and formally requests that, due to the numerous shortcomings associated with the proposed rule, the Agencies cease any further consideration of the proposal for the various reasons outlined above. Please do not hesitate to contact me should you have any questions or comments, and let my office know if there is anything TAB can do to assist either agency. (p. 3)

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

In addition, the rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making case-specific determinations. Significant nexus is not a purely scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA. Science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is

US EPA ARCHIVE DOCUMENT

informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA.

Specifically with respect federal regulatory power over private property, please see Section I.C. of the Technical Support Document.

Inland Empire Utilities Agency, California (Doc. #16520)

17.1.2 Water recycling and reuse is one of the most reliable and readily available sources of fresh water across the Nation. We are concerned that the infrastructure and technologies that produce and enable the use of recycled water supplies and the reuse of stormwater may be adversely impacted under the CWA if the new rule defining "waters of the United States" is not properly promulgated. (p. 1)

Agency Response: The final rule expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

South Dakota Farm Bureau (Doc. #16524.1)

17.1.835 The rule as proposed has a significant impact on the farmers and ranchers of South Dakota. Many of the impacts may be unintended consequences but still are very burdensome to operating farms and ranches. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

US EPA ARCHIVE DOCUMENT

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

Kentucky Association of Manufacturers (Doc. #16525)

17.1.836 KAM is concerned with the apparent lack of appropriate economic analysis associated with the proposed rule. (…) A proposed rule of this magnitude should not base its limited economic analysis on flawed assumptions with incomplete data. (…)

KAM further believes that the proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits. Under the proposed regulation, there is no limit to EPA's authority to assert jurisdiction. Nearly all areas with any hydrologic connection to downstream navigable waters, including man-made ditches, dry streambeds, ponds, floodplains, and other occasionally or seasonally wet areas would be subject to federal control. While EPA claims that adding new authority over such features merely clarifies CWA jurisdiction, in reality, the proposed rule significantly expands EPA's authority under the CWA beyond what was intended by Congress, fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. (p. 2)

Agency Response: **The rule imposes no direct costs because it is a definitional rule. The agencies prepared an economic analysis for informational purposes, and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis. See the Economic Analysis for further discussion of the costs and benefits assessment.**

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

In addition, the rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making case-specific determinations. Significant nexus is not a purely scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA. Science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

US EPA ARCHIVE DOCUMENT

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial. The agencies have also determined that the single point of entry watershed is a more reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard than ecoregions.

Oklahoma Municipal League (Doc. #16526)

17.1.837 In view of the potential for virtually all waters and most water features to be characterized as connected, most state and local government activities involving water use or transportation are susceptible to the jurisdictional change under the rule. This obviously increases direct costs and enlarges the regulatory and economic impact on them. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated.**

Kentucky Oil and Gas Association (Doc. #16527)

17.1.838 KOGA is also very concerned about the rule's jurisdictional expansion within a watershed. The rule indicates that waters adjacent to traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries are jurisdictional. The rule indicates that adjacent is defined as bordering, contiguous, or neighboring. (p. 22199) The term neighboring includes waters within the riparian area or floodplain of a water. (p. 22199) The rule further indicates that the 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 the area." (p. 22199) Floodplain means "…an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high flows." (p. 22199) Under these definitions, federal regulators could expand jurisdiction to include the watershed in its entirety. In eastern Kentucky, there will be seeps from mountains, ponded or wet areas that form features in the landscape, either natural or manmade, that are in no way in proximity to a tributary. However,

US EPA ARCHIVE DOCUMENT

because of the definition of adjacent in this rule and the breadth for which it allows jurisdiction to expand, these features would be "waters of the United States." As a result, any impact to the feature, such as filling or excavating, would require a Section 404 permit from USACE. (p. 3)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

For example, the definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provides distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

17.1.839 Finally, as the proposed rule has the potential to greatly expand the presence of waters of the United States, the regulatory impact on industry will be expanded multifold. The presence of waters of the United States indicates the connection to navigable waters. As a result, several regulatory requirements are invoked under the Clean Water Act. These include Spill Prevention, Control, and Countermeasures (SPCC) plans, permitting for the discharge of dredge or fill material, and NPDES permitting. In response to these requirements and the expansion of waters of the United States, industry must conduct investigations to determine the extent of waters of the United States, plan accordingly in an effort to avoid or minimize impacts to the extent practicable, and meet various additional regulatory requirements.

SPCC planning is designed to avoid or prevent oil pollution. SPCC plans are required when oil could possibly be discharged to or pollute navigable waters or their tributaries. As waters of the United States expand due to the proposed rule, existing facilities for which this regulation was not applicable may be required to meet this standard as waters of the United States are identified in proximity to the site. Further, facilities often use ponds, catchment basins, diked areas, etc. to reduce the potential for discharge of oil to navigable waters or their tributaries. Under this proposed rule, these features may become waters of the United States. (p. 6)

US EPA ARCHIVE DOCUMENT

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Furthermore, this action would not require facilities that have prepared SPCC plans to update these plans. The owner/operator of a facility that has an SPCC plan in place has already determined that there is a "reasonable expectation" of an oil discharge as per 40 CFR part 112.1(b).**

Riceland Foods (Doc. #16530)

17.1.840 As a result of the significant, detrimental, and unwarranted impacts that the proposed rule would have on our rice farmers, the agencies should withdraw the proposed rule and work with farming interests in developing a clear rule that allows farmers to make decisions about how to grow their crops while using water resources responsibly. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the final rule does not establish any regulatory or permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

In addition, the maintenance exemption provided within the Clean Water Act remains unchanged by this definition. The agencies' longstanding policy was summarized in a joint memorandum issued on May 3, 1990 entitled "Clean Water Act Section 404 Regulatory Program and Agricultural Activities" states "[m]inor drainage that is exempt under Section 404(f) is limited to discharges associated with the continuation of established wetland crop production (e.g., building rice levees) or the connection of upland crop drainage facilities to waters of the United States. Minor drainage also refers to the emergency removal of blockages that close or constrict existing drainage ways used as part of an established crop production. Minor drainage is defined such that it does not include discharges associated with the construction of ditches which drain or significantly modify any wetlands or aquatic areas considered as waters of the United States."

US EPA ARCHIVE DOCUMENT

Kentucky Department of Environmental Protection (Doc. #16535.1)

17.1.841 The Division believes that this effort to clarify "waters of the United States" will expand the scope of jurisdictional waters from its current interpretation, particularly in some regions, which would result in more litigation, and thus may be counterproductive. Specifically, the Division believes the proposed provisions regarding "other waters" and "significant nexus" (§302.3(2)(vii)) give the appearance of expanding the jurisdictional waters, or at the very least are unnecessarily vague. It is unclear from the rule how the provisions would be implemented in each state, though it appears that it would establish additional CWA permitting obligations, particularly under §404. Under the circumstances, those waters not traditionally interpreted as jurisdictional under the CWA would be more appropriately protected by the authorities of individual states. In the alternative, to the extent possible, the final rule should be clear regarding how circumstances previously identified as non-jurisdictional that are subsequently found to be jurisdictional under a new rule will be addressed. In order to minimize regulatory burden, provide regulatory certainty, and avoid unnecessary litigation, the final rule should describe under what circumstances it will apply to jurisdictional determinations made under the current existing rule, and also to what universe of currently pending jurisdictional determinations, if any, the rule will apply. (p. 3)

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

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA.

Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations done on or after publication of this rule in the *Federal Register* will be made consistent with this rule. Similarly, consistent with existing regulations and guidance, jurisdictional delineations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization.

Utah Farm Bureau Federation (Doc. #16542)

17.1.842 The Utah Farm Bureau Federation submits the attached comments to the US EPA and Army Corps of Engineers on behalf of 28,000 member families, and thousands of farm and ranch operations located in every county of Utah respectfully asking the federal agencies to fully withdraw the dramatic expansion of federal regulatory reach. The proposed rule is beyond what Congress intended in the Clean Water Act, contravenes Federalism and violates the ruling of the United States Supreme Court in Solid Waste

US EPA ARCHIVE DOCUMENT

Agency of Northern Cook County vs. Army Corps of Engineers, 531 U.S. 159 (2001) that sets regulatory authority for federal agencies where Congress intended and clearly warns against "altering the federal-state framework!" The EPA's expanded definition of waters of the U.S in the proposed rulemaking is beyond Congressional authority and obviously alters the federal-state framework.

For America's food producers, it clearly increases the regulatory reach of the federal government, creates uncertainty for farmers and ranchers through overly broad and ambiguous definitions, unnecessary exemption of common farming practices but only if they meet the new USDA NRCS "voluntary obligations", and potentially subjecting farmers and ranchers to fines of $37,500 per day if they don't control brush or install fencing according to federal standards.

On behalf of the 28,000 Utah Farm Bureau member families, we would ask you to withdraw the proposed rulemaking in its entirety! (p. 1)

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

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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 Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (Riverside), Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), and Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos). The significant nexus standard

US EPA ARCHIVE DOCUMENT

evolved through those cases. More information about these cases and the resulting opinions of the Court can be found in section III.A of the preamble to the final rule. See the preamble and TSD for additional discussion of the legal basis for this rule.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Utah Farm Bureau Federation (Doc. #16542.1)

17.1.843 Farming and ranching are businesses dependent on water. Water and putting the sovereign waters of the state of Utah to beneficial use is recognized by law for growing farm crops and raising livestock. Utah's water flowing across the landscape in rivers and streams was immediately diverted by our pioneer ancestors to produce food to sustain them. In an arid state like Utah the waters were diverted to irrigate thirsty farmland and any excess was returned WOTUS to the stream for downstream use. These "return flows" are waters adjudicated by state authority and utilized by downstream farmers and ranchers as water rights. Those return flows, according to Region 8 EPA may actually be in violation of the CWA as proposed in the new rule based on how the water returns to the stream.

This jurisdictional expansion and potential regulatory impacts would be a disaster for Utah's and America's farmers and ranchers. Food producers need to apply pesticides, herbicides and other chemicals to protect their crops. On most farmlands across Utah, there are summer cloudbursts and thunderstorms where heavy amounts of rain is dropped. Additionally, in our arid climate, we use various means of irrigation from flowing water on open fields to drip irrigation systems. But it is extremely difficult to entirely avoid isolated small wetlands, ephemeral drainages (dry gullies), ditches and drains located on and around production fields when applying such products. (p. 2-3)

Agency Response: **The rule does not affect or modify existing statutory and regulatory exemptions from NPDES permitting requirements, including those for return flows from irrigated agriculture (CWA 402(l)(1)).**

In addition, the rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United

US EPA ARCHIVE DOCUMENT

States and thus discharges to those waters would not require NPDES permit coverage.

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

There is no statutory definition of "ongoing." However, the regulations do highlight the types of activities that are considered with regard to "established" operations. 40 CFR 232.3(c)(1)(ii)(A) provides clarity on what is considered an "established" or ongoing farming, silviculture, or ranching operation.

To fall under this exemption, the activities specified in paragraph (c)(1) of the rule must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of the rule. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

Washington State Water Resources Association (Doc. #16543)

17.1.844 Our nation's economy is closely tied to agricultural production. The total production value for crops exceeds more than a hundred billion dollars each year and in 2012, direct on-farm employment provided more than 2.6 million jobs. Much of America's agricultural production and agricultural employment is undertaken by small businesses. The role of small business is important to NWRA's members. We share the concern of the Small Business Administration Office of Advocacy that the EPA and Corps have not adequately considered the proposed rule's impact on small businesses.

We also think it is important to note that many small irrigation districts, while not small businesses, would likely find it extremely difficult to implement their water delivery duties if the proposed rule were implemented. Some of our member districts can provide water to thousands of acres of land but have as few as five employees. If the proposed rule is implemented without the revisions requested in this letter, it would create a massive burden for these small districts. (p. 15)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and**

US EPA ARCHIVE DOCUMENT

landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Corps determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another.

ARIPPA (Doc. #16545)

17.1.845 Pennsylvania and other legacy coal mining states have environmental problems (AML-AMD) that are best resolved by the removal and conversion of legacy coal refuse into alternative energy. The coal refuse to alternative energy industry is a distinct and unique process with a record of over 25 years of improving the environment. While the removal and conversion of legacy coal refuse into alternative energy is becoming increasingly more challenging, such activity combined with the correlating use of CFB ash is overall environmentally beneficial; however, the current rule as written may pose detrimental effects on a currently viable environmentally beneficial industry that indirectly or directly employs hundreds of citizen workers. (p. 8-9)

Agency Response: **The rule has expanded the section on waters that are not considered waters of the United States, including features such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater detention basins constructed in dry land. The longstanding exclusion for**

US EPA ARCHIVE DOCUMENT

waste treatment systems designed consistent with the requirements of the CWA has been moved to (b)(1) and remains substantively and operationally unchanged.

Lafarge North America (Doc. #16555)

17.1.846 Our overall recommendation is that the Corps and EPA withdraw this jointly proposed rule, as in our evaluation, it does not actually add the clarity that the agencies indicate is the main intent of the proposed rule and results in very minimal environmental benefits. We wish to make the following key points:

- As noted by Justice Kennedy in the Rapanos vs. U.S. Supreme Court decision the term "navigable" in "navigable waters" must be given some meaning. The current proposed rule goes well beyond what the courts have expressed as the legitimate reach of the CWA based on "significant nexus" and the spirit of the law.
- Further, the proposed rule would provide relatively little added protection to downstream watersheds compared to the very significant added regulatory burden of including many additional isolated wetlands , man-made ditches, ephemeral streams and other features that would become "jurisdictional" under the proposed changes.
- The minimal benefits of the added layer of federal jurisdiction are simply not commensurate with the added costs and delays associated with additional studies, permitting, structured mitigation program requirements and other restrictions that would arise from the expanded federal jurisdiction. (p. 1-2)

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

The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (Riverside), Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), and Rapanos v. United States, 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

See the preamble and TSD for additional discussion of the legal basis for this rule.

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together

US EPA ARCHIVE DOCUMENT

form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. Protecting the long-term health of our nation's waters is essential. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

17.1.847 The proposed rule's "watershed aggregation" approach in defining "significant nexus" will lead to increased regulation of remote and ephemeral areas and increased mining costs without providing any discernible ecological benefit. Obtaining permits for these "wet weather conveyances" and swales would be extremely burdensome on businesses that engage in large-scale earthmoving projects where it was not previously required. (p. 3

Agency Response: **Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.**

The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial. The agencies have also determined that the single point of entry watershed is a more reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard than ecoregions.

In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Cucamonga Valley Water District (Doc. #16556)

17.1.848 Reclaimed and reused water is a beneficial use that develops local water resources and reduces the demand for imported water supplies. The processes for reclaiming and reusing water are costly, but are becoming increasingly feasible in areas of the country where groundwater and surface water sources are strained and importing water is cost prohibitive or unavailable. Water authorities across the country, especially those in the arid west, are investing millions of dollars in infrastructure to utilize recycled water as it

US EPA ARCHIVE DOCUMENT

is a drought-proof water resource. Treatment and distribution costs of recycled water are already high, making this valuable resource marginally cost effective in some places. Any significant increase in regulation, such as making many of these facilities jurisdictional, as proposed in the Clean Water Act rule, will escalate the cost of utilizing this water and discourage its development. (p. 2)

Agency Response: **The final rule expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Texas Water Development Board (Doc. #16563)

17.1.849 Drier areas of the State would see the greatest increase in jurisdictional tributaries due to the greater number of intermittent or ephemeral streams in those areas. The greatest effect would likely be on some off-channel reservoirs that are proposed in the upper reaches of intermittent streams and in areas between major streams. Tributaries and wetlands in many of these reservoir sites could now be considered jurisdictional waters. This could significantly increase the cost and time to develop one of these projects, and affect the design and location of proposed sites.

A potentially large effect depends on how 'significant nexus analysis' is developed for landscape or regional areas like playas, prairie potholes and karst regions. The proposed rule could make parts of these areas jurisdictional.

Specific Impacts

The proposed rule would affect the various types of TWDB-funded projects in different ways.

Reservoir Development.

Expansion of waters considered jurisdictiona1 can affect development of reservoirs. If a new reservoir would inundate tributaries and wetlands considered jurisdictional under the proposed rule, the cost and time needed to develop such projects would increase significantly. Development of off-channel reservoirs would especially be affected, because the number and area of feasible sites may decrease. Mitigative costs would increase because the areas requiring mitigation would be larger, and because suitable mitigation sites may become more difficult to find, particularly in some parts of the state. The cost of such properties also would rise. As is now the case, new reservoirs would generally require preparation of an Environmental Impact Statement, which is expensive, time consuming, and uncertain in its outcome. That uncertainty would increase given the additional waters that may be considered jurisdictional under the proposed rule. (p. 3-4)

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

17.1.850 Pipelines.

Because more streams and wetlands may be jurisdictional or require case-by-case determinations, review time may increase, and avoidance measures and/or mitigation may be needed more frequently. This would increase acquisition costs for longer alignments and require more frequent boring beneath channels, increasing design and construction costs. (p. 4)

<u>Agency Response:</u> Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing time spent conducting jurisdictional determinations.

17.1.851 Water management.

The possible effects of the rule change on water management strategies in the state water plan, and for water-supply projects involving direct and indirect reuse of wastewater, will

largely depend on resolution of points left unclear. Application of the "other waters" category and the potential regionalization of water systems not currently regarded as discrete hydrologic systems may make development of water management strategies more difficult. (p. 4)

Agency Response: **The final rule expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like Texas where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Local Government Advisory Committee (Doc. #16574)

17.1.852 In summary, there was strong agreement that clean water is an essential foundation for public health, recreation and commerce. However, the Workgroup heard strong sentiments in these areas:

Permitting: While the outreach effort focused on the proposed rule, the preponderance of discussion focused on the permitting process. It became clear that many local agencies are frustrated with the uncertainties and challenges of trying to permit good projects in their communities. Introducing the proposed rule brought all of these concerns to the forefront. A clear and predictable permitting process is an essential foundation upon which any new regulatory proposal would be built.

Clarity: There is also a strong sentiment that the proposed rule does not, as written, provide clear definitions nor achieve the objective of clarifying the extent of federal jurisdiction over local water bodies. Lack of clarity is especially problematic because, in many cases, permitting occurs at the local level and is under the jurisdiction of the U.S. Army Corps of Engineers (USACE). Interpretation of jurisdictional authority by the USACE can be a locally frustrating experience and many local agencies are fearful that the proposed rule will add to the confusion and/or increase the jurisdictional assertion by the USACE.

Exemptions: The question as to what is and what is not a Water of the United States was a common theme among speakers. Questions arose regarding agricultural exemptions as well as the status of MS4 permittees. These are critical questions that must be easily answered in order for the rule and the permitting process to be effective.

The LGAC report provides several recommendations to the Administrator that can be summarized as follows:

- The permitting process deficiencies must be addressed. Any proposed rule, regardless of its merits, will likely be poorly received until the permitting process becomes more streamlined, effective and predictable.

US EPA ARCHIVE DOCUMENT

- The rule must be written so that local agencies, states, EPA and the USACE all clearly understand key definitions and the scope of federal jurisdiction so that implementation is predictable. Whether a water body is or is not under federal jurisdiction must be clear to all parties.
- Agricultural exemptions must be explicitly and clearly stated
- Cost remains a concern, especially in the context of uncertain jurisdictional assertion and an unpredictable permitting process.
- There are significant regional differences which must be considered and addressed in the rule. Regional differences and/or unique circumstances strongly justify the need for flexibility in permitting/implementation.
- There are many local, state and federal (specifically MS4) programs and regulations that protect the nation's water quality. The rule should acknowledge and incentivize best management practices already underway. (p. 1-2)

Agency Response: **With the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The rule does not make any changes to the permitting process which is outside the scope of this rulemaking. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

In response to public comments such as yours expressing concern about definitional clarity, the final rule incorporates changes to more clearly define what is and is not a "water of the United States." For example, the rule is clearer regarding the jurisdictional status of certain ditches, and other revisions in the final rule were designed to more clearly define a "tributary" and to establish limits on the scope of "adjacent waters." The final rule also has expanded the section on waters that are not considered waters of the United States.

In regards to agricultural exemptions, the rule retains the exemptions in which Congress identified certain discharges associated with farming, ranching, and forestry practices as not needing CWA permits. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

US EPA ARCHIVE DOCUMENT

Duke Sherwood Contracting (Doc. #16588)

17.1.853 Governments far reaching and ever expanding regulations have placed this once thriving nation in a strait jacket. You are now pushing this envelope beyond reason. Your proposal to regulate all Waters of the United States, not just the navigable waters, is a very poorly conceived idea. You would be conceivably regulating seasonal streams on private property. Could this be your motive, accessing private property, thus expanding your insatiable appetite for more power? Whatever your motives, it is a bad idea and I would request that you not pursue these regulations. (p. 1)

Agency Response: Implementing the Clean Water Act beyond traditional navigable waters is not a new practice, and the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not affect private property rights. For more information about private property, please see Section I.C. of the Technical Support Document.

Virginia Poultry Federation (Doc. #16604)

17.1.854 EPA and the Corps falsely allege that the proposed rule will provide certainty, clarity and predictability to the regulated public regarding what areas are, designated waters of the U.S. and subject to CWA jurisdiction. In contrast, if there is any certainty, it is that EPA and the Corps have expanded jurisdiction beyond the legal authority of the CWA.

The fundamental tenets of the proposed rule are based on an EPA report entitled, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Report). The Report purports to establish a scientific basis concluding that isolated, rarely existing "waters" are connected to more traditional navigable waters, and, therefore subject to CWA jurisdiction. In essence, this is an attempt to establish a statutory nexus for asserting all-encompassing jurisdictional authority over a very broad range of categories of waters and geographic features. EPA and the Corps are claiming that areas where water is present, as infrequently as once every few years, should be subject to CWA permit requirements because the water could potentially be connected to navigable water. Such a claim stretches CWA jurisdiction beyond statutory authority and practical implementation.

While the processes and inter-relationships identified in the Report provide mechanisms to establish potential chemical, biological and physical ties between waters. the idea of a universally applicable mechanism for every water or drainage feature that exists on the landscape lacks any degree of scientific robustness. Given the financial and potential criminal liabilities associated with violating the CWA, the connectivity of an area to a navigable water is best established on a case-by-case basis. This vague concept of connectivity cannot be applied universally to all areas and navigable waters, thereby defeating the agencies' stated purpose of avoiding case-by-case determinations for waters of the U.S. (p. 2-3)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> 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 as well as expanding the section on waters that are not considered waters of the United States. For example, the agencies limited the tributaries that are "waters of the United States" to those that have both a bed and banks and another indicator of ordinary high water mark.

The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making case-specific determinations. Significant nexus is not a purely scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA. Science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(1) through (a)(6).

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The agencies have determined that categories of non-adjacent waters will not be defined as jurisdictional by rule, thereby recognizing that a gradient of connectivity exists and asserting jurisdiction only when the connection and the downstream effects are significant and more than speculative and insubstantial.

17.1.855 The Proposed Rule Significantly Increases the Amount of Area Subject to CWA Jurisdiction

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

US EPA ARCHIVE DOCUMENT

jurisdiction under the proposed definition of waters of the U.S. This increase is a direct result of the expanded definition that includes ephemeral streams and the land areas that are adjacent to them as "waters of the U.S." subject to CWA jurisdiction.

