

US EPA ARCHIVE DOCUMENT

Clean Water Rule Comment Compendium
Topic 3: Adjacent Waters

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

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

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

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

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Topic 3. ADJACENT WATERS

This compendium has been subdivided into the following sections: General Definition, Adjacent Waters versus Adjacent Wetlands, Floodplains, Riparian Areas, Confined Surface and Shallow Subsurface Connections, and Others. In addition there is a section of supplemental comments.

The following is a summary of the most repeated public comments received on the proposal regarding “adjacent waters”:

- The proposed definitions of “adjacent,” “neighboring,” “riparian area,” “floodplain,” “shallow subsurface hydrologic connections,” “shallow aquifer,” “ordinary root zone,” and “reasonable proximity” are not (or poorly) defined; they are too vague; and they are too expansive. The dominant request was to identify specific limits.
- The use of “best professional judgment” would not provide the goal of clarity and certainty but would have an overall effect of expanding jurisdiction. The dominant request was to identify specific limits.
- The broadening of “adjacent wetlands” to “adjacent waters” was too expansive and not supported by the Supreme Court decisions and the intent of the CWA. The dominant request was to protect only “adjacent wetlands.”

The following essay provides a response to the above comments as well as supports the responses to the specific comments below.

The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to the many commenters seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a confined surface or shallow subsurface hydrologic connection or provides that all waters within “floodplains,” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides, consistent with the agencies’ view that consideration of proximity is reasonable in interpreting the scope of adjacency, specific distance limits for “neighboring” waters. In addition, the agencies agree with the many commenters who suggested that use of the 100-year floodplain mapped by FEMA would provide additional clarity; therefore, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The agencies made use of the 100-year floodplain in part because it is well understood by the public, as demonstrated by the many commenters who suggested it. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. For more specific responses to comments regarding shallow subsurface connections, see the Shallow Subsurface Connection essay elsewhere in this compendium.

Some commenters questioned, and others supported, the proposed rule’s inclusion of waters separated from (a)(1) – (5) waters by dikes, barriers, berms, dunes and the like in the definition of “adjacent.” The agencies have retained that language (with minor edits) in the final rule for the reasons discussed in the preamble and TSD.

Some commenters’ expressed concern that the proposed rule would regulate waters that do not have a significant nexus to traditionally navigable waters, interstate waters or the territorial seas as “adjacent”. Other commenters suggested that the agencies should include an express requirement in the definition of “neighboring” that “significant effect” and “reasonable proximity” be demonstrated on a case-specific basis. As explained more fully in the preamble and TSD, the agencies have determined that “adjacent” waters as defined have a significant nexus based on the record for today’s rule and thus are appropriately regulated as jurisdictional by rule. For non-adjacent waters, all waters that are within 4000 feet of the high tide line or the OHWM of a water jurisdictional under (a)(1) – (5) and all waters within the 100-year floodplain of an (a)(1)-(3) water, a case-specific jurisdictional determination is required. With the exception of (a)(7) waters, waters beyond that 4000 foot limitation and outside the 100-year floodplain of an (a)(1)-(3) water are not regulated. Please see the preamble and TSD for additional detail, as well as the Other Waters and Significant Nexus compendiums.

The agencies agree with the many commenters who suggested that the Agency take advantage of FEMA tools in implementing the floodplains provisions of the “adjacent” definition. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

For the reasons discussed in Section 1 of the TSD, the agencies disagree with the assertion of some commenters that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.” In addition, in response to comments asking the agencies to clarify the term “waters,” the final rule, preamble, TSD, and responses to other comments in this document provide additional examples and further guidance. Some commenters expressed concern that the language of the proposed rule would allow the agencies to regulate land as “waters” of the United States. The agencies reiterate that only waters, not land, are subject to today’s definition of “waters of the United States.” See the TSD and preamble for further detail.

Some commenters more generally expressed concern that the agencies were broadening the scope of the definition of “waters of the United States.” The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Consistent with *SWANCC* and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Several commenters expressed the view that the proposed definition of “adjacent,” and in particular the definition of “neighboring,” focused too heavily on “geographic adjacency” and should be revised to focus on “functional adjacency.” In response, the agencies note that although the final definition of “neighboring” now contains specific distance limits, it is not because the agencies did not consider the “functional connections” described by the commenter. The agencies, in response to other comments, sought to promulgate a definition of “adjacent” that draws reasonable boundaries in order to protect the waters that clearly have a significant nexus while minimizing uncertainty about the scope of “waters of the United States.” As discussed more fully in the preamble and TSD, the agencies set the distance limits for adjacency based on both functional relationships and proximity, because those factors together identify the waters that clearly have a strong influence on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The agencies’ determination is informed by the science, and consideration of proximity is reasonable in interpreting the scope of adjacency. See the preamble and TSD for additional discussion of the bases for these distance limits.

The agencies also stress that the distance limits in the definition of “adjacent” only identify waters that are jurisdictional by rule. Because waters beyond these distance limits may have a significant nexus, the rule also establishes waters for which a case-specific significant nexus determination must be made. See the Significant Nexus and Other Waters compendiums as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a site-specific significant nexus analysis is required and responses to comments regarding the types of connections that should or must be considered.

See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent and the CWA.

A good number of commenters who expressed concern that their waters would or might fall under the revised definition of “adjacent” either are, or may be, subject to exclusions under subsection (b). For example, the rule excludes stormwater features, wastewater recycling structures, and artificially lakes and ponds used for irrigation. For further information on exclusions, and for responses to comments seeking specific exclusions, see the Exclusions compendium, the preamble and TSD.

Commenters questioned whether features that are excluded under paragraph (b) of the final rule or otherwise non-jurisdictional, such as shallow subsurface waters, can nonetheless serve as a hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The answer is yes, as discussed in the preamble to the final rule. The agencies’

decision is consistent with the law and current practice. For example, the agencies' 2008 Rapanos guidance states, "Under this definition, the agencies consider wetlands adjacent if one of the following three criteria is satisfied. First, there is an unbroken surface or shallow subsurface connection to jurisdictional waters. This hydrologic connection may be intermittent." In addition, the science strongly supports the important role shallow subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document. There is no basis in the statute or caselaw to ignore the significant effects a water has on downstream waters simply because the connection exists through a non-jurisdictional feature. The agencies have made determinations since the Rapanos guidance