Poultry and egg production often coincides with the farming of row crops and forage. Agricultural operations like these exist in rural, largely undeveloped open areas. In order for these agricultural operations to be sustainable, farmers rely on working and shaping the land to make it productive. This includes installing practices to control and utilize stormwater for the benefit of growing crops and forage and also sustaining and protecting agricultural livestock. The proposed rule would assert jurisdictional authority over countless dry creeks, ditches, swales and low spots that are wet because it rains or a farmer has installed practices to sustain the viability of his operation. Even worse, the proposed rule attempts to claim authority over remote "wetlands" and or drainage features solely because they are near an ephemeral drainage feature or ditch that are now defined as a water of the U.S. subject to CWA jurisdiction. Such unnecessary expansion of CWA jurisdiction significantly burdens poultry and egg production operations without any meaningful public health or environmental benefits. (p. 3-4)

<u>Agency Response:</u> 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 the Agencies have 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.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral waters that do not meet the definition of tributary are not "waters of the United States."

17.1.856 The definition of "other waters" is similarly vague and overly broad. This further expansion of CWA jurisdiction goes beyond any authority that Congress intended to provide and leaves farmers and other landowners vulnerable to unnecessary and inappropriate enforcement actions because no clear guidance is provided by the proposed rule. (p. 7)

<u>Agency Response:</u> The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the

US EPA ARCHIVE DOCUMENT

agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters."

17.1.857 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 dialogue with the agricultural 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 questionable report that has not yet been 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 rule is clear and understandable and will reduce regulatory burdens. 79 Fed. Reg. at 22192.

The proposed rule lacks clarity, is ambiguous, and would impose undue and unnecessary burdens on agricultural operations and other landowners without providing any meaningful human health or environmental benefits. The proposal should be withdrawn so that the overly broad scope and the potentially devastating impacts of the rule can be assessed more thoroughly, particularly with respect to small businesses and farms. Such action is warranted because EPA and the Corps are not compelled to issue the rule by a court order or court-issued deadline. Accordingly, the agencies can take the necessary time to redraft the rule consistent with federal statutory authority, state rights, and local land use provisions. In addition, the extra time would allow the agencies to develop a rule that is protective of human health and the environment, does not impose unnecessary burdens on law-abiding landowners, and that is clear and understandable. (p. 8-9)

Agency Response: **The rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act. These determinations are supported by a Science Report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," that was developed following all standard information quality guidelines for EPA. In September 2013, EPA released a draft of the Science Report for an independent Science Advisory Board review and invited submissions of public comments for consideration by the SAB panel. In October 2014, after several public meetings and hearings, the SAB completed its peer review of the draft Science Report. The SAB was highly supportive of the draft Science Report's conclusions regarding streams, riparian and floodplain wetlands, and open waters, and recommended strengthening the conclusion regarding non-floodplain waters to include a more definitive statement that reflects how numerous functions of such waters sustain the integrity of downstream waters. The final peer review report is available on the SAB website, as well as in the docket for this rulemaking. EPA revised the draft Science Report based on comments from the public and recommendations from the SAB panel.**

In addition, EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining

US EPA ARCHIVE DOCUMENT

the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Cortland County Soil and Water Conservation District (Doc. #16607)

17.1.858 If enacted, the proposed rule will likely increase permit applications and requests for assistance for participation in conservation programs. As the local land use go-to agency, our Soil and Water Conservation District (SWCD) will be expected to help local municipalities and landowners of all types to interpret the new rule, and also to implement conservation measures that qualify for exemption or exclusion. Financial resources should be made available to local service providers like our Conservation District, to help with education, outreach and direct technical assistance related to the new rule. (p. 2)

Agency Response: The agencies intend to develop further guidance and conduct trainings on the rule. Providing financial resources is outside the scope of this action.

Genesse County Agricultural and Farmland Protection Board (Doc. #16608)

17.1.859 Under the proposed changes an unjust burden would be placed on both our local government and farmers as routine activities such as: regular ditch and culvert maintenance; planting and plowing; or building a fence would require a lengthy permitting process. This would result in increased costs due to the increased staff time and money necessary in order to ensure compliance. Furthermore, the proposed rule change does little to ensure that the waters of the U.S. will be more "swimmable and fishable". These regulations will only serve to add additional bureaucratic burdens without producing any measurable environmental benefit to waters in Genesee County and New York State. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

US EPA ARCHIVE DOCUMENT

Additionally, the final rule updates the regulation of ditches. Some ditches are subject to jurisdiction of the Clean Water Act but there is not an intent to regulate all ditches. In response to comments, the agencies have revised the ditch exclusion proposed and the new rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. In regards to construction and maintenance of ditches, note that the Federal Water Pollution Control Act exempts these specific activities in ditches from the need to obtain a CWA section 404 permit (33 U.S.C. §1344).

Stutzman, H. (Doc. #16620)

17.1.860 I am a farmer in Indiana, I live on a farm that in heavy rain days, rain water will flow over my farm, I take my fanning practices very seriously, with my farming practices l have been able to achieve no soil washouts etc. and am very proud of that, we as a family have been and will continue to be very aggressive in conserving water, nutrients & soil. And doing it with food safety in mind. For instance when chapter 14 license was implemented, I was to the very first class, when it was completed I thought to myself, I'm already doing what is required, It is the very essence of the survivability and profitability of family farms and feeding our continuing growing world population. I have attempted to work with some government office for assistance to do some of the conservation that I do, the decision was the process takes too long to get done what needs to be done. The regulations would be and are slowing down the process to much for those of us that are doing everything we can to conserve our soils, water and nutrients. I'm asking you to withdraw (WOTUS) the Idea of regulating any further progress of development for those of us that want to profitably produce more FOOD for our ever growing population. The proposal has little clarity of what and how you want to regulate. the proposal has the potential to further bog down and overload our already 'overloaded judicial system, This proposal will at its best performance, slow down our progress and possibly prohibit our progress. (p. 1)

Agency Response: **With the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule maintains the exemptions found in Clean Water Act in Section 404(f) (33 U.S.C. § 1344(f)(1)) for many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities and

US EPA ARCHIVE DOCUMENT

clarifies the waters subjected to these exempted activities to make the permitting process less burdensome.

Bayou Concrete LLC (Doc. #16629)

17.1.861 Bayou Concrete LLC supports and is committed to smart practices and common sense methods for keeping our nation's waterways and their tributaries clean and healthy. Bayou Concrete LLC appreciates the opportunity to comment on the Army Corps of Engineers (the Corps) and Environmental Protection Agency's (EPA) (collectively the agencies) proposed rule "Definition of 'Waters of the United States' Under the Clean Water Act." While Bayou Concrete LLC understands the need for strong laws and regulations, we believe that incentivizing and promoting environmentally conscientious practices will go significantly further to achieving the goals of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," than expansive new regulations. (p. 1)

Agency Response: **The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for approximately 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

17.1.862 Finally Bayou Concrete LLC is greatly concerned about how the broad, vague language in the rule is being interpreted. If the regulated community can read the rule to mean nearly every place where water falls on the ground after it rains, could be subject to federal jurisdiction and that is not the agencies intent, as representatives for the EPA and Corps have repeatedly asserted in stakeholder meetings and hearings, then this rule needs to be pulled back and the agencies need to try again.

Bayou Concrete LLC requests that the agencies withdraw the rule and work with their state and local coregulators, and stakeholders, like the national Ready Mixed Concrete Association (NRMCA), to come up with a clearer definition of waters of the United States. The agencies are under no legal or statutory deadline for completing this rule, so there is ample time to work to get it right. (p. 2)

Agency Response: **The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules. In response to public comments expressing concern about definitional clarity, the final rule incorporates multiple changes to more clearly define what is and is not a "water of the United States." For example, the rule is clearer regarding the jurisdictional status of certain ditches, and other revisions in the final rule were designed to more clearly define a "tributary" and to establish limits on the scope of "adjacent waters." The final rule also has expanded the section on waters that are not considered waters of the United States.**

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Hardee County Board of County Commissioners, Wauchula, Florida (Doc. #16634)

17.1.863 We also feel that these proposed rules, though burdensome for the agricultural industry will be unbearable for small farmers and ranchers that do not have the resources to even begin to understand the rules, much less deal with permits and then will be faced with citations of non-compliance and subject to fines and penalties. This could be the last straw for many small operations economically and further drive them out of the industry. For these reasons, the Hardee County Board of County Commissioners encourages EPA to withdraw the Definition of "Waters United States" Under the Clean Water Act, Proposed Rule as published in the Federal Register on April 21, 2014. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule does not establish any new permitting requirements. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule maintains the exemptions found in Clean Water Act in Section 404(f) (33 U.S.C. § 1344(f)(1)) for many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities.

North Dakota Wildlife Federation (Doc. #16638)

17.1.864 Wetlands provide economic and outdoor recreation benefits to the residents of North Dakota and downstream states in the Mississippi and Central flyways. On average, 22,000 hunters collectively spend 209,000 hours annually hunting ducks in North Dakota. These hunters have a significant impact on our state's economy, creating the equivalent of 166,000 North Dakota jobs and nearly $3.8 million in income. Expenditures by duck hunters also create almost $500,000 in state tax revenue.[87] ND contributes up to 50% of the duck production in the United States prairie pothole region. Our ducks create almost 500 million dollars of economic benefit to other states within the flyway."[88,89] There are substantial ecological wetland values in addition to waterfowl hunting such as water storage, contaminant removal and storage, carbon sequestration, sediment removal and habitat. An analysis of wetland values show a median value of $200 per ha per year, resulting in an ecological value of ND prairie potholes of $290,525,600 per year. (p. 2)

[87] http://www.ag.ndsu.edu/news/columns/spotlight-on-economics/spotlight-on-economics-north-dakota-duck-nesting-habitat-economic-drivers-and-anticipated-trends/
[88] http://www.wlf.louisiana.gov/sites/default/files/pdf/pagehunting/32535-programs/nat_survey2001_waterfowlhunting.pdf
[89] http://www.fishwildlife.org/files/Hunting_Economic_Impact.pdf

Agency Response: **The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.**

Anonymous (Doc. #16646)

17.1.865 If areas in and around farm fields are regulated as waters of the U.S. under the Proposed Rule then crop protection spraying would require a permit. If even a molecule of pesticide falls into those waters the farmer would risk huge penalties. In much of our most productive farmlands, like where I live with plenty of rain, it would be extremely difficult to entirely avoid the small wetlands, ephemerals, and ditches in and around farm fields. Any accidental spray of any amount into these features, even at times when the features are completely dry, would be an unlawful discharge and incur economically devastating penalties. Conversely, if low spots in farm fields are defined as waters of the U.S., farmers will be required to apply weed, insect and disease control products directly to those spots in order to protect their crops. In other words, under the Proposed Rule, a federal permit will be required for farmers to protect their crops. I live in a county whose economic base relies heavily on agriculture. The EPA obviously has no practical understanding of farming. The Proposed Rule is unacceptable. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule does not establish any new regulatory requirements for pesticide and fertilizer applications.**

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands.

Peace River Valley Citrus Growers Association (Doc. #16654)

17.1.866 Expanding the scope of federal jurisdiction to waters that have a "significant nexus" to or are "adjacent" to a traditional WOTUS could subject nearly all of Florida's water bodies to the reach of the Clean Water Act. Florida's geography and its ample rainfall create a landscape of numerous wetlands, puddles, ponds, ditches, and ephemerals that will likely be considered "waters of the U.S." under the proposed rule. Increased jurisdiction could severely restrict farming and ranching activities. Regular land-use undertakings such as fencing, spraying for weeds or insects, or discing may be prohibited or require a Federal permit, increasing fiscal expense and delaying operations. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **Implementing the Clean Water Act beyond traditional navigable waters is not a new practice, and the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. 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 ditches and tributaries.**

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule maintains the exemptions found in Clean Water Act in Section 404(f) (33 U.S.C. § 1344(f)(1)) for many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities.

Greater Louisville Inc.'s Energy & Environment Committee (Doc. #16673)

17.1.867 [T]he GLI EEC is concerned with the increased costs of economic development projects both in rural and urban areas due to this definitional expansion of the "waters of the US." Additionally, if implemented, this rulemaking could slow or stall developments and projects due to more permit reviews from already over taxed federal and state agencies. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify.**

US EPA ARCHIVE DOCUMENT

Murnin, D. (Doc. #16709)

17.1.868 The proposed WOTUS rule also has me concerned that non-navigable waters, such as a ditch that I use seasonally for irrigation, will not fall under federal jurisdiction. This is an overreach by the federal government and simply does not make sense. I implement many conservation practices and use the water that is under my control to the best of my ability. Regulating ditches, as proposed, would also cause a tremendous burden on me and my family. I do appreciate that gullies will be exempt. I am concerned that it will be difficult for me and my neighbors to differentiate between a gully and a dry ditch; which will be regulated, and which will not be? Perhaps, the addition of ephemeral features (those that only hold water during and immediately following a rainfall event) would alleviate much of the confusion with the proposed rule. The exclusion of more features under the "gullies" definition would allow the agencies to focus on those features that more clearly have a significant nexus to larger bodies of water. I also believe that playas should be excluded in this rule. These features do not make sense to be regulated, especially looking at the traditional purpose of the Clean Water Act. Also, I am concerned with the defined agriculture conservation practices that would fall under normal farming and ranching activities. Many practices that my neighbors and I implement may fall outside of this strict definition; and I am concerned that as agriculture practices continue to become more efficient, this exemption would not be broad enough. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule does not establish any new regulatory or permitting requirements. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule maintains the exemptions found in Clean Water Act in Section 404(f) (33 U.S.C. § 1344(f)(1)) for many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities and clarifies the waters subjected to these exempted activities to make the permitting process less burdensome.

The final rule updates the regulation of ditches. Some ditches are subject to jurisdiction of the Clean Water Act but there is not an intent to regulate all ditches. In response to comments, the agencies have revised the ditch exclusion proposed and the new rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

The final rule also clarifies the category that includes gullies to identify all erosional features, not just gullies and rills, as non-jurisdictional features. While the proposed

US EPA ARCHIVE DOCUMENT

rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Erosional features can be distinguished from jurisdictional tributaries in that tributaries are defined by the presence of bed and banks and an ordinary high water mark. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

Sullivan County Highway Department (Doc. #16789)

17.1.869 Almost all of what our local highway department does is, and should remain, within the jurisdiction of local government. Cleaning roadside ditches, for example, is a daily occurrence in more than one location. We, as a small, undersized, undermanned and underfunded highway department, would be crippled if we had to apply for and wait for federal approval to perform such simple tasks. Other daily operations such as replacing culverts, small bridges, grading gravel roads or cutting road shoulders could also be affected if this rule were in place.

As this rule is presently written, local highway departments such as ours, just would not be able to operate. The cost would be significant, in time and in money, and the resulting degradation of our roads would be catastrophic.

We appreciate your consideration of these comments. We urge that this rule be withdrawn. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule does not establish any new regulatory or permitting requirements. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Some ditches are subject to jurisdiction of the Clean Water Act but there is not an intent to regulate all ditches. In response to comments, the agencies have revised the ditch exclusion proposed and the new rule includes new ditch exclusions. The rule explicitly excludes certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches, including intermittent roadside ditches that drain federal, state, county or municipal roads, and that are not a relocated tributary or excavated in a tributary. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Mississippi Manufacturers Association (Doc. #16790)

17.1.870 This rule greatly expands the authority of the Agencies beyond the boundaries of the law and will have a significant negative impact on manufacturers' ability to operate, maintain and expand their facilities. This rule will create unnecessary delays and costs for manufacturers of all sizes and in virtually all sectors. (…)

However, the rule instead expands the authority of the Agencies in a way that is unclear and inconsistent with current regulations, and creates greater uncertainty for businesses. This rule would force companies to perform a comprehensive evaluation of their

US EPA ARCHIVE DOCUMENT

operations to determine if the manner in which they deal with water issues, including such things as ditches and stormwater runoff, would now be jurisdictional under the new rules. New construction or expansion activities under this rule could require water permits that were not needed previously. As written this rule cannot be fixed. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule does not establish any new regulatory or permitting requirements. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Beaver County Conservation District (Doc. #16791)

17.1.871 The Beaver County Conservation District of the Commonwealth of Pennsylvania respectfully requests EPA and the Army Corps of Engineers to withdraw this proposed rule making. Removing the term "Navigable" from the Clean Water Act far exceeds the authority of the EPA and (ACOE). We feel the Commonwealth of Pennsylvania is in a better position to oversee the waters of the Commonwealth than the EPA and the Army Corps of Engineers. (p. 1)

Agency Response: **Implementing the Clean Water Act beyond traditional navigable waters is not a new practice, and the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule does not affect private property rights. For more information about private property, please see Section I.C. of the Technical Support Document.**

Commissioners for Somerset County (Doc. #16795)

17.1.872 Our major concern is that the proposed definition broadens the definition to include man-made or man-altered ditches, such as roadside ditches, Public Drainage Association ditches, and potentially others, thus making them subject to federal regulation under Section 404 of the CWA. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. The rule does not establish any new regulatory or permitting requirements. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Some ditches are subject to jurisdiction of the Clean Water Act but there is not an intent to regulate all ditches. In response to comments, the agencies have revised the ditch exclusion proposed and the new rule includes new ditch exclusions. The rule

US EPA ARCHIVE DOCUMENT

explicitly excludes certain categories of ditches, such as ditches that flow only after precipitation and most roadside ditches, including intermittent roadside ditches that drain federal, state, county or municipal roads, and that are not a relocated tributary or excavated in a tributary. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Hendrix, C.D. (Doc. #16863)

17.1.873 As I read through the proposed rule, I am more confused than ever about what exemptions farmers like myself, and those I represent would have. It concerns me that for a document that is supposed to add clarity to the Clean Water Act will probably result in my having to meet more regulatory guidelines, face more restrictions on how we can farm our land, and likely force us to spend more money to continue farming. Young farmers are presently having a difficult time making ends meet. Farmers go to the extra mile to protect land resources and the environment with the goal to pass farm down the next generation. We understand the value of protecting this resource, however this rule would penalize the very people who are working hard to protect the environment for future generations. (p. 1)

Agency Response: **With the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

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. The rule does not establish any new permitting requirements. Instead, it makes the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule maintains the exemptions found in Clean Water Act in Section 404(f) (33 U.S.C. § 1344(f)(1)) for many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities.

Montana Water Resources Association (Doc. #16889)

17.1.874 The irrigation entities and agricultural producers represented by MWRA own, manage, and operate thousands of miles of canal, ditch and related structures serving thousands of farms and ranches that would be impacted by expansion of federal jurisdiction. The proposed rules would clearly reach beyond the intent of the CWA,

US EPA ARCHIVE DOCUMENT

impacting the noted water conveyance facilities through costly permitting and timing delays. The line between jurisdictional waters of the U.S. and agricultural facilities has always been clearly drawn, and this proposed rule is contradictory to historic precedent. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.**

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary. As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

The agencies have included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another.

Transportation Corridor Agencies (Doc. #16897)

17.1.875 The TCAs share many of the same concerns as other transportation agencies, developers, and private landowners regarding the potential widespread implications of the Proposed Rule and the regulatory over-reach of the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"; collectively, the "Agencies"). In the name of clarifying the definition of "Waters of the United States," EPA and the Corps are proposing to expand their jurisdiction to cover all perennial, intermittent and ephemeral streams," and wetlands, lakes and ponds that contribute flow directly or indirectly to a downstream water of the United States. The Agencies may also deem "other waters" jurisdictional on a case-by-case basis. The Agencies' interpretation goes beyond a reasonable reading of the Clean Water Act and would make it more costly and time-consuming for the TCAs and other transportation agencies in Orange County to

US EPA ARCHIVE DOCUMENT

advance critical infrastructure projects that will alleviate growing congestion in the region. (p. 1)

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

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 as well as expanding the section on waters that are not considered waters of the United States. For example, the agencies limited the tributaries that are "waters of the United States" to those that have both a bed and banks and another indicator of ordinary high water mark. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows, but where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional.

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be assessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

Arkansas Attorney General (Doc. #16899)

17.1.876 Likewise, the proposed rule's definition of "tributary" introduces so many exceptions and qualifications that it fails to provide a clear and enforceable regulatory standard. Both definitions are overly broad and contain multiple factual components on their own. When those definitions are combined with the definition of "waters of the United States," the process for determining jurisdiction over a particular body of water becomes a maze for both regulators and the public to navigate. For example, Arkansas' agricultural community would be left with increased uncertainty over of the applicability of the CWA, such as the recent interpretive rule regarding conservation practices. Each step of the process under the new rule will increase uncertainty for the regulated community, which leads to lost productivity and more litigation to resolve ambiguities. (p. 1-2)

US EPA ARCHIVE DOCUMENT

<u>Agency Response:</u> The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. In response to comments requesting clarity in the definition of "tributary," the final rule includes a definition of bed and banks adapted largely from longstanding agencies' practice as well as comments and adds the Corps' existing regulatory ordinary high water mark definition to EPA's regulations. In order to clarify when a ditch is covered, for example when it is excavated in or relocates a covered tributary, the agencies also modified the ditch exclusion proposed and the rule includes new ditch exclusions. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

The Interpretive Rule is no longer applicable. It was on public notice from April 21, 2014, and was extended until July 7, 2014. Since the close of the public comment and as directed by Congress the agencies withdrew the Interpretive Rule on January 29, 2015.

<u>Association of Equipment Manufacturers (Doc. #16901)</u>

17.1.877 The proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the Supreme Court. In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. The proposed rule will result in duplicative and incongruent regulatory requirements that are inconsistent with the purpose and structure of the Act and have not been adequately considered by the agencies. These comments identify practical problems with the proposed rule for AEM's members and request that the agencies withdraw the proposed rule, consult with stakeholders, including AEM, and work to revise the proposed rule to resolve these important issues.[90] (…)

Our members are extremely concerned about the impacts EPA's new "waters of the United States" will have, not only on the manufacturing process, but also on our customers. (…)

The agencies have failed to consider the significant implications on these programs, including Section 404 dredge and fill permitting, Section 402 NPDES permitting, including stormwater and non-stormwater, Section 401 water quality certification, Sections 303, 304, and 305 State water quality standards, and Section 31 1 oil spill prevention. AEM is concerned that the proposed rule's categories of "waters of the U.S."

[90] AEM is a member of the Waters Advocacy Coalition, WAC, and incorporates by reference comments submitted on behalf of WAC. WAC comments address in detail the legal, scientific and economic deficiencies associated with the rulemaking.

US EPA ARCHIVE DOCUMENT

and associated definitions are overbroad and ambiguous, suffer from a variety of legal infirmities, and are not supported by the science. Contrary to the agencies' assertions, the proposed rule will lead to more confusion for regulators and the regulated community, and will by no means establish the certainty or predictability the agencies claim. If the agencies are truly interested in clarity, they must meet with stakeholders to understand their concerns, gather further scientific evidence, and revise the proposed rule accordingly. (p. 1-2)

Agency Response: **Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."**

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 on legal precedent and the best available peer-reviewed science as well as on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" by changing a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404).

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

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

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under programs that protect "waters of the United States" from pollution and destruction. Each of

US EPA ARCHIVE DOCUMENT

these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes, and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis.

See the Economic Analysis for further discussion of the costs and benefits assessment and effects on CWA programs.

17.1.878 We are concerned that under the proposed rule, the agencies' authority to assert jurisdiction is limitless. (…)

Inconsistent with the limits established by Congress and recognized by the Supreme Court, the proposed rule creates sweeping jurisdiction based on connections under newly devised theories such as "any hydrological connection," "significant nexus," "aggregation," and new definitions and key regulatory terms such as "tributary," "adjacent waters," and "other waters." (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories. The final rule has included clearer definitions of regulatory terms such as "tributary" and "adjacent waters." In response to concern expressed by commenters in regards to uncertainty created by the "other waters" category, the final rule places limits on which waters could be subject to a case-specific significant nexus determination, in recognition that case-specific analysis of significant nexus is resource-intensive and to reflect the consideration for the body of science that exists.**

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters is critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. See the Technical Support Document which outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

In addition, the rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. In response to comments requesting clarity in the definition of "tributary," the final rule includes a definition of bed and banks adapted largely from longstanding agencies' practice as well as comments and adds the Corps' existing regulatory ordinary high water mark definition to EPA's regulations. In order to clarify when a ditch is covered, for example when it is excavated in or relocates a covered tributary, the agencies also

US EPA ARCHIVE DOCUMENT

modified the ditch exclusion proposed and the rule includes new ditch exclusions. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

17.1.879 The proposed approach is certain to sweep in many features that have only remote and insubstantial connections with traditional navigable waters. 'Waters that used to be considered "isolated" and therefore beyond the scope of CWA jurisdiction will now be "adjacent" and the proposed "shallow subsurface hydrologic connection or confined subsurface hydrologic connection" language will be used to assert jurisdiction over any wet area, including on-site ponds and impoundments. Such unbounded jurisdiction would have major impacts for countless industrial facilities which rely on industrial ponds for their operations. (p. 5)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories. In the proposal, the agencies sought comment on a number of ways to address and clarify jurisdiction over adjacent waters. In light of the comments, the science, the agencies' experience, and the Supreme Court's consistent recognition of the agencies' discretion to interpret the bounds of CWA jurisdiction, the agencies have made some revisions in the final rule designed to more clearly establish limits on the scope of "adjacent waters."In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. As recommended by the public and based on science, the agencies defining limits for "neighboring" are primarily based on the reliance of a 100-year floodplain.**

Bennett, J. (Doc. #16911)

17.1.880 We depend on the land and the water to grow our berries and for our very lives; and therefore, we are good stewards of both. However, this proposed rule does not help but rather complicates our decision making and frightens us that our livelihood is at great risk. We want to be compliant but request that you work with those ACTIVELY involved in agriculture on any revisions.

The confusion and concern we face will only persist if the rule is finalized, as we will be left to determine which aspects of our farms are directly subject to jurisdiction under the Clean Water Act thus burdening our ability to effectively manage our operations without additional cost or delay.

I believe the rules language will be a burden to my growing operation and ultimately my livelihood. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities. The agencies have also revised the exclusions for ditches to provide greater clarity and consistency.

Lake and Trail Properties (Doc. #16913)

17.1.881 As a REALTOR® who is concerned about clean water, property rights and economic development, I urge you to withdraw your proposed rule that would expand jurisdiction over more waters of the U.S. REALTORS® are committed to the protection of America's water resources but if finalized, this rule will not have a measureable impact on water quality and will severely hinder future economic development and growth.

Nearly every sector of the economy – including agriculture, housing, and energy production – needs permits required under the Clean Water Act to conduct their daily operations. Just as importantly, private property owners who want to develop their own land must also frequently obtain these permits. The Supreme Court has affirmed that both the U.S. Constitution and the CWA limits federal authority over intrastate waters, yet EPA and the Corps - through this proposed rule - are attempting to expand the scope of federal jurisdiction beyond anything that ever existed under the CWA. An expanded scope over more waters of the U.S. will mean more waters under EPA jurisdiction, more permits and loss of property rights.

In fact, if this rule were to be finalized, my own business and the activities of my clients would be negatively impacted. In the business of selling land for development, obtaining permits under the CWA is already time-consuming and expensive. Any increase in the number of permits required to sell a property will hinder that development and impede economic growth in my community. Further, this unwarranted expansion invites litigation, creating greater cost and uncertainty. It will undoubtedly provide an easy opportunity for those who may seek to frustrate productive use of property.

While the water quality protections provided by the CWA are vital, so too is the ability of private property owners to utilize their property to spur economic development.

Only Congress can change the jurisdiction and authority of the CWA. I therefore request that you withdraw the proposed rule expanding authority over more waters of the U.S. until such time as Congress decides that a change should be made. (p. 1)

US EPA ARCHIVE DOCUMENT

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

Illinois Agri-Women (Doc. #16916)

17.1.882 I believe the most important issue is the deletion of "navigable waters". When I think of "waters of the U.S." I picture someone in a canoe rowing down a stream or river. I do not think of a child playing barefoot in a rain-produced puddle. I hope that whoever reads this and those who make the decisions will realize that you folks have "overstepped" in rewriting the Clean Water Act. (p. 1)

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

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.

US EPA ARCHIVE DOCUMENT

Texas Oil & Gas Association (Doc. #16917)

17.1.883 TXOGA member companies will be directly impacted by the revisions to the definition of waters of the United States proposed by the Environmental Protection Agency (EPA) and the Department of the Army Corps of Engineers (Corps). We join with the American Petroleum Institute ("API") in requesting that the proposal be withdrawn, as it is an unjustified expansion of federal jurisdiction. Further, as detailed in the API comments, the proposal is inherently flawed since it is based on inaccuracies and misconceptions such as:

- Misinterpretation of the definition of "waters of the United States" pursuant to two Supreme Court decisions;
- Reliance on the EPA Office of Research and Development's Connectivity Report that failed to define significant nexus; and
- Inaccurate economic analysis of the proposed rule by the agencies.

TXOGA urges the agencies to carefully consider the detailed legal, policy, and economic analysis submitted by the API. (p. 1-2)

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

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in Rapanos. The rule establishes a definition of significant nexus based on Supreme Court opinions and the science. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them. The Technical Support Document outlines the agencies legal and scientific rationale supporting the use of "significant nexus."

This rule establishing the definition of "waters of the U.S.," by itself, imposes no direct costs. While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis. The economic analysis discusses the fact that, in comparison to a baseline of the existing regulations, there would be no additional costs because the final rule is narrower in jurisdictional scope. See the Economic Analysis for further discussion of the costs and benefits assessment.

US EPA ARCHIVE DOCUMENT

Johnston N. (Doc. #16920)

17.1.884 It will cost the U.S. economy billions of dollars and add several thousand dollars in surface compliance costs to every oil and gas well drilled to develop my private property. It will reduce the economic viability of my private minerals and will decrease not only my family income, but also the tax revenue flowing to the U.S. Treasury, states and communities nationwide. (p. 1)

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

Coachella Valley Water District (Doc. #16926)

17.1.885 CVWD operates and maintains 123 miles of concrete canal, 1,000 acres of groundwater replenishment basins, 130 acres of percolation ponds, 330 acres of stormwater retention basins, 73 miles of flood control dikes, and over 100 miles of swales and ditches. The proposed rule would require Clean Water Act permits to operate, maintain and repair these critical facilities. CVWD has found that the Agencies do not have the resources to process CWA permits effectively. CVWD has entered into a Water Resources Development Act (WRDA) agreement to fund the Agencies work to process CVWD permit requests. While this gives CVWD projects a higher priority than those not covered by a WRDA agreement, this effort does not make the permitting process any less difficult to execute and it surely increases the costs to obtain permits. By expanding jurisdiction to cover CVWD facilities, the proposed rule would dramatically increase CVWD's regulatory burden without added benefit to Waters of the U.S. (p. 2)

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

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in in the final rule codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

US EPA ARCHIVE DOCUMENT

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

Border Soil & Water Conservation District, Elida, NM (Doc. #16977)

17.1.886 BSWCD is responsible for protecting the tax base for our area. The proposed WOTUS definitions do not allow for the district to carry out this part of our state's statute. For example, if farmland defined as part of WOTUS is regulated so that is cannot be farmed, and cattle are not allowed to graze or water on these regulated areas, income is lost in our county, state and nation. And, you and your family would not have the safe food our American farmers and ranchers produce. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The agencies recognize of the vital role of farmers and ranters in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities. The agencies have also revised the exclusions for ditches to provide greater clarity and consistency.

Island County Board of Commissioners (Doc. #16999)

17.1.887 Island County requests that the agencies work with local governments to improve these rules with more refined definitions and descriptions of what is jurisdictional and what is not. The County also requests that the rule recognize the significant cost that jurisdiction and permitting bring to a local government infrastructure projects. (p. 2)

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

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

US EPA ARCHIVE DOCUMENT

feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

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

Although the rulemaking process did not require an economic analysis because the rule by itself imposes no direct costs, the agencies developed an economic analysis for informational purposes. See the Economic Analysis for further discussion of the costs and benefits assessment.

Lower Wind River Conservation District (Doc. #17013)

17.1.888 Agriculture is one of the top economic drivers in our District. The expanded authority suggested in the proposed rule could increase regulations by which local farmers and ranchers would need to comply in order to conduct normal farming operations. In turn this would lead to increased costs for agricultural operations and a negative effect on the economy in our area. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities. The agencies have also revised the exclusions for ditches to provide greater clarity and consistency.

Terrebonne Parish Council (Doc. #17016)

17.1.889 WHEREAS, the rule, as proposed, will impact parish-owned and maintained public safety and service infrastructure, including, but not limited to, drainage canals, pump stations, levees, roadside drainage ditches, and sewer treatment plants; (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

In addition, this rule also does not change the longstanding regulatory exclusions for wastewater treatment systems designed to meet the requirements of the CWA.

Association of Texas Soil and Water Conservation Districts (Doc. #17020)

17.1.890 Our members have attended multiple meeting with EPA to answer questions on the proposed rule and the largest concern is the uncertainty surrounding its implementation. EPA continues to clarify the proposed rules and each meeting holds a different answer than the meeting before. How can we proceed when you do not have a clear path forward? Our farmers and ranchers cannot operate under that level of uncertainty and should not be expected to. (p. 1)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

Placer County Water Agency (Doc. #17027)

17.1.891 However obtaining a Section 404 permit—even a nationwide permit—from the Corps is time-consuming and not without significant cost. The permitting backlog is already staggering; it would grow exponentially under the proposed WOTUS rule. In this era of limitations, both of budget and qualified personnel, it is unwise to expand

US EPA ARCHIVE DOCUMENT

jurisdictional responsibilities without a concomitant benefit to justify it. The increased regulatory burden on water systems that the proposed rule would impose would not result in any improvements in water quality. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

Mississippi Department of Environmental Quality (Doc. #17031)

17.1.892 The rule poses a financial hardship to the regulated public and the economy of Mississippi. Significant work and the development of tools are needed to make implementation of a rule feasible. Without the appropriate tools, the amount of time needed to complete a jurisdictional determination will cause an undue economic burden to applicants. Should this rule be implemented in the current form, it will have unnecessary regulatory and implementation costs for both the state and the regulated public. For example, more accurate mapping tools must be developed to ensure that permitting timeframes are not further extended. Development and use of these kinds of tools is important to ensure there is not an even greater economic burden placed upon applicants. Likewise, the states must have adequate resources to implement a burdensome new rule. (p. 4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

The agencies intend to develop tools and other resources to support implementation of the rule.

Arizona House of Representative (Doc. #17041)

17.1.893 Despite the assertions by the proposing agencies that the rule clarifies federal regulatory jurisdiction, it remains unclear what the reach of the Clean Water Act will be under the new definition. The rule refers to a "significant nexus" with navigable waters, but does not provide adequate direction on what that ultimately includes. Thus, the exact extent of federal reach cannot be determined based on the language of the rule itself. It is possible that any puddle or stock pond with a remote possibility of reaching "waters of the United States" could be subjected to the CWA. This is problematic for many reasons, including increased administrative costs to comply with the rule, and the difficulty in creating a replicable standard across states and the nation. What is clear is that the additional costs associated with permitting will likely have a stifling effect on

US EPA ARCHIVE DOCUMENT

development and could impose significant liabilities on the regulated public. The economy cannot withstand these types of burdensome regulatory regimes. (p. 1)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters." The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed.

Ames Construction, Inc. (Doc. #17045)

17.1.894 In the preamble to the proposed rule, EPA and the Corps state that key U.S. Supreme Court decisions 'resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA' and that, through this rulemaking, the 'agencies are providing clarity to regulated entities as to whether individual water bodies' are or are not jurisdictional and discharges are or are not subject to permitting.' I respectfully disagree with this finding. The proposal leaves many key concepts unclear, undefined, or subject to agency discretion, resulting in more confusion for contractors in the field, not less. (p. 2-3)

US EPA ARCHIVE DOCUMENT

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

The proposed rule included a broad provision (paragraph (a)(7) of the proposal) that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. In consideration of comments expressing concern over the proposed approach, the agencies made changes to provide for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable water, interstate waters, and the territorial seas address concerns in the approach to "other waters." The final rule provides a more detailed definition of significant nexus which includes a list of nine specific functions that can be analyzed. The agencies have also determined that the single point of entry watershed is a more reasonable and technically appropriate scale for identifying "in the region" for purposes of the significant nexus standard than ecoregions.

San Gabriel Basin Water Quality Authority (Doc. #17049)

17.1.895 More than 30 groundwater treatment facilities are operating in the San Gabriel Basin today and many of them require the ability to discharge large volumes of water to flood control channels over short periods of time to facilitate plant start-up (including complying with the State Water Resources Control Board's Division of Drinking Water permit requirements), operations and maintenance. Earlier this year the WQA, in furtherance of its mission, sponsored a basin wide Los Angeles Regional Water Quality Control Board discharge permit for the efficient discharge and reuse of water not otherwise available for direct potable use. This permit also allows for the future construction and use of groundwater recharge basins to allow direct recharge to the San Gabriel Valley groundwater basin. Additionally, these basins are envisioned to be multi-benefit by also serving as integrated stormwater capture basins. Much of the land available for these newly constructed recharge basins located adjacent to facilities and waterways considered waters of the U.S. Therefore, if the proposed rule were implemented as proposed these constructed basins could be subject to additional permitting that is time-consuming, burdensome and costly with no additional benefit or improvement of water quality for San Gabriel Valley residents. (p. 2)

Agency Response: **Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations done on or**

US EPA ARCHIVE DOCUMENT

after publication of this rule in the *Federal Register* will be made consistent with this rule. Similarly, consistent with existing regulations and guidance, jurisdictional delineations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization.

St. Charles Parish, Office of the Parish President (Doc. #17053)

17.1.896 We already experience hazardous delays in the Section 10/404 permitting process through the Regulatory Branch of the Corps because of low federal budget and staffing. Adding to the workload of an already strained Corps District office by requiring applications to be submitted for activities that will likely prove to have no direct or significant impact on water resources will result in delayed schedules for construction and maintenance of hurricane protection levees and forced drainage systems critical to the survivability of coastal Louisiana. (…)

Imposing such an exorbitant financial burden on an otherwise determined business investor could effectively destroy an economy-boosting project that would not only provide goods and services to our community and additional tax revenues to local, state, and federal budgets, but would also prevent the creation of desperately needed jobs in such a trying time for our national economic system. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

See the Economic Analysis for further discussion of the costs and benefits assessment.

St. John the Baptist Parish, Office of the Parish President (Doc. #17054)

17.1.897 There are currently delays in the Section 10/404 permitting process through the Regulatory Branch of the Corps. We are concerned that the new rule will cause further delays and require higher costs for local, state, and federal offices. Financial and manpower assistance will need to be considered for all parishes/counties to mitigate these delays and costs. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and

US EPA ARCHIVE DOCUMENT

cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

See the Economic Analysis for further discussion of the costs and benefits assessment

City of Portsmouth (Doc. #17057)

17.1.898 If the new EPA regulations are enacted as proposed it would be a huge burden on this city. It will increase the costs of our maintenance efforts. Additional staff would be needed for permitting and tracking of activities relating to the additional requirements; and the EPA would "overreach" into our Stormwater program. It will slow the ditch cleaning activities and significantly delay our response time to complaints, therefore exacerbating our flooding and mosquito problems. (p. 5)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Castaic Lake Water Agency (Doc. #17061)

17.1.899 [T]he proposed rules would place an inordinate burden on CLWA and its partners, significantly increasing regulatory burden and costs and potentially precluding the redevelopment and operation of beneficial water supply management programs. (p. 1)

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

Anderson-Cottonwood Irrigation District, Anderson, CA (Doc. #17085)

17.1.900 The definition of tributary in the proposed rule is so broad that numerous man-made, non-stream conveyances would become "waters of the United States" and subject to the full spectrum of Clean Water Act permitting. The proposed definition of tributary would have broad implications for Anderson-Cottonwood Irrigation District. The District provides surface water by way of gravity diversion and lift pumps, and distributes such water to over 800 ratepayers within two counties. The conveyance system for this service

US EPA ARCHIVE DOCUMENT

comprises a main canal over 35 miles in length and over 150 miles of lateral canals made up of a mixture of lined and unlined earthen ditches and buried pipelines.

Under the proposed rule, Anderson-Cottonwood Irrigation District would be subject to all the permitting requirements in the CWA when, for example, the District conducts routine maintenance within its extensive water distribution system. Anderson-Cottonwood Irrigation District recommends that water conveyance systems be excluded from the definition of tributary. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule's definition of "tributary" retains many elements from the proposed rule, but reflects public comments in several important ways. In particular, the rule emphasizes flow. The rule defines "tributary" by emphasizing physical characteristics created by water flow and requiring that the water contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas. The agencies have also included an exclusion that applies to water distributary systems. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another.**

South Dakota Soybean Association (Doc. #17097)

17.1.901 South Dakota farmers have enjoyed an intimate working relationship with the land for generations, know its intricacies, and want to preserve the soil and ensure clean water so that our children and their children have the opportunity to share in that legacy. We take very seriously the responsibility which is ours for protecting soil, water, and the environment in general, for future generations. We believe that efforts aimed at soil and water protection are best managed at the local level where nuanced changes in ecosystems are visible, measurable, and can be properly managed.

South Dakota farmers are concerned that the proposed changes will harm the sustainability of a significant number of farm operations, particularly family farms, while at the same time producing no significant benefits to the environment. The rules and regulations, will expose farmers to greater liability and increased personal expense with no method of recovering costs. We are concerned that the exclusions for agriculture will provide little protection.

SDSA is very appreciative of the outreach by EPA and the Corps of Engineers in sharing information and addressing our concerns about the rule changes. Particularly, the meetings and communication with Rebecca Perrin, EPA Region 8 Agricultural Advisor. It is our hope, that in the future, EPA and the Corps of Engineers will consult with private citizens before establishing proposals of great significance in an effort to gain an

US EPA ARCHIVE DOCUMENT

understanding of how changes impact citizens, and how to work cooperatively to achieve shared goals.

SDSA wishes to express its opposition to the proposed changes, and urges EPA and the Corps of Engineers to withdraw their proposal. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The agencies have also revised the exclusions for ditches to provide greater clarity and consistency.

Additionally, in response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Lander County Board of Commissioners (Doc. #17098)

17.1.902 The proposed definition could cause counties to be unduly burdened as the number of ditches within the counties that fall under federal jurisdiction could be significantly increased;

Counties could be the subject of expensive and time-consuming lawsuits as the federal jurisdiction process is not well understood and it is very difficult for local governments to apply for and receive a federal exemption; and

Counties that own Municipal Separate Storm Sewer Systems ("MS4") are placed in a position to be subject to additional water quality standards and it is not clear whether storm water management activities are exempt under the new rule. (p. 2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

US EPA ARCHIVE DOCUMENT

The Agencies considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system.

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Anonymous (Doc. #17112)

17.1.903 Federal regulation restricting common practices such as weed control and fertilization will prohibit us from raising a bountiful crop capable of feeding thousands, stimulating local economy and providing for our family. We live on this land. Of course we are going to be mindful of the impact unsafe practices will have on our families and our neighbors. Another burdensome regulation will take valuable time and resources away from our singular goal...instilling in our children and grandchildren the love of farming and the grace of knowing they are intelligent enough to do the right thing to preserve our way of life as Americans. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The rule does not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the Implementation Compendium.

US EPA ARCHIVE DOCUMENT

Office of the Parish President, Terrebonne Parish Consolidated Government (Doc. #17165)

17.1.904 While the survivability of our community may be put in jeopardy because of these delays, the survivability of our economy may be at risk, as well. An additional level of permitting and regulation, specifically considering the costs associated with complying with such a level, could have a drastically detrimental impact on responsibly-planned commercial and industrial developments. While Terrebonne Parish has graciously enjoyed low unemployment percentages, those unemployment rates could quickly escalate without the ability for our growing region to provide more jobs to our growing population. Imposing such an exorbitant financial burden on an otherwise determined business investor could effectively destroy an economy-boosting project that would not only provide goods and services to our community and additional tax revenues to local, state, and federal budgets, but would also prevent the creation of desperately needed jobs in such a trying time for our national economic system. (p. 2)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

In addition, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects can proceed with the necessary environmental safeguards while minimizing permitting delays.

Shumnaker, Loop & Kendrick (Doc. #17166)

17.1.905 While the goal of providing clarity of when Clean Water Act §§402 or 404 permits are required is admirable, OUG believes that the proposed definition does not provide clarity, is expansive in what constitutes a "water of the United States," and will require Clean Water Act permits for projects that previously did not require them. OUG also believes that the proposed rules will expose regulated entities to permit challenges by non-governmental organizations, increase enforcement actions, and slow the permitting process as a whole. (p. 1-2)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators,

US EPA ARCHIVE DOCUMENT

stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Cook Farms & Cattle Company (Doc. #17203)

17.1.906 We the people of the U.S. do not need any more regulations from our government on the Waters of the United States. I am a cattle rancher in the Texas Panhandle, I have stock ponds that hold water when it rains but dry up in the droughts. We also have sand draws that run waters when we have heavy rains, that flow into the stock ponds. I received the Hemphill County Award several years back for being the Conservation Rancher in Hemphill County of the Year. More government regulations would cost the Tax Payers more Money. With the hiring of more employees to oversee the regulations. Also what I have see about a lot of the government employees they have NO COMMON SENSE !! They have not worked in the real world only as a government employee ! We need less government not more government regulations !! (p. 1)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The final rule includes a provision that waters subject to

US EPA ARCHIVE DOCUMENT

established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1).

South Big Horn County Conservation District (Doc. #17264)

17.1.907 The proposed rule would result in a significant expansion of Federal jurisdiction which is unwarranted and interferes with the prerogatives of the states and local governments. Private landowners could feel major impacts through reductions in their ability to use their lands and increased costs to comply with the rules they would become subject to through the expansion of the definition. This could also reduce Conservation Districts' abilities to promote and sponsor water conservation and water quality improvements as landowners try to keep issues on their lands away from federal regulatory radar. Aside from the cost considerations, the time requirements to get permits to perform routine agricultural operations would severely impact agricultural operations, and would flood the EPA and Army Corps with permit applications whose issuance would provide no value. (p. 2)

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

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation. If the proposed activity is not exempt under CWA Section 404(f), the work may be authorized under one or more Nationwide General Permits (NWPs), or under a Regional General Permit (RGP), or pursuant to a Standard Individual Permit. The NWPs can be found at: http://www.usace.army.mil/cw/cecwo/reg/ and the RGPs can be found on the local Corps District regulatory web pages. Additional guidance on the NWPs/RGPs may be obtained from the local Corps District office.

Rhea, B. (Doc. #17294)

US EPA ARCHIVE DOCUMENT

17.1.908 In addition this lack of restraint will lead to an enormous bureaucracy, and an impossibility to regulate. The only time in which it will be enforced is when a complaint is made by a random passerby or jealous neighbor. The end result of this not be cleaner water but more likely deeper pockets of lawyers, resentment between neighbors, and inequity of the application of the law. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Walpole, W. (Doc. #17310)

17.1.909 In 1994 our farm received the EPA "Clean Water Farm Award", an award we considered significant given that we were selected out of eight Southeastern states. All work was funded by private capital generated within our business. No government funds were used. Under the proposed changes the work probably would not have been possible to perform in a timely manner, as a result, negating the sustainability of our multi-generational family operation and all of the jobs it creates.

We care enough about our land and the rivers that we live on to spend our own money to protect them. Please, do not take away our freedom that was granted by our forefathers to own and operate our farms and ranches with this unneeded overreach of Government into our private lives. If this Rule passes, our livelihoods are at stake, jobs will be lost, and the Safest supply of food and fiber produced in the world will be at risk due to unnecessary regulations.

Keep America strong and support good government. Limited government encourages private conservation by rewarding private landowners and not forcing them out of business.

In sum, I believe the EPA and the Corps should not finalize their proposed definition for "waters of the U.S." and should scrap the entire rule. There are too many fundamental problems with the proposal. By starting fresh, the agencies could potentially have meaningful dialogue and outreach with the cattle industry. As proposed it violates the law, will not benefit the environment, and will have a negative impact on small businesses like mine. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of**

US EPA ARCHIVE DOCUMENT

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f). The agencies have also revised the exclusions for ditches to provide greater clarity and consistency.

Fields, F.S. (Doc. #17352)

17.1.910 It is not clear to our staff the extent to which water within the County's stormwater system, which is intended to retain, detain and convey stormwater for treatment, may be treated as a "water of the United States." (p. 2)

Agency Response: **The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).**

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

City of Poquoson (Doc. #17358)

17.1.911 Stormwater costs will significantly increase due to the proposed rule as Poquoson finds itself dealing with more and more onerous permitting requirements, mitigation measures, paperwork requirements, and time delays. This will impact the City's financial ability to implement other water quality and environmental measures such as recycling initiatives, tree planting and boat pump out stations that the City has implemented for the public good rather than to meet a specific permit requirement. As flooding is a key concern of the City, more expensive permitting and more limitations on ditch and manmade pond modifications could in turn affect other public safety needs like addressing sea level rise or providing police and emergency first responder resources. (p. 7)

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

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6). Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule. The rule does not make any changes to the permitting process.

Tangipahoa Parish Government (Doc. #17369)

17.1.912 Upon review of the proposed changes to the language of the Clean Water Act we disagree that the proposed rule will not result in an increase of Federal Overreaching. It is obvious that this ruling would open the way for further expansion of EPA Regulation and Permitting of all types of activity near or at any water feature. This could go as far as requiring EPA permitting the maintenance of road side ditches. (p. 1)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The rule does not make any changes to the permitting process.

Ditches have been regulated under the Clean Water Act (CWA) as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Upper Macungie Township (Doc. #17370)

17.1.913 Upper Macungie Township, a Township in Lehigh County, Pennsylvania, wishes to go on record as an objector to the proposed changes to the Clean Water Act. Changing the definition of "waters of the United States," would create yet one more unfunded mandate that would greatly affect the budgets of all local governments. In addition to the financial impact, obtaining certain permits would drastically "slow down" public improvements, remediations, and maintenance.

We are asking that you please consider the effects of this proposed new layer of bureaucracy, the inefficiency that will be created, and the monies it will cost local municipalities. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use**

US EPA ARCHIVE DOCUMENT

of bright-line rules to provide greater predictability in implementing the Clean Water Act.

With the final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Georgia Transmission Corporation (Doc. #17371)

17.1.914 As cooperatives across the nation increase generating capacity, we will continue to build new transmission and distribution infrastructure. Expanded CWA jurisdiction could affect GTC by delaying and increasing the costs for constructing and maintaining transmission facilities. GTC is concerned about the potential impact of the proposed rule on our operations. Specifically regarding our ability to construct and maintain transmission facilities as well as our ability to manage small, de minimis, spills at these facilities. (p. 1)

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

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many energy infrastructure projects, such as NWPs 8, 12, 17, 44, 51, and 52. In general, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

The Nature Conservancy (Doc. #17453)

17.1.915 Waters and wetlands are critically important to the health and well-being of the people, the economy, and the environment of our country. These are shared, interconnected resources that waters supply our drinking 1help grow our food, transport our goods, and provide our energy, and support our communities and economy. These waters also support a broad range of biodiversity, including fish and wildlife and the natural areas on which they depend. The threats to our waters and wetlands are well documented. Over 50 percent of our waters do not meet their state water quality

US EPA ARCHIVE DOCUMENT

standards.[91] In the lower 48 states, we have lost over 50 percent of the wetlands that existed when our country was first formed.[92] Despite the progress we have made, we continue to see declines in aquatic health and the sustainability of our waters,[93] with over 40 percent of our freshwater fish species now imperiled.[94] While many factors contribute to these trends, protecting our waters wetlands, including small streams and wetlands, is necessary for these resources to continue to support our communities, our economy, and our environment. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Congress of the United States (Doc. #17454)

17.1.916 The City of Perryville is apprehensive about the proposed rule's apparent assertion of federal authority over land and water currently administered municipally. The city is fearful that this will impede its ability to meet the needs of the community at the local level, imposing both societal and monetary costs. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

[91] U.S. EPA, National Summary of State Information, from: Watershed Assessment, Tracking & Environmental Results, http://ofmpub.epa.gov/waterslO/attains_nation_cy.control, accessed Oct 6, 2014.
[92] Dahl, T.E. 1990. Wetland Losses in the United States: 1780's to1980's. U.S. Department of the Interior, Fish and Wildlife Service, Washington D.C.
[93] Dudgeon et al. 2006. Freshwater biodiversity: importance, threats, status and conservation challenges. Biological Reviews 81: 163-182.
[94] Jelks, Howard L. et al. *Conservation Status of Imperiled: North American Freshwater and Diadromous Fishes*, Fisheries, Vol 33, no. 8, August 2008. www.fisheries.org.

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The rule does not make any changes to the permitting process. However, the agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

United States House of Representatives (Doc. #17457)

17.1.917 Blind to the state of our economy and deaf to the hardworking Americans begging for relief from bureaucratic red tape, your agency has levied rule after rule, enforcement action after enforcement action, killing jobs and curbing growth. My constituents in the Commonwealth of Kentucky know all too well the human cost associated with these policies, with some counties facing double-digit unemployment as coal mines have been shuttered by a deadlocked permitting process, the threat of retroactive retractions of legal permits, and environmental regulations tailored to banning coal from the energy marketplace. While the impacts have been felt most acutely in coal country, the EPA's assault on the American Dream has been felt in other sectors central to Kentucky's economy, from agriculture to manufacturing. (…)

This redefinition goes well beyond congressional intent in the Clean Water Act and asserts federal jurisdiction over intermittent or ephemeral waters that are beyond the scope of the enumerated powers of Congress to regulate. Moreover, the EPA's unreasonable interpretation of the law erodes private property rights and the balance between state and federal oversight enshrined in statute. It empowers your agency to impose immense costs and burdensome regulatory obstacles on different economic sectors, from farming to road construction to mining. (p. 1-2)

Agency Response: **Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."**

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 on legal precedent and the best available peer-reviewed science as well as on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are

US EPA ARCHIVE DOCUMENT

clearly connected to downstream waters in ways that profoundly influence downstream water integrity.

The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters.

United States House of Representatives (Doc. #17460)

17.1.918 It's critically important that EPA keep in mind the intensive work, both administrative in the field, that producers in Iowa and across the country go through to provide the safest and most affordable food to consumers. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. To make the permitting process less burdensome, the rule clarifies the waters subjected to these exempted activities. The agencies have also revised the exclusions for ditches to provide greater clarity and consistency.

City of Natchitoches, LA (Doc. #17469)

17.1.919 It is my understanding, under the proposed rule, more waters would become WOTUS and fewer projects will qualify for nationwide permits. If applicants are required to obtain individual permits from the Corps, this will trigger more companion federal permitting processes. Currently, $1.7 billion is spent each year by the public and private sectors to administer wetland permits. This can only mean more time and more money will be spent, ultimately jeopardizing projects across the state. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries. The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for many projects. The agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of ephemeral and intermittent tributaries to ensure that projects can proceed with the necessary environmental safeguards while minimizing permitting delays.

Tennessee Valley Association (Doc. #17470)

17.1.920 As evidenced by the magnitude of interest and the ongoing controversy over the determination of which waters fall under federal authority, this rulemaking effort is a necessary but complex undertaking. TVA is both a power generator and resource steward, and as such, has a vested interest in ensuring that the Agencies promulgate an effective, reasonable, and balanced rule. The rule should be scientifically and legally sound, as well as protective of the nation's aquatic resources. The rule should also provide clarity in the process of determining which waters are jurisdictional waters. While this proposal represents an initial step in that effort, it falls short of this objective. (p. 1)

Agency Response: **With the final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.**

17.1.921 The Agencies have stated that the Proposal is intended to make the process of identifying which waters are federally protected "less complicated and more efficient". In addition, they indicate that the new definition would narrow the existing definition of "waters of the U. S." However, the rule is structured such as to incorporate all elements of the current definition and introduces additional ambiguity by the inclusion of several new and/or revised definitions. These include "tributary", "neighboring", "riparian area", and "floodplain". As currently defined, each of these terms is subject to interpretation and

US EPA ARCHIVE DOCUMENT

opens the door for additional waters and land-based activities to be jurisdictional due to the expanded ambiguity. (p. 2)

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

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Pyramid Lake Paiute Tribe (Doc. #17472)

17.1.922 There is much confusion regarding what defines waters of the United States. The rule should be clearly written so that local agencies, states, EPA, and the USACE all clearly understand what defines waters of the United States, so that implementation of the rule is predictable. Whether or not a water body is considered waters of the United States needs to be clear by all parties. (p. 1)

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

Strout, D. (Doc. #17683)

17.1.923 This proposed rule will affect a multitude of business sectors and municipalities; agriculture, builders, developers, manufacturers, and rural water districts, just to name a few. The proposed rule would greatly increase what can be considered "navigable waters" subject to CWA regulation.

Developers and Builders in the State of Oklahoma have come a very long way in the past 20 years in developing Best Management Practices in erosion control before, during and after development and construction. As the President of the Home Builders Association of Great Tulsa's Developers Council, we have held numerous classes and meetings with the Corps of Engineers, Oklahoma Department of Environmental Quality and the local jurisdictions to learn and improve on our techniques. With the inroads made in keeping the Water of the US cleaner, I think additional regulations at this time are unwarranted. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for approximately 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

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.

Harrison, S. (Doc. #17892)

17.1.924 As the mayor of a small city in rural Oklahoma, I am very concerned that this new rule, if put into effect, will continue the seemingly inexorable increase in federal regulations that require an ever larger portion of our limited municipal budget in order to maintain compliance. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In response to feedback from public outreach efforts, in the proposed rule, the agencies have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."**

Water Advocacy Coalition (Doc. #17921.1)

17.1.925 [T]his proposed rule will not resolve the inconsistency and confusion surrounding CWA jurisdiction. Although we recognize the value of improving the clarity of CWA regulation and in improving the process for making permit decisions and jurisdictional determinations, the proposed rule's broad categories and ambiguous definitions are not the answer. Clarity is very different from expansion. If the agencies are interested in developing a meaningful, balanced, and supportable rule, they must take a more methodical approach, one that is supported by science, informed by a robust understanding of the State and local laws that address water issues, and is true to Congress's intent and Supreme Court precedent. (p. 13)

Agency Response: **With the final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the**

US EPA ARCHIVE DOCUMENT

public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

Lovett's Speed Shop, Inc. (Doc. #17978)

17.1.926 We don't need this EPA-HQ-OW-2011-0880 rule. Farmers already have enough government regulations to be concerned with. Government is like cancer once it gets a foot hold it keeps growing until it's host is dead, then it dies also. There are ditches on my place that have water in them only in the spring when it rains. To someone who has lived in a condo all his life, with government authority wanting to show his authority and power, it will become a major waterway. And we already have enough of them on our payroll. Soon each farmer will have to have his own government bureau of people who know nothing about farming to tell him what he is allowed to do. And by the time they take vacations and coffee breaks paid for by him, the growing season will be over and there will be no food to feed the bureaucrats. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as ditches and tributaries. The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Hassel Haven Ranch (Doc. #17990)

17.1.927 I am opposed to any more regulations from the EPA as it relates to the Clean Water Act. (p. 1)

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

Tennessee Citizens for Wilderness Planning (Doc. #18014)

17.1.928 We strongly support the proposed rule on the definition of waters of the United States. Protection of our nation's vital waters, undertaken through the Clean Water Act, is greatly helped with this rule. It is critical that the CWA be applied as broadly and deeply as possible in order to protect wetlands, ephemeral streams at headwaters, and headwaters. Science has advanced our understanding of the connectivity of waters since

US EPA ARCHIVE DOCUMENT

the CWA was first passed. Please support efforts to act on that understanding for the sake of our country's water supply and its integrity. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #18016)

17.1.929 We are deeply concerned that the Proposal fails even the most basic goals advanced by the Agencies. Far from providing consistency, clarity and certainty, the Proposal would dramatically confuse the regulatory environment for determining which waters are regulated, and which ones are not. This is because the Agencies have introduced wholly new concepts and terms that are incredibly broad and vague, and that depart from established practice and precedent in Virginia and around the country. In particular, the Proposal would make jurisdictional all tributaries, regardless of flow and duration, as well as all adjacent waters, broadly defined to include waters with a shallow hydrologic or subsurface connection, even where separated by uplands or wholly man-made features. When combined with the Agencies' unbounded theories of connectivity, unnecessarily narrow exemptions for historically nonjurisdictional features like ditches, rills and gullies, and other ambiguous terms and concepts such as "adjacent" (which in turn introduces new and confusing definitions for "neighboring," "riparian areas" and "floodplain"), "other waters," and "biological connectivity," the Proposal would mark an historic - and we submit, illegal - expansion of federal jurisdiction. (…)

Simply put, as the comment period comes to a close, the Proposal seems to have fallen on increasingly shaky ground. Rather than scramble to shore it up, the Agencies need to abandon the Proposal and begin anew with due attention to all of the legal and technical issues that have been identified. (p. 3)

US EPA ARCHIVE DOCUMENT

Agency Response: **In response to comments on the proposed rule, the agencies have reshaped the definitions included in the final rule, ultimately with the goal of providing increased clarity. For example, the definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.**

The final rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

Finally, the definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area, but instead provides distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

United States Senate (Doc. #18022)

17.1.930 As a cattle rancher I am proud to be the primary steward of the natural resources on my property. I strive to care for the air and the water because the well-being of my cattle, and family, depend upon it. That care should NOT require a federal permit to complete routine farm chores. Unfortunately the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) believe otherwise. Please STOP

US EPA ARCHIVE DOCUMENT

these agencies from finalizing their devastating new definition for waters of the U.S. (p. 2)

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

United States Senate (Doc. #18025)

17.1.931 We have repeatedly heard concerns about regulations from our agriculture constituents and rural leaders during their visits to Washington as well as back home in our states. While the agriculture economy remains vibrant, there are significant concerns regarding a number of regulatory matters before the Environmental Protection Agency. As members of the Agriculture Committee, we write to request an opportunity to meet with you so we can share those thoughts directly and have a better understanding of your commitment, including activities and timeframe, for addressing the needs of agriculture and rural America.

We have heard concerns about the expansion of the definition of "waters of the United States," pesticide regulations, methane emissions, the handling of personal information from agriculture operations, and other regulatory issues that may be on the horizon and could threaten the continued productivity and economic viability of American agriculture. At a time when farmers and ranchers face the challenges of managing weather risks, responding to market demands, and adjusting to changes from the recently passed farm bill, regulatory uncertainty further complicates the operating environment for producers. The world is depending on the United States to meet the challenge of feeding a hungry and rapidly growing global population.

Uncertainty about how and when such regulatory concerns will be resolved not only threatens America's leadership position in global food production, but also investment and prosperity in our rural cities and towns, which are dependent on the health of the agricultural sector. We look forward to beginning a dialogue about these important concerns in the near future. (p. 1)

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

US EPA ARCHIVE DOCUMENT

This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period. In response to the feedback we received from these public outreach efforts in combination with the written comments received during the public comment period, the agencies have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

Xcel Energy (Doc. #18023)

17.1.932 [Many] states within Xcel Energy's service territory, such as Colorado, Texas and New Mexico, have numerous ephemeral streams and arroyos that may exhibit the characteristics of a "tributary" defined in the Proposed Rule, but lack any substantive flow except for a handful of days each year. A bed, bank, and OHWM can be seen even in features without an ordinary or regular flow. Particularly in the desert and semi-arid west, field indicators of an OHWM can develop easily. Including these areas as Waters of the U.S. would change the construction practice for high pressure gas pipelines, electric feeders, transmission lines, and other underground utilities. Currently, many ephemeral areas can be open trenched and pipelines installed using conventional construction techniques that do not trigger Section 404 permitting requirements. With the expansive definition of tributary under the Proposed Rule, Xcel Energy will have to directionally drill under these same areas and employ more difficult boring and connecting operations/construction, thus increasing the number of bores needed to complete the same amount of pipeline construction. Bores are more time consuming, require discontinuous construction techniques, and increase the risk of unintended bore fluid releases during operations. This change will have measurable impacts on project engineering, costs, and implementation.

The Proposed Rule will also negatively impact pipeline maintenance activities. During pipeline integrity inspections, we sometimes find issues that require gas pipeline maintenance. These maintenance issues require us to excavate the pipeline to make necessary repairs and can happen anywhere along the pipeline length. Including new areas with ephemeral flows (i.e., arroyos and ditches) due to the expanded definition of "tributary" will again directly affect these projects. Section 404 permits will now be required in areas not previously subject to jurisdiction. This could delay needed preventative maintenance or could impact emergency repairs due to ruptures, with no measurable benefit to these normally dry, ephemeral areas.

The same concerns also apply to expanding the definition of Waters of the U.S. to include floodplain areas adjacent to traditional navigable waters. The broad terminology used to define "adjacent" allows for jurisdiction over every wet feature in a floodplain or riparian area, or that has a hydrologic connection to a jurisdictional water. This expanded concept of adjacency would require us to perform longer bores at additional logistical and monetary expense. Instead of boring just across a defined channel, we would now have to bore across a full floodplain. Although we recognize that the floodplain itself would not

US EPA ARCHIVE DOCUMENT

be considered Waters of the U.S., it makes little economic or practical sense to bore underneath a wet feature, open trench a section of the floodplain, and then bore again under another wet feature. Once two or more waters were identified within a floodplain or riparian area, Xcel Energy would necessarily bore underneath the entire floodplain. With longer bores comes the greater risk of unintended bore fluid releases, which could have a negative impact on surface water quality. (p. 3-4)

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

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. As recommended by the public and based on science, the agencies defining limits for "neighboring" are primarily based on the reliance of a 100-year floodplain.

United States Senate (Doc. #18027)

17.1.933 By expanding federal Clean Water Act jurisdiction to include ditches, small streams, ponds, and other purely local waterbodies, EPA and the Corps may be exposing landowners and municipalities across the country to costly citizen suit litigation if they should attempt to conduct a neighborhood fireworks show. Recent history in California may set an ominous precedent for such challenges to fireworks displays in other states. If the proposed "waters of the United States" rule becomes final and serves as the eventual basis for future citizen suits against those who organize fireworks shows, we fear few homeowners, communities, or local organizations will be able to conduct fireworks displays as they have for decades or longer. (p. 2)

Agency Response: **Implementing the Clean Water Act beyond traditional navigable waters is not a new practice, and the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are**

US EPA ARCHIVE DOCUMENT

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

In regard to citizen suits, although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Plu's Flying Service (Doc. #18028)

17.1.934 The proposed rule would greatly expand not only federal jurisdictional waters but ultimately waters of the state; thereby, adding responsibilities, challenges and potential liabilities of me, as an ag pilot and anyone else who is an aerial applicator in trying to consistently comply with the requirements of the various contracts, PGP's and FIFRA label specifications. (p. 2)

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

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

Peters Township, McMurray, PA (Doc. #18311)

17.1.935 Peters Township believes that the proposed rule as written is unnecessary, is a logistical nightmare to enforce, will paralyze decision making in both the regulatory and business communities, and will waste valuable resources in terms of time, money, and effort in both the regulatory and business communities to justify and defend litigation that will certainly ensue in the future should the proposed rule be adopted. (p. 1)

Agency Response: **The scope of federal 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 Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for approximately 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex**

US EPA ARCHIVE DOCUMENT

as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

Wilson, M.D. (Doc. #18403)

17.1.936 As currently written, the rule could potentially have major impacts to many of our highway maintenance activities. Without clear delineations as to what qualifies as a water of the state, routinely performed activities such as cleaning blocked ditches and drain pipes and the management of vegetation through our herbicide program could suffer. If we are not able to perform activities such as these in a timely manner, it will directly impact the safety of the traveling public on our state's highway system. (p. 1)

Agency Response: The scope of federal 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.

EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The agencies believe the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases. The Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance") and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstance described.

Whittingham, J. (Doc. #18426)

17.1.937 The proposed rule would significantly expand the scope of navigable waters subject to Clean Water Act jurisdiction by regulating small and remote waters -- many of which are not even wet or considered waters under any common understanding of that word. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

Reitmeier, J. C. (Doc. #18429)

17.1.938 I farm land that drains through waterways that are dry 99% of the time. The only time water is in the waterways is during an extreme rain event. The water from the waterways flows through filter strips before flowing into a drainage ditch.

I also have fields that drain through tile during rain events. The tile removes excess water from the soil, keeping the land viable to grow crops.

If these forms of drainage are controlled, I would not be able to grow crops which would put my farming operation in jeopardy. (p. 1)

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

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms

US EPA ARCHIVE DOCUMENT

describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule.

Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.

As discussed in the preamble and the Ditch Compendium, the agencies have explained that there is not an intent to regulate all ditches. The agencies modified the ditch exclusion proposed and the rule includes new ditch exclusions. Reference the Ditch Compendium for a full discussion on the treatment of ditches in the final rule.

Fogg III, F. W. (Doc. #18446)

17.1.939 I believe the rule's language will be a tremendous burden to my growing operation and my livelihood, thus I respectively request that it be rescinded and the EPA and USACE start the rulemaking process over with consideration of landowner and state's rights, the language and intent of the CWA and related court decisions, and analysis of the true economic impact of rule making it proposes. (p. 1)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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.

DeGrandchamp, J. (Doc. #18478)

17.1.940 I believe the rule's language will be a burden to my growing operation and ultimately my livelihood, thus I respectfully request that it be rescinded entirely and that the EPA and USACE start the rulemaking process over with consideration of landowner and states' rights, the language and intent of the Clean Water Act and related court decisions, and analysis of the true economic impact of rulemaking it proposes. (p. 1)

Agency Response: EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators,

US EPA ARCHIVE DOCUMENT

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

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.

Indiana Coal Council, Inc. (Doc. #18495)

17.1.941 Indiana coal mines have comprehensive stormwater and surface water management features that could fall beneath the auspices of this proposal. These features are already regulated by Indiana's Department of Natural Resources through surface coal mining statute and regulations and by Indiana's Department of Environmental Management through Clean Water Act implementations including Sections 401 and 402. Diversion ditches, treatment facilities including ponds and impoundments, and numerous siltation structures are utilized at coal mine facilities to comply with applicable regulations. These structures have specific design requirements and undergo comprehensive review by regulatory personnel both prior to, during, and after construction, to ensure compliance with performance standards. The ICC urges revision of the proposal to clarify these type features, be they natural or constructed, do not constitute Waters of the United States. Exerting jurisdiction of these structures is unnecessary and would add delays, costs, permitting requirements, and duplications of authority without increased environmental benefit. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA. In addition, the rule has an expanded section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.**

The agencies also believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

Meike, D.L. (Doc. #18550)

17.1.942 Instead of perpetuating the great agricultural and industrial development of the past century the government of the United States seem to be intent on restricting our production in an ever growing population, much of it from illegal immigration. Let us start to return America to its past greatness by rejecting the proposals in WOTUS and work to return the right of the states back to where they belong. (p. 1)

US EPA ARCHIVE DOCUMENT

Agency Response: **The agencies are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for approximately 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

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.

Snyder, S. (Doc. #18555)

17.1.943 You have not given any clear definitions for the new definitions but you have created confusion and uncertainty for agriculture producers as we have been trying to determine if our carefully constructed NRCS specification terraces on our dryland farms will now require permits because the purpose of a terrace is to stop soil erosion and direct rain water runoff across the fields to minimize soil and crop losses. (p. 1)

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

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule.

US EPA ARCHIVE DOCUMENT

There is no change in the treatment of NRCS determinations. There is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule.

Grether, S. (Doc. #18668)

17.1.944 You, the Federal EPA and the Army Corps of Engineers are attempting, under their rule making authority, to change the definition of the term, Waters of the USA, which would allow your agencies to expand their regulatory authority to encompass any land features that experience run off during precipitation events. This would include seasonal ponds, puddles, creeks, ditches, or basically any land feature that gets rained on. Furthermore, permit requirements now applicable to navigable waters would, under this new definition, then be applied to the aforementioned land features. Since many of these land features exist on privately owned land, and virtually all of it gets rained at some point during a normal year, federal agencies could then regulate almost everything we do on our property via a permitting process.

To redefine the term "Waters of the United States" in such a way redefines the very idea of private property. So in essence you regulators don't mind us owning the land, but you want to control everything we do on it. This way we are still responsible for paying the property taxes and incurring any and all liability which might befall said property. Is the scope of the rules ever enough? At what point do regulators kill the industry they are trying to control? Let these proposed rules stand and we will get to that point quickly.

What is it that the proposed rules say? Normal farming practices are exempt from the onslaught of these new definitions and eventual new regulations. That simply is not true, as are most of the government's promises and edicts. We as farmers will have to obtain permits, and of course pay fees, penalties too, and wait for them, for what are now considered routine normal farming practices. Imagine having almost everything that occurs on our rural property regulated, through a permit process, because it gets wet. I fully and whole heartedly agree to DITCH THE RULE!!!!!!! (p. 1)

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

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result

US EPA ARCHIVE DOCUMENT

of the rule. The final rule has also expanded the section on waters that are not considered waters of the United States, including features such as puddles, artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Lastly, this rule does not affect private property rights. Please see Section I.C. of the Technical Support Document for more information about private property rights.

Indiana Wildlife Federation (Doc. #18723)

17.1.945 Indiana Wildlife Federation strongly supports your efforts to clarify the Clean Water Act to protect our wetlands and headwater streams. Without this protection it will be difficult to control pollutants flowing into our rivers and lakes. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

National Governors Association (Doc. #18790)

17.1.946 There is a substantial need to continue to collaborate and consult with states throughout this rulemaking process, as states are the primary authority for regulating waters within their boundaries. The rule should give as much weight and deference as possible to state needs, priorities and concerns, as they will be tasked with much of the responsibility of implementing and enforcing any final rule. We request that you thoughtfully consider the comments by individual states, recognizing their authorities under the CW A, as well as the protections they can provide beyond the scope of the Act. A key issue for states is increasing clarity in the definitions of the proposed rule determining what constitutes a "significant nexus" between bodies of water for jurisdictional purposes. The rule must be clear for state officials tasked with its

US EPA ARCHIVE DOCUMENT

implementation. Likewise, developing clarity, in close coordination with states, on the proposed interpretive rule for agricultural exemptions is vital. (p. 1)

Agency Response: **States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters is critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. See the preamble, Technical Support Document and the Significant Nexus Compendium for further discussion of defining significant nexus.

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

Philadelphia Sustainable Businesses (Doc. #18794)

17.1.947 If we do not protect these networks of small streams, we cannot protect and restore the lakes, rivers and bays that our economy and way of life depend on. We will also be jeopardizing jobs and revenue in businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

Protecting streams and wetlands that science has shown are clearly linked to downstream rivers and other water bodies is not only commonsense, it ensures the quality of water used in our products. Whether a company produces food, manufactures silicon wafers, brews beer, or operates an outdoor door recreation outfitter, businesses rely on clean water to produce high quality, safe products and services. Protecting these water

US EPA ARCHIVE DOCUMENT

resources is critical to the continued growth of Pennsylvania businesses. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade and better protection for critical water resources on which our businesses all depend in order to prosper. (…)

We value the protection that the EPA and Army Corps guarantee for our water supply-consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, Definition of "Waters of the United States," without delay and reject any efforts to weaken the proposal. (p. 1-2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Friends of Shades Creek (Doc. #18816)

17.1.948 As a local water protection organization, we see the need to improve the health of our rivers and streams to a far greater degree than we have currently achieved and to extend, not restrict, the protections to them outlined in the Clean Water Act. We support adoption of this rule and encourage the Army Corps and EPA to adopt a more inclusive view of which waters are to be covered under Clean Water Act regulations. (p. 1)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

US EPA ARCHIVE DOCUMENT

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Earth Bread + Brewery et al. (Doc. #18817)

17.1.949 Clean and abundant water is the most important ingredient in our beer, and this action by the Agencies gives us the confidence that our growing businesses need to continue to thrive. (…)

The Agencies' proposal recognizes the importance of wetlands and headwaters to rivers and streams downriver, and protecting these water resources is critical to the continued growth of the craft brewing and micro brewing industry in Pennsylvania and nationally. (p. 1-2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Virginia Manufacturers Association (Doc. #18821)

17.1.950 [E]phemeral streams and other less-than-intermittent features are common across the Virginia landscape. Thus VMA is particularly concerned about the Agencies' apparent attempt to expand federal CWA control over these previously non-jurisdictional features via the sweeping new definition of tributaries. As noted above, under the Proposal, all tributaries — perennial, intermittent and ephemeral — would be deemed to be per se jurisdictional. The VMA fails to see how this approach is supported by the underlying science or, more importantly, how it comports with binding Supreme Court precedent. The implications for manufacturers in Virginia are significant. (p. 2-3)

US EPA ARCHIVE DOCUMENT

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

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity.

The final rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Indiana Republican Congressional Delegation (Doc. #18822)

17.1.951 As written, this rule has the potential to have significant implementation costs. It appears that EPA will begin regulating many pieces of land which have not historically required permits. By adding more regulations, farmers, units of government, builders, and other businesses will be required to hire more staff to handle permitting and compliance issues or to contract with other businesses. Those requirements have significant costs without a known benefit. This is unacceptable at a time when the economy has not recovered.

The rule also has the potential to add significant delays in permitting. Many of the projects undertaken by farmers and government are to address emergency situations such as when a road washes out or significant erosion threatens to harm private property. Waiting on the Federal permitting process will only add to the potential harm to both people and property. As individuals responsible for the safety of others, local government will be jeopardized in its ability to serve its constituents. Farmers will be impacted by potential restrictions on their ability to properly manage their farmland and produce the crops and livestock up on which much of the economy is built and people rely.

We are concerned that the new definition of a tributary may be used to justify the regulation of water features which are not considered a "tributary" in any common sense of the word. We understand that the features must have a bed, bank and ordinary high

US EPA ARCHIVE DOCUMENT

water mark. Based upon recent implementation of this definition in Indiana, it appears that water features which are completely temporary and drain few acres are going to be considered tributaries. Those water features provide no base flow and thus would not normally be considered a tributary as it is commonly understood or as it would appear to have been historically interpreted by the agency.

We have significant concerns about the potential reach of this rule-with respect to ditches. As written, the rule appears to give the agency control over nearly every ditch in existence in our state. Most ditches are temporary features, and they should not be subject to agency control. Finally, the definition or lack thereof for the "other waters" category also raises much concern. It is difficult, if not impossible, to understand what is meant to fall within this category. However, a review of the trend to include more features within the regulations leads to the conclusion that "other waters" will be broadly interpreted. While this rule was supposed to provide clarity and certainty, it instead creates confusion and fear that the agency is going to exert authority over things typically within state or local jurisdiction. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories. The agencies also believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The final rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States." There are also specific exclusions in the rule for ephemeral ditches and erosional features, which not jurisdictional. Please see the preamble, the Tributary Compendium, the Ditches Compendium and the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

US EPA ARCHIVE DOCUMENT

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

Florida Department of Transportation (Doc. #18824)

17.1.952 The proposed language appears to broaden the definition of WOTUS. The new or revised definitions of "tributary," "adjacent," and "neighboring" support the FOOT's assertion. The only requirement to be deemed a tributary is "the presence of a bed and banks and ordinary high water mark." A "tributary" could be considered jurisdictional even if it is a "man-made water." The connectivity of a tributary can also be through "one or more man-made breaks (such as bridges, culverts, pipes, or dams)". The term "adjacent" is expanded to include "waters , including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." Further, the term "neighboring" is used in the definition of "adjacent." Neighboring waters are those that are "located within the riparian area or floodplain of a water... " The rule does not specify the return period of the floodplain; this could, if a 100 year floodplain is used, identify vast acreage in Florida as "neighboring waters." An expanded definition of WOTUS would have a significant impact on the jurisdictional areas the FOOT would be required to assess as part of our project development process. It also increases the amount of jurisdictional areas the FOOT would be required to provide mitigation for in the event that there are unavoidable wetland impacts. (p. 4)

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

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

The final rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create

US EPA ARCHIVE DOCUMENT

such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States." There are also specific exclusions in the rule for ephemeral ditches and erosional features, which not jurisdictional. Please see the preamble, the Tributary Compendium, the Ditches Compendium and the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Under the final rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. See preamble and Adjacency Compendium for further discussion of adjacency.

City of Goose Creek, South Carolina (Doc. #18827)

17.1.953 Given the assessment of the proposed regulations/definitions and considering all tests in total, in many areas throughout the City of Goose Creek the following types of water bodies will now be considered to be jurisdictional waters of the United States:

Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) within the floodplain of classic Waters of the U.S.; and

Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) that have a direct connection to Waters of the U.S.

Note that the expansion of the number of jurisdictional waters may be especially pronounced in the City of Goose Creek, where ditches may exist that are built in and drain uplands but have significant groundwater inputs. If they have constant flows from groundwater, they could be considered to be Waters of the U.S. even if constructed in uplands. (p. 1-2)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional. For example, an entire roadside ditch does not become subject to jurisdiction because a portion of it is excavated in or relocates a tributary.**

US EPA ARCHIVE DOCUMENT

In addition, it was not the agencies' intent to change current practice to make stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land "waters of the United States. In the final rule, the agencies added an exclusion to reflect current agencies' practice, and (b)(6) of the final rule excludes "[s]tormwater control features constructed to convey, treat, or store stormwater that are created in dry land."

Under the final rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. See preamble and Adjacency Compendium for further discussion of adjacency.

Concerned Citizens of Long Branch and NJ Environmental Justice Alliance (Doc. #18829)

17.1.954 We (…) support, and call(…) on the strengthening, of the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed Definition of Waters of the United States Under the Clean Water Act to clarify which streams, wetlands and other waters are protected under the Clean Water Act. (p. 1)

Agency Response: With the final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

BMG Marine, Inc. (Doc. #18855)

17.1.955 EPA has indicated this proposed rulemaking is for clarification. However, there is no regulatory failure that justifies this proposed rulemaking. In fact, on two separate occasions, (SWANCC and Rapanos), the Supreme Court has ruled against this type of agency efforts. (…)

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

Agency Response: With the final rule, the agencies are responding to requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States*, 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the

US EPA ARCHIVE DOCUMENT

resulting opinions of the Court can be found in section III.A of the preamble to the final rule. See the preamble and TSD for additional discussion of the legal basis for this rule. EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The Honorable Kevin Boyle, et al. (Doc. #18858)

17.1.956 We support the draft rule's proposal to restore Clean Water Act protection to all tributaries of navigable waterways. Failure to do so would jeopardize water quality in our larger riversheds and estuaries. It would also put at risk the millions of dollars and thousands of jobs generated by water related tourism activities and other businesses that are dependent on clean water supplies. (p. 2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.**

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

Action United, et al (Doc. #18859)

17.1.957 We support the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries. (p. 2)

Agency Response: **This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the**

US EPA ARCHIVE DOCUMENT

nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

South Carolina Public Service Authority (Doc. #18860)

17.1.958 Virtually all ditches contribute flow, either directly or through another water, to a WOTUS. If ditches were declared WOTUS, there would be significant new regulatory burdens and cost impacts. Activities that involve dredging (i.e., sediment removal) or filling (e.g., culvert installation or building expansions) of any portion of the ditch system could require permitting and potential mitigation. Compliance with NPDES Storm Water permitting obligations would be of particular concern. If the ditches of the stormwater drainage system were determined to be WOTUS, the compliance point(s) would move from where the storm water leaves the drainage system to the points where various stormwaters enter the ditch. Imposition of numeric limitations, for example, could involve additional design, permitting, construction, and operational cost for facilities. This additional time would delay many routine types of maintenance and minor modification activities. This would also make those storm water systems redundant and essentially useless for their intended purpose, and would add exorbitant costs (mostly borne by the customers) for replacement systems that provide little or no additional benefit. State, Federal, and local governments also would face additional costs, since they would have to establish water quality standards for those water bodies and issue permits for the individual points where storm water(s) enter the drainage systems. (p. 2-3)

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

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather

US EPA ARCHIVE DOCUMENT

exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. Where a ditch is excavated in or relocates a covered tributary, only the segment of the ditch actually excavated in or relocating the covered tributary would be considered jurisdictional.

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

17.1.959 The proposed approach is certain to sweep in many features that have only remote and insubstantial connections with traditional navigable waters. Waters that used to be considered "isolated" and therefore beyond the scope of CWA jurisdiction will now be "adjacent" and the proposed "shallow subsurface hydrologic connection or confined subsurface hydrologic connection" language will be used to assert jurisdiction over any wet area, including on-site ponds and impoundments. Such unrestrained jurisdiction would have major impacts for electric utility's facilities which rely on industrial ponds, impoundments, and other similar formations for their operations. Only wetlands should be jurisdictional by virtue of adjacency. (p. 4)

<u>Agency Response:</u> The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion

US EPA ARCHIVE DOCUMENT

applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis. At the core of the "significant nexus" analysis, the protection of upstream waters is critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present.

The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area, but instead provides distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

17.1.960 The proposed rule would drastically expand WOTUS jurisdiction of the agencies, which would subject more utility projects and activities to CWA jurisdiction. This expansion would mean that some projects' permitting processes would be required to undergo lengthier and costlier individual Section 404 permit procedures. It also would affect the applicability of and compliance with other CWA programs, including NPDES requirements for industrial and municipal wastewater and storm water, Section 311 requirements, and Section 401 certification, to name a few. These impacts would affect utilities and the costs would be passed along to their customers. The proposed rule would apply to myriad internal features on utility company facilities, most of which are components of facility systems that are already regulated at their points of discharge to external waters under the CWA, and will result in duplication and unnecessary regulation of features on electric utility sites. (p. 5)

<u>Agency Response:</u> 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.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will be required. The agencies also believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and

US EPA ARCHIVE DOCUMENT

cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

See preamble and Exclusions Compendium for further discussion of excluded features.

Western Farmers Electric Cooperative (Doc. #18861)

17.1.961 Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect WFEC and members by delaying and increasing the costs for (1) constructing and maintaining power lines; (2) operating and maintaining existing and new generation, including generation from both traditional fuels like natural gas and renewables; and (3) decommissioning existing generating facilities. As coops across the nation increase generating capacity to meet growing demands of our members and to invest in generation from other fuels (including renewables), we will need to build new transmission and distribution infrastructure. (…)

WFEC is especially concerned about the potential impact of the proposed rule on our operations. Specifically:

- WFEC's ability to maintain- including repair- our existing power lines
- WFEC's ability to construct new power line- especially lines related to newer generation WFEC's ability to manage small, de minimis, spills along our rights of way
- WFEC's ability to manage waters- including wastewater, stormwater, and cooling water - at our current generating plants, power lines, substations, and switch stations.
- WFEC's ability to site and construct new generation- including new renewable generation
- WFEC's ability to retire old sites and convert them to new, productive use. (p. 2)

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

This rule also does not change the longstanding regulatory exclusions for wastewater treatment systems designed to meet the requirements of the CWA (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments.

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will be required. The agencies also believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and

US EPA ARCHIVE DOCUMENT

cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

American Public Gas Association (Doc. #18862)

17.1.962 What this illustrates is that permitting on CWA waters is slow now, and if the Agencies are successful in extending their jurisdictional reach, acquiring such permits will be even slower and more widespread in the future. This will be especially so, if as appears to be the case, the Agencies are not seeking any, much less adequate, additional funding to support their widened authority. The bottom line is that this will make operating safe and efficient natural gas distribution systems more difficult and more expensive, without any offsetting benefit.

With the potential increase in the number of geographical features that would have to undergo a review and likely additional permitting, APGA's members are concerned with the impact the increased workload would have on the Agencies with respect to both the quickness of the review process and the quality of the review. Due to the nature of our business, timely review and issuance of permits are not only critical to maintain safety but are also critical for maintaining a reliable and resilient system. (p. 3)

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

Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will be required. The agencies also believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

17.1.963 APGA believes, is that the proposed rule will subject far more activities to both federal and state CW A permitting requirements, NEP A analyses, mitigation requirements, and citizen lawsuits challenging the applications of new terms and provisions. The impact will be felt by our members and our member's customers, especially small businesses that are likely to be least able to absorb the costs. The potential adverse effect on economic activity and job creation in many sectors of the economy has been largely dismissed by the Agencies and certainly is not reflected in EPA's flawed economic analysis for the proposed rule. Neither do the Agencies adequately address the effect on state and federal resources for permitting, oversight, and enforcement. (p. 4)

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

US EPA ARCHIVE DOCUMENT

See the Economic Analysis for the final rule for a discussion of the agencies' estimates of costs and benefits for CWA programs as a result of implementation this rule.

Hagerman-Dexter Soil and Water Conservation District (Doc. #18863)

17.1.964 We are opposed to the proposed rule and request that it be withdrawn. We along with other agencies including New Mexico Department of Agriculture, Central Valley Soil and Water Conservation District and Penasco Soil and Water Conservation District feel that this rule will create a burden on the economically and cultural environment of our district and state. This rule is a burden on agricultural and natural resource. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Independent Petroleum Association of America, et al. (Doc. #18864)

17.1.965 These joint comments provide the following key points:

- Impact on Operations. Factual examples of the exploration and production industry demonstrate the expansive nature of this proposal and the impacts on the industry.
- Improper Implementation of the Clean Water Act and Rapanos. The proposal fails to adhere to the CW A and the Rapanos decision. The significant nexus test as proposed results in a regulatory over-reach beyond the jurisdiction of the CWA.
- Complicated and Unwarranted Proposal. The proposed definition complicates rather than streamlines administration of "waters of the United States" under the Clean Water Act and the purpose for change is not well justified.
- Regulated waters broadly defined. The proposed definitions for tributary, adjacent waters, neighboring, riparian area, and floodplain and the scope of "other waters" create confusion and will result in significant administrative burdens.
- Connectivity Report. The scientific assumptions of the report were not informed by the appropriate jurisdictional scope of the CWA; therefore, its conclusions are not relevant.
- Expanded Economic Impact. The economic analysis of this proposal demonstrates broadening of the regulatory scope of "waters of the United States" as evidenced

US EPA ARCHIVE DOCUMENT

by the increase of overall jurisdiction by 3 percent. The proposed definition is dismissive of the fact that the CWA was not intended to regulate all waters of the United States. The Associations believe that the agencies assertion of an overall jurisdictional increase of 3 percent grossly underestimates the scope of waters that would be jurisdictional under the proposed rulemaking.

- Grandfathering Needed. Grandfathering of pending and existing CWA authorizations and interpretations must be addressed.
- Exhaustion of Existing State and Federal Resources. State regulatory authorities (e.g., groundwater, water quantity) and state and federal resources (administrative staff) have not been adequately addressed in this proposal. It is apparent that states were not consulted in the development of this proposal when they should have been.
- Future Litigation. This proposal invites significant citizen suit litigation with its overly broad jurisdictional implications. (p. 3-4)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.**

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

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

Please see responses to each point in other Compendiums.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Teichert Materials (Doc. #18866)

17.1.966 Due to our geographic location in California's Central Valley, many of our operations have the potential of being significantly affected by the proposed actions of ACOE and EPA if not done mindful and fully engaged with our industry. We send this letter as a written declaration that we are concerned that EPA (and ACOE) have NOT been fully engaged and are NOT fully and honestly taking into account the comments, science and economic scope of the proposed rule as written. In turn, we are requesting that this proposed rule be withdrawn by EPA and the Corps and the rulemaking process started again in a more collaborative manner with stakeholders. (p. 1)

Agency Response: This rule reflects significant consultation with many stakeholders. The EPA held over 400 meetings with interested stakeholders, including representatives from states, tribes, counties, industry, agriculture, environmental and conservation groups, and others during the public comment period.

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

17.1.967 While Teichert and our employees pride ourselves as being environmentally responsible in the planning and mitigation of our environmental impacts, we are concerned that the scope of the rule has the high potential to negatively impact the planning, permitting and operation of our aggregate related facilities while offering limited environmental and economic benefits. Through increases in the time required to acquire permits, increased costs in mitigation, and related eventual reductions in the amount of companies willing or able to bring permitted reserves to market, the potential impacts of EPA's proposed rule, as it stands, would increase costs and decrease viability of public works projects and regional infrastructure. These increased costs would be borne by the taxpayer and would have negative impacts on employment in an industry where wages have remained strong.

In closing, we urge EPA and the Corps to withdraw the current proposed rule and work with the aggregate industry and all other stakeholders in an open and collaborative process to develop language for a new rule. The stakeholders would include the state agencies responsible for implementing and enforcing Section 401 of the CWA. Such a process will hopefully lead to a rule that is clear, is based on science, incorporates Section 401 considerations, and does not impose an undue economic burden on our industry or the economic prosperity of America while also recognizing the important role that functioning wetlands play in our environment and the need to protect them to the extent practicable through informed regulation. (p. 3)

Agency Response: The agencies have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach

events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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 agencies believe that the rule will expedite the permit review process in the long-term by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community for certain waters in light of the 2001 and 2006 Supreme Court cases.

While the rule imposes no direct costs, the agencies developed an economic analysis based on the proposed rule and have revised the analysis based on the final rule policies and public comments. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs. See the Economic Analysis for further discussion of the costs and benefits assessment.

Pioneer Natural Resources USA, Inc (Doc. #18874)

17.1.968 Expansion to Groundwater. The proposed expansion of the "Waters of the U.S." definition fails to acknowledge states' jurisdiction as exemplified in the reach to regulate groundwater. The connectivity analysis and the regulatory terms for "significant nexus" all involve groundwater impacts. (p. 3)

Agency Response: The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems. As discussed in the preamble to the proposed rule, the agencies have never interpreted "waters of the United States" to include groundwater. The exclusion does not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds.

Marcellus Shale Coalition (Doc. #18880)

17.1.969 CONFLICTS WITH PENNSYLVANIA STATE LAW

The Rulemaking is not only beyond the Agencies' statutory authority and improperly based upon a scientific question that cannot justify such an expansion, it would create significant and unnecessary conflicts with Pennsylvania law, which provides a robust system for the protection of waters of the Commonwealth under the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 396, as amended; 35 P.S. §§ 691.1 et seq.

As noted in the comment to the Rulemaking submitted by the Pennsylvania Department of Environmental Protection (PADEP), Pennsylvania has abundant water resources that are comprehensively protected under the Pennsylvania Clean Streams Law. PADEP issues thousands of permits and authorizations for the conduct of oil and gas operations, including well pads, compressor pads and pipelines, across the Commonwealth pursuant

US EPA ARCHIVE DOCUMENT

to the existing legal framework. The Rulemaking is not only unnecessary for the protection of waters in Pennsylvania; it is also likely to create conflicting obligations related to the construction and maintenance of oil and natural gas facilities.

Under the Rulemaking, ditches and ponds that are required and created in accordance with Pennsylvania earth disturbance permits for erosion and sedimentation control, or to manage stormwater runoff during and after earth disturbances, could become waters of the United States, triggering duplicative and contradictory permitting obligations with respect to the management of such features.

Erosion and sediment control/post-construction storm water management

In Pennsylvania, an erosion and sediment control plan must be prepared for any well site earth moving activities, (58 Pa.C.S. 3216(b)). Owners and operators must also obtain authorization under an Erosion and Sediment Control General Permit (ESCGP-2) for oil and gas activities that involve five acres or more of earth disturbance or under an individual permit, where appropriate, (See 25 Pa. Code 102.5(c)).

ESCGP-2 authorizations usually require drainage ditches around oil and gas operations to be constructed and stabilized with appropriate erosion and sediment controls. Under the Proposed Rule, the maintenance or repair of drainage ditches as required by the ESCGP-2 would be prohibited by the Corps without a Section 404 permit.

Stormwater detention ponds are installed to control storm water runoff from well pads. These ponds typically have an outlet that ultimately drains to a stream or wetland. Under the Proposed Rule, these ponds would be considered to be jurisdictional (as tributaries or adjacent waters). The maintenance, repair or removal of these ponds, as required by the ESCGP-2, would be prohibited by the Corps without a Section 404 permit. (p. 3)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding which waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be assessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective

US EPA ARCHIVE DOCUMENT

standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters.

U.S. Shorebird Conservation Partnership (Doc. #18881)

17.1.970 We understand the need for agencies to develop a clear and understandable rule that protects the Nation's waters, and is supported by science and consistent with the law. To that end, we believe Ducks Unlimited (DU) has provided you with a substantiated, scientific response to the proposed definition for "Waters of the United States". As well, DU's comments offer an analysis of the legal, biological, and societal implications of the final rule. The U.S. Shorebird Conservation Partnership urges you to carefully consider the recommendations they provided.

The understanding of connectivity of wetland systems throughout the U.S. is still emerging, and we support DU' s recommendation for you to use a "weight of evidence approach" for evaluating the science of wetland connectivity. We found their presentation of Justice Kennedy's example of the Gulf of Mexico hypoxia zone as strong evidence for carefully considering implications of wetland connectivity and downstream water quality. DU provides numerous suggestions on how to provide greater clarity to definitions of "adjacent waters" and "floodplains", and we concur with the idea, as supported by Justice Kennedy, of considering functional adjacency in defining the Nation's waters and not restricting the definition to physical proximity. We also support the recommendation of comprehensively mapping (a)(l) through (a)(3) waters to provide interpretive clarity. Mapping would also provide a basis for establishing a systematic approach to conducting significant nexus analyses for "other waters" on an ecoregional basis. More clarity should be provided in defining a significant nexus in the final rule, particularly when considering how cumulative impacts to "other waters", including geographically isolated wetlands, could affect downstream waters in the future.

The scientific literature clearly documents that many other wetlands and wetland subcategories falling within the proposed rule's "other waters" classification have similar types of significant nexuses with downstream navigable waters and should be designated as jurisdictional by rule. Abundant water resources not only support the economically important outdoor recreation industry, including hunters, anglers, and birders, but also alleviate economic burdens associated with the increasing frequency of damaging floods, harmful algal blooms, and environmental restorations. Additionally, surveys of the public from across the country demonstrate that a very large majority supports wetland conservation and clean water goals.

We realize a final rule must balance science and pragmatism such that the purposes of the Act are fulfilled and are consistent with the weight of the scientific evidence. The extent to which the final rule relies upon case-by-case analyses will be more impractical and costly for all entities, and perhaps open the door to increased litigation to dispute facts that are drawn and interpreted from various perspectives. In light of the extensive amount of science that demonstrates significant nexus for many classes of "other waters" within their regional contexts, designation as "jurisdictional by rule" will most often be more

US EPA ARCHIVE DOCUMENT

scientifically accurate than designation as "non-jurisdictional until determined to be so" via a case-specific significant nexus assessment that would suffer from the inherent shortcomings imposed by scientific and administrative realities. (p. 1-2)

Agency Response: **The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.**

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions for "adjacent," "significant nexus," and "other waters," as suggested in your comment.

Many commenters expressed concern that such a broad opportunity for case-specific "waters of the United States" determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

Kankakee River Basin Commission (Doc. #18886)

17.1.971 Agriculture and industry will be forced into costly efforts to determine what is regulated by the new WOTUS. This will certainly affect finances in a struggling economy. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part**

US EPA ARCHIVE DOCUMENT

because the rule puts important qualifiers on some existing categories such as tributaries.

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be assessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required

Pottawattamie County, Iowa (Doc. #18889)

17.1.972 The proposed rule creates the demand for more permits which will jeopardize the Iowa Nutrient Reduction Strategy already underway. The cumbersome permit process will discourage conservation practices due to cost of paperwork and loss of time. It takes control of local land use decision out of the hands of the landowners. (p. 1)

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

The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

Georgia Association of Manufacturers (Doc. #18896)

17.1.973 GAM is very concerned about the impact on economic development this change would engender when one considers the increased pem1itting burdens for industrial facilities, office parks, roads and sewers, and other developments. While the Agencies ' assertions that the proposed rule is intended only to clarify the definition of" Waters of the United States" may be genuine, the result of the actual proposal would be to increase the scope of federal jurisdiction and impose burdensome costs on industry that will stifle economic development. (…)

The proposed rule does nothing to resolve any lack of clarity but instead dramatically increases regulatory burdens and inefficiency. The result could be disastrous for the U.S. economy. (…)

The proposed rule expands the concept of "adjacent waters" to capture isolated bodies of water. Specifically, it would make all "waters" within the floodplain of a river or tributary automatically jurisdictional. This will increase the costs of development and stunt economic growth. (p. 2)

US EPA ARCHIVE DOCUMENT

Agency Response: **EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.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 definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area, but instead provides distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.**

Cross Three Quarter Horses and Livestock (Doc. #18902)

17.1.974 I am a property owner in Montana. On our ranch, we are very involved with range and water quality measures, working closely with our Natural Resources Conservation District, and industry experts to protect, enhance and improve our property and water resources. I feel the proposed changes regarding the EPA WOTUS are over-reaching, detrimental to landowner rights, and will have numerous unintended consequences, hampering landowners' abilities to best manage their resources in an environmentally and economically sound manner. The management of landowner's water and water resources are best left to the landowner. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. The agencies recognize the vital role of farmers and ranchers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

West Valley Planned Communities (Doc. #18906)

17.1.975 We are writing this on behalf of west valley planned communities. These planned communities typically have several recreational features, including golf courses, which could be impacted by the proposed rule. Planned communities, which are very common in the arid west, are designed with stormwater and flood control and erosion control features that collect and transfer water into flood-control canals. These flood-control canals are often owned and managed by a flood control district, and often discharge into dry washes and arroyos that could meet the definition of "tributary" of the proposed rule.

US EPA ARCHIVE DOCUMENT

Consequently, EPA's proposed rule presents a significant regulatory and economic burden on planned communities.

In addition to the stormwater and flood-control features within the communities themselves, there are often recreational features within these planned communities that may be impacted by the proposed rule. These recreational features include artificial lakes or ponds, golf courses, parks, and other green spaces. These recreational features are designed with inlets from adjacent property, including streets, which allow ephemeral flows to cross the property and collect in various water features. The water features serve as water storage and flood and erosion control. The water features include natural and man-made lakes, ponds, drainage ditches and waterways, and typically drain into some type a county flood-control canal. These canals will often discharge into dry washes and arroyos that could meet the definition of "tributary" of the proposed rule.

In both of these scenarios, the proposed rule could allow the EPA or Army Corps to assert that certain water features within planned communities are either "waters of the U.S.," because they fall within the expansive definition of tributary, or they are point sources that require compliance with Section 402 of the Clean Water Act ("CWA"). This would be a massive expansion of the jurisdiction of the CWA, and bring several water features within the regulatory regime of the EPA, Army Corps, and Arizona Department of Environmental Quality for the first time. EPA has repeatedly represented that the intent of the proposed rule is to provide "clarification" and not to expand the jurisdiction of the CWA and, consequently, the proposed rule should be abandoned, as it currently fails to accomplish the agency-stated goal. (p. 1-2)

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

EPA and the Corps have used the feedback we received from public outreach efforts and the written comments received during the public comment period to reshape each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The final rule has included clearer definitions and has increased the use of bright-line rules to provide greater predictability in implementing the Clean Water Act.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, and they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where

US EPA ARCHIVE DOCUMENT

such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

In addition, the rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comments, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

Clark Canyon Water Supply Company (Doc. #18932)

17.1.976 Common features such as on-farm ponds, retention basins, water courses, ditches, streams, potholes and wetlands may all become subject to federal regulation under the CWA. CCWS's small family-run farms and ranches cannot withstand the expense and delay associated with CWA permits or fines for noncompliance while performing traditional farming practices such as the application of fertilizer, pesticides, herbicides, or even performing such common tasks as earth moving, plowing and fencing. Nor can CCWS's farmers economically engage in water conservation and irrigation improvement projects on their farms if they must endure the cost and delay of finding their way through the labyrinth of the EPA's or the Corps' various permit requirements. The CWA was never intended to regulate such typical and traditional farming and ranching activities where water from such work does not flow directly into navigable streams or which does not otherwise have a significant nexus to waters already under the CWA's jurisdiction. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.**

US EPA ARCHIVE DOCUMENT

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

17.1.977 Until the EPA, assisted with scientific evidence, can establish clear rules regarding return flows, farmers and ranchers would be left in limbo under the proposed rules trying to determine whether they are subject to the CWA's permitting and punitive fine provisions. (p. 3)

<u>Agency Response:</u> To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together

US EPA ARCHIVE DOCUMENT

form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity.

The rule does not affect or modify in any way the many existing statutory exemptions under Clean Water Act (CWA) Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. Section 404(f)(1)(B) exempts dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" for more information. The rule also does not affect or modify existing statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding practice, these exempt activities do not change the jurisdictional status of the water body as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f)(1).

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

<u>Wyoming Board of Agriculture (Doc. #18938)</u>

17.1.978 We strongly believe the proposed rule will inappropriately expand jurisdiction under the CWA. The proposed rule defines adjacent water as bordering, being contiguous, or neighboring traditional waters. The definition then includes within the

US EPA ARCHIVE DOCUMENT

term neighboring waters located in riparian areas or floodplains adjacent to traditional waters. This will expand the CWA jurisdiction onto lands that would not normally be considered within the scope of a significant nexus and will provide uncertainty, confusion, be extremely time consuming and costly. All of which goes against the purpose of the proposed rule. (p. 1-2)

Agency Response: **This final rule interprets the Clean Water Act 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 establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations. Significant nexus is not a purely a scientific determination and neither is the agencies' interpretation of the scope of "waters of the United States." Further, the opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.

The final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. In order to improve clarity, the final rule expands the discussion of excluded waters and other features not regulated. When a water is excluded by rule, it is not a "water of the United States" even where it meets the definition of a paragraph in (a)(4) through (a)(8).

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

Progressive Farm Credit Services (Doc. #18948)

17.1.979 Progressive Farm Credit Services opposes the definitions of the Waters of the United States as proposed in the regulation because they are too broad and overreaching. It will lead to substantial new restrictions and confusion about what activities farmers and ranchers can do, and when they can do it, on their land. There are already a lot of regulations, restrictions, penalties and fines in place for misapplication of fertilizers and chemicals, and the proposed rule would interject another agency into the current process, making it more complex and difficult to comply with. It would result in a vast unwarranted expansion of the duties of the EPA to expand its jurisdiction to encompass virtually all farm and ranch land in the nation. (p. 1)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more**

US EPA ARCHIVE DOCUMENT

predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to Clean Water Act jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

Maryland Building Industry Association (Doc. #18978)

17.1.980 The proposed changes have the potential to extend the limits of federal jurisdiction, particularly for ephemeral streams. As a result, any proposed impacts to these areas could require additional stream mitigation.

Given the complex and detailed permitting processes in Maryland, we see the very real potential of lengthy discussions, application procedures and timelines on what "water features" are regulated or not. If this regulation is approved as proposed, all this uncertainty will translate to a prolonged state/federal permitting process causing major delays and increasing the cost of project development and construction. The current Economic Analysis of the proposed rule fails to consider the full cost of implementation. (p. 2-3)

Agency Response: **The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.**

The science has advanced considerably in recent years and the comprehensive report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereafter the Science Report) synthesizes the peer-reviewed science which support the connection of tributary

US EPA ARCHIVE DOCUMENT

streams to the chemical, physical, and biological integrity of downstream waters. The agencies believe that by defining "tributary" for the first time and including the requirements for an ordinary high water mark and bed and bank. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Where ephemeral features do not meet the definition of tributary, there are new exclusions for ephemeral ditches and erosional features which not jurisdictional. Please see the preamble, and the Tributary Compendium, the Exclusion Compendium for a discussion on the definition of tributaries, the relevance of flow regime, and the exclusions.

City of Hanahan, South Carolina (Doc. #18983)

17.1.981 Since the regulations are jointly issued by EPA and the Corps, there are at least two significant consequences which will affect the City of Hanahan:

- MS4 permit requirements and water quality standards must be met in stormwater conveyances and retention structures that are determined to be Waters of the U.S., including applicable water quality criteria and other permit conditions.
- Dredge and fill permitting policies of the Corps will be applicable to stormwater attenuation ponds, drainage ditches and other conveyances that are determined to be Waters of the U.S., even during routine maintenance activities. (p. 1-2)

Agency Response: This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

The EPA considers MS4s to be systems, and in terms of jurisdiction MS4s should be thought of as component parts and not a singular entity. MS4s can include jurisdictional and non-jurisdictional features and the Agencies have committed to clarifying which are jurisdictional and which are not. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific

US EPA ARCHIVE DOCUMENT

characteristics of each system. The Agencies generally discourage using jurisdictional waters for waste treatment. However, it may be appropriate in certain circumstances where the Corps of Engineers issues a permit for the construction of such a treatment system, based on an application of the 404(b)(1) guidelines.

The rule does not change the fact that discharges of backfill, fill and/or excavated material into jurisdictional waters may require a permit under Section 404 of the Clean Water Act. However, many activities associated with routine or emergency road maintenance or repair have been and continue to be either exempt from such permitting (see, e.g., 33 C.F.R. §§323.4(a)(2) and 323.4(a)(6)), already authorized by Corps of Engineers nationwide permit #3, or eligible for abbreviated emergency permitting procedures (pursuant to 33 C.F.R. §325.2(e)(4)).

Abbott, P. (Doc. #19212)

17.1.982 Many ponds and lakes would become subject to the CWA under this proposal. Agriculture is likely to be adversely affected by this proposal due to the broad definitions of adjacent waters and tributaries. Many ditches used for drainage or agricultural runoff would become subject to the CWA coverage. Also, ditches and other manmade waters can be considered a tributary under this proposed rule, which would likewise bring it under CWA jurisdiction. (p. 1)

Agency Response: The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by 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. Along with a narrowing of

US EPA ARCHIVE DOCUMENT

jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required. The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

The rule also clarifies that a water meets the definition of tributary if the water contributes flow through an excluded feature such as an ephemeral ditch. While the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional.

Park County Commissioners, Montana (Doc. #19240)

17.1.983 As public officials in a mostly rural, agricultural county in Montana, we believe that the proposed changes, if adopted, will cause significant harm to local ranchers, stall the development of business and negatively impact the general welfare of Park County, Montana. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

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"

US EPA ARCHIVE DOCUMENT

under the rule than under the existing regulations. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

South Carolina Farm Bureau (Doc. #19246)

17.1.984 Everyone agrees that clean water is a must for South Carolina farmers. Time and again, farmers have always been at the forefront of conservation efforts because they depend on clean water. In short, clean water is good business. However, the proposed WOTUS rule will have a limited impact on water quality at the expense of crippling family farms and small businesses in South Carolina. Accordingly, we strongly urge the EPA and the Corps to withdraw the WOTUS rule. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

There is no change in the treatment of NRCS determinations. There is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

US EPA ARCHIVE DOCUMENT

Pinnacle Real Estate (Doc. #19249)

17.1.985 The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (The Corps) have issued a proposed rule-making that redefines most water bodies as "waters of the U.S.," which is a fundamental change to the Clean Water Act. If promulgated, this proposed regulation would place more water bodies under the authority of the EPA and the Corps, which would result in more time consuming and expensive permits, regulatory red tape, and less economic development in communities across the country. (p. 1)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

17.1.986 This will not only affect my ability to sell rural properties that have water rights but it can also affect my own property. I live in the Hondo Valley and rely on the water for pasture and watering my livestock. Not to mention our domestic well. If the government takes control of the water usage it will drastically affect

We are already in pre-litigations over moving water out of the valley into the village of Ruidoso to support the village and that will affect the valley drastically because the valley is downstream from the village. The current climate has left the river bed often to dry to water.

Please withdraw the proposed rule to regulate any bodies of water! (p. 1)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to Clean Water Act jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

US EPA ARCHIVE DOCUMENT

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under Clean Water Act Section 404(f).

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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

As explained in the record, this rule will not cause a "significant increase" in the scope of Clean Water Act jurisdiction, and the agencies disagree that there will be a proliferation of litigation.

U. S. House of Representatives (Doc. #19303)

17.1.987 The family farms of the Hudson Valley create thousands of jobs and bring in millions of dollars to the regional economy. But too many of them are struggling to get by. Small family farms already face significant obstacles and razor thin profit margins, the last thing the government should be doing is saddling them with unnecessary burdens. Instead they need support, certainty, clarity and technical guidance for their soil and water conservation activities.

As folks who make their living off the land, farmers are often leaders in environmental conversation. Farmers in my district have cautioned that the interpretive rule, rather than support local agriculture and environmental conservation, may actually have the opposite effect. There is real worry that by specifically listing 56 NRCS conservation practices as exempt from 404 permitting your agencies are creating the impression that a wide range of conservation practices not specifically listed would be subjected to permitting requirements. As you know, the Clean Water Act statutorily exempts normal agriculture practices, and those 56 NRCS practices must affirm - not be seen to limit - those longstanding, reasonable exemptions. Any guidance that fails to do so violates Congressional intent and is therefore inherently unacceptable. Moreover, an overreliance on NRCS practices could lead to increased confusion. As a joint letter of concern from the New York State Department of Environmental Conservation and Department of Agriculture and Markets pointed out, "NRCS practices contain generic considerations, technical specifications and certain requirements, elements [that] will lead to varying interpretations and judgments." For these reasons, I ask that you withdraw the interpretive rule and work with stakeholders to address their concerns before moving forward. (p. 1)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and**

US EPA ARCHIVE DOCUMENT

landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

There is no change in the treatment of NRCS determinations. There is no requirement for NRCS program participation within this rule. NRCS management of their program is outside the scope of this rule. The Joint Guidance from the Natural Resources Conservation Service (NRCS) and the Army Corps of Engineers (COE) Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, (dated February 25, 2005) remains valid. The final rule does not change the definition of wetlands nor in any way change the tools used for delineating wetlands.

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries," including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by 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.

United States Senate (Doc. #19307)

17.1.988 I write today regarding your agencies' proposed regulation to expand the definition of federal waters under the Clean Water Act. As I expressed to Administrator McCarthy in a July meeting at the Senate Agriculture Committee, the coal and agriculture industries would be severely damaged by this proposal. I have since heard this same message from numerous other job creators from my home state, including commercial development and real estate industries as well as the construction and contracting industries that rely upon them. It is evident that the collective toll this proposal would have on Kentucky jobs and economic productivity would be devastating.

Your agencies are proposing to regulate nearly every wetland, stream and ditch across Kentucky and the United States. Indeed, your agencies have provided a drastic expansion of the definition of what constitutes a wetland, and thus what areas would be subject to federal permitting requirements under the proposed rule. As such, more time and money will be necessary to determine whether a federal permit is required for construction of

US EPA ARCHIVE DOCUMENT

new projects or renovation of existing properties. This will represent fewer opportunities to begin new construction, grow businesses and create jobs.

Moreover, there is likely to be an increase in the number of individual property and business owners who will be subject to Environmental Protection Agency regulation and water quality standards for ditches, streams, or other features on their property who had not been previously regulated. This could further stagnate job creation as many across various industries choose to forego undertaking new projects due to uncertainty regarding permits, as well as out of fear that the federal government now has a greenlight to regulate more of their land.

Additionally, by increasing the number of wetlands subject to regulation, your proposal will require more individuals and businesses to obtain federal and state CWA permits. The CWA permitting process is already burdensome and slow, and adding more applications to the pile will only generate longer wait times and uncertainty for all businesses dependent on these permits to operate, including those traditionally dependent on permits prior to this proposal. I believe this proposed regulation is an unjustifiable intrusion by the federal government into private property rights, as well as a deterrent to job growth for countless Kentuckians. As such, I respectfully request that you withdraw this proposed rule. (p. 1)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The Clean Water Act only deals with the pollution and destruction of waterways—not land use. Nor does this rule affect private property rights.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Smith's Ready Mix, Inc. (Doc. #19313)

17.1.989 Smith's Ready Mix, Inc. supports and is committed to smart practices and common sense methods for keeping our nation's waterways and their tributaries clean and healthy. Smith's Ready Mix, Inc. appreciates the opportunity to comment on the Army Corps of Engineers (the Corps) and Environmental Protection Agency's (EPA) (collectively the agencies) proposed rule "Definition of `Waters of the United States' Under the Clean Water Act." While Smith's Ready Mix, Inc. understands the need for strong laws and regulations, we believe that incentivizing and promoting environmentally conscientious practices will go significantly further to achieving the goals of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," than expensive new regulations. (…)

In order to have an effective rule, everyone must understand how to comply with it. The proposed rule's vague and confusing definitions make it nearly impossible for ready mixed concrete producers to determine what they will need to do to meet federal requirements for doing every day, routine tasks around their facility and on a construction site. Furthermore, Smith's Ready Mix, Inc. already has to, and does, comply with numerous requirements to ensure that all waters on and around ready mixed concrete facilities are not subject to harmful pollutants and discharges; begging the question of why such a confusing "clarification" would then be needed at all?

Smith's Ready Mix, Inc. has concerns that this rule will greatly increase the cost of doing business, as well as, raise the cost of all construction projects across the country to unacceptable and unnecessary levels. Smith's Ready Mix, Inc. suggests EPA take great consideration of the economic effects on both materials. Please see comments submitted by the National Ready Mixed Concrete Association for more information, in part, on the economic impacts on the industry as a whole. (…)

Finally, Smith's Ready Mix, Inc. is greatly concerned about how the broad, vague language in the rule is being interpreted. If the regulated community can read the rule to mean nearly every place where water falls on the ground after it rains, could be subject to federal jurisdiction and that is not the agencies intent, as representatives for the EPA and Corps have repeatedly asserted in stakeholder meetings and hearings, then the rule needs to be pulled back and the agencies need to try again.

Smith's Ready Mix, Inc. requests that the agencies withdraw the rule and work with their state and local co-regulators, and stakeholders, like the National Ready Mixed Concrete Association (NRMCA), to come up with a clearer definition of waters of the United States. The agencies are under no legal or statutory deadline for completing this rule, so there is ample time to work to get it right. (p. 1-2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

The Clean Water Rule will clarify that the Clean Water Act protects certain streams and wetlands. Protection for about 60 percent of the nation's streams and millions of acres of wetlands has been confusing and complex as the result of Supreme Court decisions in 2001 and 2006. For nearly a decade, 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.

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

The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that

US EPA ARCHIVE DOCUMENT

under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations.

Louisiana House of Representatives (Doc. #19316)

17.1.990 I write to you to express my opposition to the proposed Rule concerning the Clean Water Act because I think it is an overreach by the federal government into local and state matters. The rule introduces terms such as "tributary" and "flood plain" and defines these terms very broad. As I read the proposals, it seems to me that the rule seems to bring within the EPA's power every water and land that happens to lie within giant flood plains based upon the premise that those waters and lands may connect to national waters after a "once in a blue moon" rain storm. This concerns me about our rangers, farmers, and agricultural workers as it may place the federal government onto their properties. (p. 1)

Agency Response: The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

States and tribes, consistent with the Clean Water Act, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction 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 EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly

US EPA ARCHIVE DOCUMENT

reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

Upper White River Watershed, Missouri (Doc. #19323)

17.1.991 We commend your administration's proposed Clean Water Act rule for the protections it restores to headwaters streams and adjacent wetlands, and ask that the final rule offer similar protections for other important yet presently unprotected waters. We also support your administration's efforts to preserve longstanding Clean Water Act exemptions for farmers and foresters that encourage wise stewardship of land and water resources. (p. 2)

The final rule reflects that the scientific evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The health of rivers, lakes, bays, and coastal waters depends on the streams and wetlands where they begin. Streams and wetlands provide many benefits to communities – they trap floodwaters, recharge groundwater supplies, remove pollution, and provide habitat for fish and wildlife. They are also economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

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

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

F & W Forestry Services, Inc. (Doc. #19326)

17.1.992 The problems caused for private landowners with the definition and expansion is further exacerbated by COE and EPA regulators that continue to overreach their authority ignore written regulations with impunity and lack common sense in the application of the regulations supporting the statute. For example in the last few years I have had firsthand experience where my clients have had to:

US EPA ARCHIVE DOCUMENT

- Pay legal fees and purchase wetland mitigation credits for mowing a wetland (SAS 2011-00449) even though the regulations (FR 73 (250) 79641-79642, December 30, 2008 clearly states that "(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting and chainsawing) where the activity neither substantially disturbs the root systems nor involves mechanical pushing, dragging or similar activities that redeposit excavated soil material" does not constitute a discharge or dredged fill material.
- Spend months and 10's of thousands of dollars defending construction of a forest road to combat wildfire (originating on federal lands), facilitate the harvest of damaged timber and regeneration of pine plantations destroyed by this fire.
- Defend the right to construct and maintain forest roads, site prepare and regenerate forests in long established and managed timberlands.
- Convince Region IV EPA and the Savannah District COE that they don't have the authority to require written forest management plans and prior notification of planned activities prior to conducting statutory exempt activities; nor to define or otherwise unreasonably limit what is considered a normal ongoing ranching or silvicultural activity.
- Respond to the misuse and misinterpretation of the November 28, 1995 MOU which limits the use of mechanical site preparation for the establishment of pine plantations on specifically defined high quality bottomland hardwood and other defined wetland types.
- And, numerous other examples

Plainly put neither the EPA nor the COE have demonstrated an ability to efficiently and effectively manage the Section 404 Wetland program whether for normal ongoing agricultural and silvicultural activities or commercial development. Any further expansion or potential expansion of this program that would tend to increase the limits of federal jurisdiction on land use would likely have significant financial and management impacts on land use decisions that should be far beyond the purview of the Federal Clean Water Act. (p. 1-2)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will

US EPA ARCHIVE DOCUMENT

required, reducing state and federal workload associated with jurisdictional determinations.

Board of Madison County Commissioners, Virginia City, MT (Doc. #19370)

17.1.993 As elected public officials in a mostly rural, agricultural county in western Montana, we believe that the proposed changes, if adopted, will cause significant harm to local farmers, stall the development of businesses and negatively impact Madison County owned and maintained infrastructure such as bridges, roads and ditches. (p. 1)

Agency Response: The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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 agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

West Virginia Sustainable Business Council (Doc. #19423)

17.1.994 As West Virginia's statewide business organization promoting the connections between good environmental policy and a vibrant economy, the West Virginia Sustainable Business Council strongly supports the proposed "Waters of the United States" rule. (…)

About one million of West Virginia's 1.8 million residents rely on public water systems for their drinking water that originates in part in intermittent, ephemeral or headwater streams. As goes West Virginia residents' access to clean water, so goes West Virginia businesses. American businesses have always depended on the availability of clean water for their processes, and historically, the EPA's regulation in this area has been a successful example of the vital partnership between business and government. Whether companies are food producers, high-tech manufacturers of silicon wafers, providers of outdoor recreation or beer manufacturers, businesses rely on clean water to produce safe, high-quality products. The proposed rule will clarify the Clean Water Act's jurisdiction, reduce uncertainty, and protect drinking water for millions of Americans whose source

US EPA ARCHIVE DOCUMENT

water originates in the West Virginia headwaters— including those who reside in West Virginia. For these reasons, we strongly support the proposed rule making. (p. 1)

Agency Response: **The agencies agree. This final rule interprets the Clean Water Act 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. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing.**

American Legislative Exchange Council (Doc. #19468)

17.1.995 WHEREAS, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers have proposed a rule to redefine "waters of the U.S." that could significantly increase the cost and regulatory requirements for state and local governments and ultimately the costs for state and local residents and businesses; and (p. 4)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. 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.

CEMEX (Doc. #19470)

17.1.996 The Agencies should not adopt new terms which will require case-by-case analysis, like "floodplain," "riparian area," and "shallow subsurface hydrology."

The agencies should not adopt terms that required significant, case-by-case scientific input, like "floodplain," "riparian area," and "shallow subsurface hydrology." (…)

This rulemaking should focus on regulatory interpretation, not public policy making. (…)

US EPA ARCHIVE DOCUMENT

Clarity - missing from the proposal- is particularly necessary where there are potential criminal penalties.

Clarity is also particularly necessary given the potential for citizen enforcement of the Clean Water Act

The rulemaking should be abandoned and the Agencies should re-propose a new rule which is clear, simple to implement, and within their statutory authority.

While we pride ourselves as being environmentally responsible, the broadened scope of the rule would directly impact our operations, with little environmental benefit. These impacts would increase costs on public works projects, which will be ultimately borne by the taxpayer. For example, the proposed rule may adversely impact our long-term plans for expansion and future quarry development in operations across the United States, which would limit the supply of aggregates that result in projects that never happen, profits that are never generated and jobs that are never created. Additionally, the proposed rule will result in increased permitting and operating costs for CEMEX and the industry due to the expanded unclear and/or overreaching language of the definitions and elements in the proposed rule. For example, numerous aggregate site operations have drainage channels and ponds that may currently flow to adjacent jurisdictional streams through an authorized outfall as permitted under the National Pollutant Discharge System and the adjacent waters definition, as written, has potential to expand jurisdictional determinations and interpretations that impact these onsite water systems. Our ability to efficiently provide needed materials for critical infrastructure such as roads, bridges and flood control projects essential to protect public health and safety will be greatly impaired.

In closing, we urge EPA and the Corps to withdraw this proposed rule and work with our industry and other stakeholders to develop a rule that is clear and precise; and one that does not impose an undue economic burden on our industry or the economic prosperity of America. (p. 3-4)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

One final new exclusion in the rule also relevant to ditches covers wastewater recycling structures, including distributary canals constructed in dry land and used for wastewater recycling. As a result of the aforementioned changes, the agencies do not anticipate increased jurisdiction over ditches or an increase in jurisdictional determinations.

National Agricultural Aviation Association (Doc. #19497)

17.1.997 We believe the proposed rule would place unwarranted burdens and legal jeopardy on pest-control operations and other activities on millions of acres of private and public property, increasing costs and regulatory burdens, and subjecting NAAA members and others to increased risk of regulatory enforcement by the agencies and their state counterparts, or from citizen suits levied by nongovernmental organizations (NGOs). Were this rule to be promulgated as proposed, we anticipate subsequent additional federal and state regulations for activities affecting newly-jurisdictional waters, including perhaps further restrictions on pesticide use and revisions to federal or state PGPs. (p. 2)

Agency Response: **The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. 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**

US EPA ARCHIVE DOCUMENT

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

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

17.1.998 Rather than clarify the intent of Congress and the Supreme Court, the proposed rule's vague definitions and broad reach to, among others, ephemeral, man-made and indirect conveyances, would add complexity and uncertainty about where jurisdictional waters could be located and to what extent an aerial applicator or his client(s) face the risk of regulatory enforcement by the agencies, states or citizen suits. The CWA's robust citizen suit provisions coupled with the regulatory complexities of PGPs (e.g., state-to-state compliance differences; compliance differences between "applicators" and "decision makers;" EPA's joint and several liability; and certification of no adverse effects to ESA species or their habitat) has in recent years convinced many aerial applicators to decline important mosquito control contracts. We believe the proposed rule would further challenge the timely use of FIFRA-registered pesticide products for pest control in crops and forests by creating confusion and legal jeopardy for aerial applicators and their clients, not to mention all the other segments of society likely to be affected by the rule. Due to the life cycles of pests, generally there is only a small window of time to make successful control applications; aerial application is the only method to achieve coverage of the necessary acreage in such a compressed time period. Timely pest-control efforts will be hampered by the proposed rule, as aerial applicators and their customers work to identify newly-defined jurisdictional waters and properly adjust pesticide applications to comply with product label restrictions and PGP requirements. (p. 5)

<u>Agency Response:</u> The final rule does not establish any regulatory requirements and does not change permitting requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach

US EPA ARCHIVE DOCUMENT

events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as irrigation return flows or agricultural stormwater, and <u>do</u> require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid courts in responding consistently to citizen suits.

<u>Home Builders Association of Mississippi (Doc. #19504)</u>

17.1.999 I am contacting you on behalf of the Home Builders Association of Mississippi regarding our concerns regarding the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers4 proposed rule entitled "Definition of 'Waters of the United States' Under the Clean Water Act" that was published in the Federal Register on April 21, 2014. Although the Agencies claim this rule simply clarifies which areas may and may not be jurisdictional under the Clean Water Act, in truth, it includes new and inadequate definitions that expand the scope of the existing regulations and a significant nexus analysis that can be used to deem virtually any wet spot jurisdictional.

For years, landowners and regulators alike have been saddled with continued uncertainty regarding the scope of federal jurisdiction under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural, and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives.

US EPA ARCHIVE DOCUMENT

The proposed rule contains the following major flaws:

Ignores the Intent of Congress. The Clean Water Act was enacted as a means for Congress to exercise its traditional commerce power over navigation. The proposal's attempt to expand the CWA's reach to isolated, non-navigable waters, among others, is a far cry from the navigable waters the statute intended to cover. (…)

Creates and Exacerbates Regulatory Confusion. The proposal's ambiguous terms, ill-defined limits, and assertion of federal jurisdiction over waters that exhibit little or no connection to traditional navigable waters will only create more, not fewer questions. The Agencies' claim that the proposed rule creates clarity and certainty is a fallacy because it only does so by illegally asserting jurisdiction over every possible wet feature.

The CWA and its associated permitting scheme must be consistent, predictable, timely, and focused on protecting true aquatic resources. It must also honor Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts and heed the limits of federal jurisdiction recognized by the Supreme Court in both SWANCC and Rapanos. Unfortunately, the proposal fails to adhere to these tenets and rulings.

For these reasons, and the numerous additional shortcomings associated with the proposed rule, the Agencies should withdraw the rule and repropose it only after its many Constitutional, judicial, legal, economic, scientific, practical, and procedural infirmities have been addressed and rectified. (p. 1-3)

Agency Response: **Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the Clean Water Act clearer, simpler, and faster. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins." This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-

US EPA ARCHIVE DOCUMENT

established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States,* 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the resulting opinions of the Court can be found in section III.A of the preamble to the final rule.

See the preamble and TSD for additional discussion of the legal basis for this rule.

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

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

The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

US EPA ARCHIVE DOCUMENT

Mitchell Environmental Health Associates, et al. (Doc. #19533)

17.1.1000 The undersigned owners and partners of businesses in Connecticut support the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed Definition of "Waters of the United States Under the Clean Water Act" to clarify which streams, wetlands and other waters are protected by the Clean Water Act. Our businesses depend on the availability of clean and abundant water, and this action by the Agencies is a prime example of the vital partnership between business and government.

For its first thirty years, the Clean Water Act safeguarded nearly all of our nation's waters. These protections are necessary to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as intended by Congress when it passed the Clean Water Act in 1972. Despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction. These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's streams miles and at least 20 percent of the 110 million acres of wetlands in the continental United States. This confusion has put the drinking water for 117 million Americans at risk. If we do not protect these networks of small streams, we cannot protect and restore the lakes, rivers and bays that our economy and way of life depend on. We will also be jeopardizing jobs and revenue in businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

Protecting streams and wetlands that science has shown are clearly linked to downstream rivers and other water bodies is not only commonsense, it ensures the quality of water used in our products. Whether a company produces food, manufactures silicon wafers, brews beer, or operates an outdoor door recreation outfitter, businesses rely on clean water to produce high quality, safe products and services. Protecting these water resources is critical to the continued growth of American businesses. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade and better protection for critical water resources on which our businesses all depend in order to prosper.

A recent national poll[95] found that 80% of small business owners favor federal rules to better protect headwaters and small streams. The poll found that small business owners assign high importance to clean water for their own operations and believe that government regulations are needed to safeguard it. Two-thirds of the business owners polled expressed concern that water pollution could hurt their business. In fact, more than seven in ten business owners, regardless of political affiliation, believe protecting clean water helps spur economic growth.

We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage

[95] http://asbcouncil.org/sites/default/asbc_clean_water, http://asbcouncil.org/sites/default/files/asbc_clean_water_poll_report_july2014_sv_final_140721v2sm.pdf

US EPA ARCHIVE DOCUMENT

the Agencies to finalize the proposed rule, Definition of "Waters of the United States," without delay and reject any efforts to weaken the proposal. (p. 1-2)

Agency Response: **The agencies agree. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

Clark Fork Coalition (Doc. #19539)

17.1.1001 With the clarification provided by the proposed rule, especially the explicit protections for headwaters streams and tributaries, Montana can ensure the strongest protection possible for the water resources on which we all depend. (p. 1)

Agency Response: **The agencies agree. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

National Association of Home Builders (Doc. #19540)

17.1.1002 On behalf of the National Association of Home Builders (NAHB) and its more than 140,000 members, I write to express our deep concerns regarding the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' (collectively, the Agencies) proposed rule, entitled "Definition of 'Waters of the United States' Under the Clean Water Act," that was published in the Federal Register on April 21, 2014. Despite the goal of creating certainty and consistency, the proposal does little to stop the moving target that comprises the Agencies' interpretation of "waters of the United States," and instead, exacerbates the challenges builders and developers face when

US EPA ARCHIVE DOCUMENT

making decisions to purchase land, design subdivisions, control stormwater and mitigate impacts of development. Due to the proposal's many infirmaries and untenable results, NAHB strongly urges the Agencies to withdraw the rule. (…)

Creating lots and building homes involves substantial earth-moving activities. Because the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have historically asserted broad jurisdiction over "waters of the U.S.," NAHB members must often obtain Clean Water Act permits to complete their development and home building projects. Due to the significant project delays, permitting costs, mitigation and other requirements associated with obtaining and operating pursuant to CWA permits, most builders and developers regularly avoid wetlands and other jurisdictional features to minimize the associated challenges and uncertainties.

Unfortunately, defining which areas are subject to the CWA has never been easy or predictable. In fact, since the U.S. Supreme Court rulings in SWANCC (2001) and Rapanos (2006), perhaps the only thing all parties agree on is that the current regulatory definition of "waters of the U.S." is too vague. The result has been regulatory confusion, inconsistent application and questionable jurisdictional interpretation, particularly with respect to isolated wetlands, man-made conveyances, and ephemeral streams. In 2008, the Agencies attempted to address these problems by issuing interim guidance. However, its implementation proved burdensome and unpredictable, particularly when demonstrating a "significant nexus." At the same time, it created uncertainty for home builders and developers in assessing what landscape features may or may not be deemed jurisdictional. In an attempt to rectify these issues, NAHB asked the Agencies to complete a rulemaking that allows for consistent application of the statute, while simultaneously providing landowners the clarity they need for making reasonable purchase and land use decisions.

Unfortunately, the proposed rule misses the mark. For example, although the Agencies claim the rule would provide greater clarity regarding the scope of the CWA, it is littered with ambiguous terms (e.g., "shallow subsurface hydrologic connection," "gully," "rill," "upland," "waste treatment system," etc.), ill-defined limits (e.g., extent of the floodplain and riparian area), and fails to define the point at which any connection between a "water" and a traditional navigable water (TNW) becomes "significant." These undefined terms and vague concepts will only generate more, not fewer questions. As a result, the proposed rule creates clarity and certainty only by illegally asserting jurisdiction over every possible wet feature.

Similarly, the Agencies claim the rule does not expand the scope of federal jurisdiction, yet the overbroad definition of "tributary" includes ditches and man-made conveyances and the expanded concept of "adjacency" extends to all waters found within subjectively identified and potentially expansive "floodplains" and "riparian areas." What's more, even if a feature fails to meet the categorically jurisdictional "tributary" or "adjacent waters" definition, the Agencies could still assert jurisdiction over the most isolated wetland regardless of how remote or tenuously connected it is to a TNW based upon the ill-defined "other waters" provision. In the end, many landscape features that exhibit few attributes of "waters" will be brought into the federal regulatory net. (…)

US EPA ARCHIVE DOCUMENT

Instead of developing a rule that provides the certainty, predictability, and consistency that was promised and is sorely needed, the Agencies have drafted a proposal that is riddled with considerable constitutional, statutory, judicial, scientific, economic, practical and procedural deficiencies that are further explained in the attached comments. Further the proposed rule is inconsistent with Congressional intent, Supreme Court precedent, and common practice. Given the many deficiencies within the proposed rule, coupled with the fact that identifying the types of landforms that fall under the jurisdiction of the federal CWA imposes immediate, binding, and real legal obligations and liabilities on property owners; Congress not the Agencies is in the best position to address this issue. At a minimum, the Agencies should withdraw the proposed rule, engage in open dialog with the regulated communities, states and other affected entities, develop a revised proposal that corrects the many identified shortcomings, and initiate a replacement rulemaking process. (p. 1-3)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States." The definition of "neighboring" in the final rule has been changed to provide clearer lines on what is considered adjacent. The final rule no longer defines adjacency based only on the floodplain or riparian area but instead provide distance limits. See preamble and Adjacency Compendium for further discussion of adjacency.

US EPA ARCHIVE DOCUMENT

For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance limits with the 100-year floodplain to define adjacency fofloodplain waters. Based on public comment, the agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as adjacent are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters. . However, the rule calls for waters to be considered on a case-specific basis, either alone or in combination with similarly situated waters, where they are located within the 100 year flood plain, but beyond 1,500 feet from the ordinary high water mark of a water identified in (a)(1) through (a)(3) of this section or within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section.

In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. As recommended by the public and based on science, the agencies defining limits for "neighboring" are primarily based on the reliance of a 100-year floodplain. The agencies will rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain.

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

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

US EPA ARCHIVE DOCUMENT

water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

The agencies have not provided specific definitions of the terms "ditch," "gully," "rill," or "swale," in the final rule. However, the rule makes it clear that ditches are included in the definition of tributary and would have the physical features required of other jurisdictional tributaries, including bed and banks and an ordinary high water mark. Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called "gullies" or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Further discussion of exclusions for erosional features is found in the summary response 7.0: Features and Waters Not Jurisdictional.

The rule has expanded the section on waters that are not considered waters of the United States, including many of the features listed in the comment, such as artificial lakes and ponds created in dry land, water-filled depressions incidental to mining or construction, constructed grassed waterways and non-wetland swales, and stormwater and wastewater detention basins constructed in dry land.

17.1.1003 NAHB and its members have been advocates of the Clean Water Act since its inception. The CWA has helped the nation make significant strides in improving the quality of our water resources. Because the nature of the home building industry involves substantial earth-moving activities and because the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) have historically asserted such broad jurisdiction over "waters of the United States," NAHB members must often obtain CWA Section 402 permits to be allowed to discharge stormwater into a "water of the United States" and Section 404 permits in instances where activities result in placement of dredged or fill materials into "waters of the United States." Most builders and developers must also comply with a myriad of state and local requirements that are designed to protect natural resources and promote conservation. For example, there are an estimated 4,000 to 6,000 local governments that have adopted wetland protection regulations and ordinances.[96] Beyond these mandates, NAHB members regularly design their projects to avoid sensitive areas, showcase natural resources, and mitigate adverse impacts. As an organization, NAHB has tirelessly advocated for the CWA and an associated permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. NAHB has also strongly supported implementing

[96] Kusler, J. Common Questions Local Government Wetland Protection Programs. Prepared by Association of State Wetland Managers and The International Institute for Wetland Science and Public Policy (June 26, 2006), at 2.

US EPA ARCHIVE DOCUMENT

measures that honor the Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts.

Despite this continuing work, the moving target that comprises the Agencies' interpretation of the meaning of "waters of the United States," its inconsistent application, and the reliance on staff judgment to determine which waters fall under federal authority regularly causes confusion and concern. Unfortunately, today's proposal does little to alleviate these problems and only exacerbates the uncertainty developers and home builders face when making decisions to purchase land, design subdivisions, control stormwater, or reduce impacts.

These challenges are further amplified by the fact that the housing industry is only beginning to recover from the greatest housing downturn in recent memory. The ability to obtain project financing, the availability of lots, and the ability to produce affordable housing – primary components needed for NAHB's members to fulfill their missions – have been severely impacted. Likewise, because residential construction already is one of the most heavily regulated industries in the country, we remain concerned about any government action, like today's proposed rule, that will impose broad obligations and substantially impact regulated entities and the public. As the Agencies' jurisdiction expands, so does the time and costs of compliance. This not only impacts a business's ability to thrive and grow, it can also negatively affect housing affordability and stifle economic development. As our nation slowly recovers following the Great Recession, regulatory burdens placed on home builders should be reduced, not increased.

It should be noted that residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners. The breadth of these regulations is largely invisible to the home buyer, the public, and even the regulators themselves, yet nevertheless has a profound impact on housing affordability and homeownership. While each of these regulations on its own may not be significantly onerous or problematic, builders and developers are often subject to a layering effect, where numerous regulations are stacked on top of one another. When ten or more seemingly insignificant regulations are imposed concurrently, the cost implications, complexities, and delays can be considerable. Likewise, the overabundance of these regulatory policies tends to distort and cause inefficiencies in the market due to decreased competition. When there are fewer builders, land, design, and construction costs increase, housing prices expand, and profit margins are skewed.

The nation's home builders recognize the need for certain rules and regulation, but when the government goes too far, as it is proposing to do here, the implications can be widespread and untenable. For years, landowners and regulators alike have been frustrated with the continued uncertainty regarding the scope of federal jurisdiction over "waters of the United States" under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA when developed in 1972. They would also represent a marked departure from Supreme Court decisions and raise significant

US EPA ARCHIVE DOCUMENT

constitutional questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives.

For these reasons, and the numerous additional shortcomings highlighted in these comments, it is clear that the scope of the CWA should be determined by Congress. If that cannot be done, the Agencies should withdraw the rule and repropose it only after its many constitutional, judicial, legal, economic, scientific, practical, and procedural infirmities have been addressed and rectified. (p. 12-13)

Agency Response: **The Supreme Court has addressed the scope of "waters of the United States" protected by the Clean Water Act in three cases: *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States*, 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the resulting opinions of the Court can be found in section III.A of the preamble to the final rule. See the preamble and TSD for additional discussion of the legal basis for this rule.**

The agencies' rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of

US EPA ARCHIVE DOCUMENT

the United States" under the rule than under the existing regulations. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

17.1.1004 The Agencies claim that the extent of waters over which they assert jurisdiction under the CWA will not increase under this proposed rule when compared to the extent of waters over which jurisdiction has been asserted under existing guidance. Yet, by categorically asserting jurisdiction over all broadly defined "tributaries," all broadly defined "adjacent waters," and on a case-by-case basis, "other waters" – alone or in combination – the Agencies have proposed to expand their reach well beyond what was intended by Congress, what can be supported by science, and critical case law holdings.

Because there is only one definition of "waters of the United States" within the CWA, the proposed rule will apply to all decisions concerning whether a water is subject to any of the CWA programs. Although SWANCC and Rapanos specifically involved only Section 404 and the discharge of dredged or fill material, the term "waters of the United States" must be interpreted consistently for all CWA provisions that use the term. Indeed, the term "navigable waters" is used throughout the CWA and its regulations 135 times. The term "waters of the United States" is used 98 times. Changing the definition of "waters of the United States" will have broad and dramatic implications for the Agencies, states, and the regulated community, including the home building industry. (p. 22-23)

<u>Agency Response:</u> To keep our lakes, rivers, and coastal waters clean, the smaller streams and wetlands that feed them have to be clean too. This is confirmed by the science; The Clean Water Rule is informed by a review of more than 1,200 pieces of peer-reviewed and published scientific literature. This well-established body of science tells us what kinds of streams and wetlands are important to the long-term health of the water downstream so our Clean Water Rule protects these waters.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of

US EPA ARCHIVE DOCUMENT

case-specific determinations that will required. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of "waters of the United States." Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction.

17.1.1005 For the first time in nearly 30 years, however, EPA and the Corps are proposing to change the regulatory definition of "waters of the United States" and in turn expand the federal scope of jurisdiction under the Act. While the Agencies assert the proposed definitional change clarifies the scope of the Act and does not expand federal jurisdiction, in fact today's proposal introduces entirely new regulatory definitions for "tributary," "neighboring," "floodplain," "riparian area," and "significant nexus" that are riddled with ambiguities that will increase regulatory uncertainty and yet so expansive as to sweep countless ephemeral drainage features, stormwater treatment devices, man-made ditches, and isolated ponds – waters that have historically been protected as waters of the states – into the federal regulatory net.

For years, landowners and regulators alike have been saddled with continued uncertainty regarding the scope of federal jurisdiction under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered under the proposed rule. Such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural, and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives.

For these reasons, NAHB strongly believes that the scope of federal authority under the CWA must be determined by Congress. At a minimum, given the numerous additional shortcomings associated with today's proposal, the Agencies must withdraw the proposed rule and repropose it only after its many constitutional, judicial, legal, economic, scientific, practical, and procedural infirmities have been addressed and rectified. (p. 168-169)

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

US EPA ARCHIVE DOCUMENT

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required. The final rule does not establish any regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act , Supreme Court precedent, and science.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

Clean Up the River Environment (Doc. #19551)

17.1.1006 On behalf of the nonprofit Clean Up the River Environment (CURE), I urge you to finalize the Army Corps of Engineers' and Environmental Protection Agency's proposed Clean Water Act Waters of the U.S. proposed rule as soon as possible. The science showing how water bodies are interconnected affirms the need for fully protecting all waterways with important connections to one another. Furthermore, it is critical that there is clarity about what water bodies are and are not covered, to minimize unnecessary agency work and citizen worries. (p. 1)

Agency Response: **The agencies agree. 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**

US EPA ARCHIVE DOCUMENT

four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Ohio Pork Council (Doc. #19554)

17.1.1007 Altogether, of course, this will fundamentally alter the manner in which farmers farm, removing significant tools farmers have used to make America the world's leading agricultural producer. It also will change how lenders assess potential risk, both from direct litigation and potential enforcement actions as well as from crop failures because of the lack of flexibility that farmers will have to address the impacts of constantly changing weather patterns on their crops and animals. (p. 3)

Agency Response: **The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).**

Union Craft Brewing Co. (Doc. #19559)

17.1.1008 The undersigned owners and partners of craft breweries in Maryland support the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed Definition of "Waters of the United States Under the Clean Water Act" to clarify which streams, wetlands and other waters are protected under the Clean Water Act. American industries require clean and ample water supplies. American craft brewers especially depend on high quality clean water to produce our products.

Having a healthy water source is critical to our product. Beer itself is 95 percent water and without clean water, we cannot make great beer. In Maryland, many of the main sources of water to our breweries are protected by the Clean Water Act. But many of the wetlands that filter water and intermittent streams that feed these sources are not.

As business owners that have carved out a unique niche in the marketplace craft brewers rely on plentiful supplies of clean water to produce a safe and high quality product. This is certainly represented by the true economic impact that we have generated by tapping into strong consumer demand in Maryland. According to the Brewer's Association, the beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion. Small and independent craft brewers contributed $33.9 billion to the U.S. Economy in 2012 and provided more than 360,000 jobs.

In Maryland, craft brewers contributed $455.5 million to the economy in 2013 alone. The Agencies' proposal for protecting water resources is critical to the continued growth of industry in Maryland and nationally. The science is clear that what happens upstream, in small streams and wetlands, impacts the quality and health of downstream tributaries and larger rivers. EPA's proposal recognizes the importance of wetlands and headwaters to

US EPA ARCHIVE DOCUMENT

rivers and streams downriver, and protecting these water resources is critical to the continued growth of the craft brew and microbrew industry in Maryland and nationally.

Maryland businesses have always depended on the availability of clean water for success. EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Clean and abundant water is the most important ingredient in our beer, and this action by the Agencies gives us the confidence that our growing businesses need to continue to thrive.

We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, Definition of "Waters of the United States," without delay and reject any efforts to weaken the proposal. (p. 1-2)

Agency Response: **The agencies agree. The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.**

American Society of Civil Engineers (Doc. #19572)

17.1.1009 In light of Congress not addressing this difficult task and decisions handed down by the Supreme Court, ASCE believes that the Environmental Protection Agency and Army Corps of Engineers have both the subject matter expertise and legal authority to carry out a rule making. ASCE supports the need of the rule to add clarify to a complex and confusing area of law, but does not consider the proposed rule acceptable in its current form. ASCE also supports the recommendations and findings of the Science Advisory Board (SAB), namely, that "the available science supports the conclusion that the types of water bodies identified as waters of the United States in the proposed rule exert strong influence on the physical, biological, and chemical integrity of downstream waters."[97] While we accept the science that all water is connected, the Society does not

[97] See Letter to Administrator McCarthy re: 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. (09/17/14).

US EPA ARCHIVE DOCUMENT

believe it was Congress's intent - nor is the federal government's prerogative - to exert jurisdiction over the nation's water to the extent postured in the proposed rule. (p. 5-6)

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

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." Id. at 132-33 (citing Senate Report 92-414). The Court also recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."

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.

Finally, 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

St Charles Parish, Louisiana (Doc. #19582)

17.1.1010 In recent years, several factors have collectively led to a slow, but steady decline in the overall American economy. Local governments have not been immune to this decline, losing substantial funding through less consumer spending, and therefore, fewer sales tax revenues. Applying for and acquiring CW A permits through the Regulatory Branch of the Corps more often than not impose great expense to the applicant , given the necessity to submit detailed plans and specifications in addition to operational plans for proposed mechanical systems. Increasing the number and types of activities that would be subject to Section 40/ 404 CWA regulations would create another financial burden on already strained local budgets of parishes, counties, and municipalities. As a result, public bodies may lack adequate financial resources needed to provide the protection and delivery of basic services required for the health, safety, and welfare of the American citizens they serve. (…)

Health concerns for the American people should also be noted in the list of potential unintended consequences should this proposed rule be finalized and adopted by the EPA.

US EPA ARCHIVE DOCUMENT

Additional permitting burdens for projects aimed at improving stormwater and wastewater management, which are already regulated by such programs as the National Pollutant Discharge Eliminating System (NPDES) permitting process would add an unnecessary level of additional review and cause more delays, which could potentially affect the health, safety, and welfare of the American citizens who benefit from these water management systems and services. Mosquito abatement programs also covered under the current NPDES regulations will also be subject to these new regulations. Delays in implementing EPA-approved pesticide application measures to control vector mosquito populations because of Corps Regulatory Branch congestion could result in increased instances of Arboviral Encephalitides such as West Nile Virus and St. Louis encephalitis, Dengue Fever, Malaria, Chikungunya, Rift Valley Fever, and Yellow Fever, to name a few. It is imperative that these activities that are already regulated and monitored under other federal programs and regulations be exempted from the types of activities required to be managed under the Section 10/ 404 permitting process. (p. 2-3)

Agency Response: **The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.**

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are <u>not exempt</u> as

US EPA ARCHIVE DOCUMENT

irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

Home Builders Association of Central Arizona and Southern Arizona Home Builders Association (Doc. #19588)

17.1.1011 The Home Builders Association of Central Arizona (HBACA) and Southern Arizona Home Builders Association (SAHBA) are submitting the following comments on the proposed rule regarding the definition of waters of the U.S. under the Clean Water Act. The proposed rule, if adopted, will have substantial negative impacts on the economy in general and the housing industry in particular. We join countless other individuals and organizations in urging EPA and the Corps to withdraw this proposal. (…)

The scope of jurisdiction under the CWA, particularly over marginally "aquatic" features such as desert washes and arroyos ("ephemeral streams" in EPA parlance) is of vital concern to our members. Many of HBACA and SAHBA members are homebuilders and real estate developers. In connection with developing and improving their land, members regularly construct streets and roads, install utility lines and related improvements, and grade and improve lots and other parcels of private land. In many cases, these activities cannot be conducted without impacting desert washes and other drainage features, which are common throughout the Sonoran desert and are found on many parcels of developable land, including land owned by HBCA and SAHBA members. Due to broad agency approaches to jurisdiction, these features are often deemed to be navigable waters, subjecting these projects to the expensive and time-consuming process of securing permits pursuant to Section 404 of the CWA. In addition, EPA regulates stormwater emanating from construction sites and discharged to CWA navigable waters under the NPDES program and associated state programs, and this same approach to jurisdiction makes it often impossible to construct a project in a manner that avoids these discharges. Compliance with stormwater permit requirements is likewise burdensome, expensive and time consuming.

As discussed in the attached comments, the agencies' approach to jurisdiction is essentially boundless and takes an approach soundly rejected by the Supreme Court on two occasions. The proposal must be withdrawn and real effort made to define identifiable limits of jurisdiction that avoid conflict with land use and provide certainty to the regulated community. (p. 1-2)

Agency Response: The Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases: *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (SWANCC), and *Rapanos* v. *United States,* 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the

US EPA ARCHIVE DOCUMENT

resulting opinions of the Court can be found in section III.A of the preamble to the final rule.

See the preamble and TSD for additional discussion of the legal basis for this rule. The agencies' determination of what constitutes a "significant nexus" is grounded in Justice Kennedy's opinion. At the core of the "significant nexus" analysis, the protection of upstream waters must be critical to maintaining the integrity of the downstream waters. These upstream waters function as integral parts of the aquatic environment, and if these waters are polluted or destroyed there is a significant effect downstream. The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present.

By clarifying the definition of "tributary," the agencies intend to make the determination of jurisdictional waters independent of local nomenclature, such as "dry wash" and "arroyo." Waters that flow in response to seasonal or individual precipitation events are jurisdictional tributaries if they contribute flow, either directly or indirectly, to a traditional navigable water, an interstate water, or the territorial sea, <u>and</u> they possess the physical characteristics of a bed, banks, and ordinary high water mark, which may be spatially discontinuous. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. Where such features do not contribute flow downstream and/or do not have a bed, banks, and ordinary high water mark, they are not jurisdictional tributaries.

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

<u>Butte County Administration, County of Butte, California (Doc. #19593)</u>

17.1.1012 In our community, we believe that reasonable growth and development is integral to our future viability and prosperity. We want our children and their children to move back home where they were raised, and to be able to raise their own families in their hometown. For that to occur, we must have the ability to support orderly development to provide housing, businesses, and industry to broaden our economic appeal. The proposed rule must not burden our local communities by setting forth newly broadened and expansive controls over local, regional and state waters, using the federal CWA to regulate such growth. Regulation over the tiniest trickles of runoff by broadly defining "tributary" as jurisdictional waters could cause untold damage to our community's ability to grow and prosper, raising the specter of pricey permitting processes and citizen

US EPA ARCHIVE DOCUMENT

lawsuits to slow or stop this modest growth, and possibly ruin the future prosperity of our county. (p. 2)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States."

Louisiana House of Representatives, District 12 State Representative (Doc. #19648)

17.1.1013 I write to express my opposition to the proposed Rule concerning the Clean Water Act because I think it is an overreach by the federal government into local and state matters. The rule introduces terms such as "tributary" and "flood plain" and defines these terms very broad. As I read the proposals, it seems to me that the rule seems to bring within the EPA's power every water and land that happens to lie within giant flood plains based upon the premise that those waters and lands may connect to national waters after a "once in a blue moon" rain storm. This concerns me about our rangers, farmers, and agricultural workers as it may place the federal government onto their properties.

I am aware that you have received letters from the Attorneys General of seven (7) states, including mine (Louisiana), and also from six (6) governors. I write to join in their opposition to these proposed rules and I hereby incorporate, by reference, all of the reasons, without reciting them all, in their letter to each of you dated October 8, 2014.

From my standpoint, this is yet another overreach by an insatiable national government wl1ich erases even more the states' individual and sovereign rights to govern its people

US EPA ARCHIVE DOCUMENT

and property within its boundaries. I ask that you place this objection and opposition, with all the others you may have received, concerning this proposed Rule. (p. 1)

Agency Response: **The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.**

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

The final rule includes several changes to provide the additional clarity requested. The changes include identifying the specific functions to be accessed in a significant nexus evaluation, providing more exclusions as part of the rule text for the first time, and reducing the number of case-specific determinations of jurisdiction required. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required, reducing state and federal workload associated with jurisdictional determinations.

The EPA and the Corps have used the feedback we received from public outreach efforts as the source of early guidance and recommendations for refining the proposed rule. Specifically, stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in the final rule, ultimately with the goal of providing increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as "waters of the United States."

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and

US EPA ARCHIVE DOCUMENT

"tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral ditches that do not meet the definition of tributary are not "waters of the United States."

Centennial Water and Sanitation District (Doc. #19650)

17.1.1014 CWSD has reviewed the proposed rule and concluded that it would have significant negative impacts on our long-term ability to provide safe and reliable drinking water and wastewater reclamation services to our customers at a reasonable price; and, there would be no measureable improvement to overall water quality. (p. 2)

Agency Response: This rule will enable greater protection of drinking water sources. About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on the downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps is clarifying protection.

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the Clean Water Act or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Miami County Farm Bureau Association (Doc. #20336)

17.1.1015 The Miami County Kansas Farm Bureau Board of Directors is concerned about the EPA's proposed rule on bodies of water in the United States. This proposed rule will result in severe impact not only on our Farmers and Ranchers but on our Communities as well. Farmers will be dictated to how they can farm their ground and where they can make improvements with their facilities. Simple tasks such as spraying for weeds, moving dirt, building terraces and grazing cattle on pasture will be affected. Our profit margin is slim enough without being forced to get permits to do tasks we do now to be good stewards of the land. All because we have farm ditches that have standing water from time to time. Communities and County governments will be affected if they are forced to change their watershed and storm water management plans, and get permits to control pest and weeds. We could see widespread outbreaks of diseases if certain pests are not controlled. Mosquito and ticks for instance could wreak havoc with public health.

US EPA ARCHIVE DOCUMENT

Homebuilders, golf courses and general business owners will be forced to purchase these permits to expand and or maintain their operations. The costs they incur will be passed on to the consumer. The consumers in small communities can barely maintain what they currently have let alone support a constricting rule such as this. The fines will be debilitating for small communities. All these concerns arise from having ditches and ravines in our Communities. Residents in our urban areas will have to get permits to fertilize their lawns or spray for pests. This may cause many to not continue to maintain their property adding additional expenses to the Cities. We respectfully request this revision be abandoned. We support EPA's control of navigable waters but our rural ditches and waterways have no place in this rule. This rule will deeply impact our ability to produce food and fiber for our Country. (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

The final rule includes a provision that waters subject to established, "normal" farming, silviculture, and ranching activities are not "adjacent" waters. Recognizing the critical role of agriculture, the Clean Water Act in Section 404(f) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, ranching, and silviculture is clarified in the agencies' implementing regulations to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 40 C.F.R § 232.3(c)(1). The rule reflects this framework by clarifying the waters in which the activities Congress exempted under Section 404(f) occur are not jurisdictional by rule as "adjacent." It is important to recognize that "tributaries,"

US EPA ARCHIVE DOCUMENT

including those ditches that meet the tributary definition, are not "adjacent waters" and are jurisdictional by rule.

The rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer on farm fields. A NPDES pesticides general permit is required only when there are discharges of pesticides into waters of the United States. The CWA provides NPDES permitting exemptions for runoff from agricultural fields and ditches. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves Waters of the United States, are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. Some irrigation systems may not be Waters of the United States and thus discharges to those waters would not require NPDES permit coverage.

Please see the responses to comments on the application of the pesticides general permit (PGP) in the comment compendium describing implementation issues.

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long "generally" not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. The agencies have clarified stormwater related exclusions in response to numerous public comments. The exclusion for stormwater control features in paragraph (b)(6) of the rule is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under the exclusion of ditches at paragraph (b)(3) of the rule and (b)(6).

Ditches have been regulated under the Clean Water Act as "waters of the United States" since the late 1970s. In 1977, the United States Congress acknowledged that ditches could be covered under the CWA when it amended the Federal Water Pollution Control Act to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including "construction or maintenance of…irrigation ditches, or the maintenance of drainage ditches" (33 U.S.C. §1344). By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit.

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a

US EPA ARCHIVE DOCUMENT

relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule].” A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Empire District Electric Company (Doc. #20501)

17.1.1016 We are concerned that, as proposed, the rule would require EDE to engage in unnecessary permitting, studies, compliance efforts, mitigation, and related actions involving EPA, the Corps, and state water quality managers than under current regulations. This conflict will result in uncertainty about whether a water feature or potentially wet area is jurisdictional, and if jurisdictional, what that means for use of the land and water involved. EDE is concerned that the increase in time and financial resources to address marginal water features and potentially wet areas in our extensive four state service territory will impact limited company, and state agency resources without providing commensurate benefits in terms of water quality. (p. 2-3)

Agency Response: The rule does not change permitting requirements. Instead, it clarifies the scope of “waters of the United States” consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

17.1.1017 The impact of such an expansive scope would be significant to our ability to generate, transmit, and distribute electricity to residential, commercial and industrial customers. In the normal course of business the construction of electric substations, transmission lines, gas pipelines all impact water management conveyance systems and disturb land that would be significantly changed by an expanded jurisdictional reach. (p. 3-4)

Agency Response: The EPA and ACOE are issuing this as a joint rule and are responding to those requests from across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including states with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

US EPA ARCHIVE DOCUMENT

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

Lapeer County Board of Commissioners (Doc. #20503)

17.1.1018 WHEREAS, the proposed rule change, if adopted, will cause significant harm to local farmers, stall the development of businesses, take control of land used for sustainable food production out of our local providers' hands, and negatively impact county-owned and maintained infrastructure such as roadside ditches and county drains; and,

WHEREAS, the cost to our farms, municipalities, and taxpayers will be enormous (p. 1)

Agency Response: **The Clean Water Rule strengthens the protection of waters for the health of our families, our communities, and our businesses. Our nation's businesses depend on clean water to operate. Streams and wetlands are economic drivers because they support fishing, hunting, agriculture, recreation, energy, and manufacturing. The agencies' economic analysis indicates that indirect incremental benefits exceed indirect incremental costs.**

The rule does not change permitting requirements. Instead, it clarifies the scope of "waters of the United States" consistent with the Clean Water Act, Supreme Court precedent, and peer-reviewed science. 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. Along with a narrowing of jurisdiction, the final rule also significantly reduces the uncertainty and number of case-specific determinations that will required.

The agencies recognize of the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The final rule reflects the intent of the agencies to minimize potential regulatory burdens on the nation's agriculture community, and recognizes the work of farmers and landowners to protect and conserve natural resources and water quality on agricultural lands. The rule reflects this framework by clarifying the waters subject to the activities Congress exempted under CWA Section 404(f).

US EPA ARCHIVE DOCUMENT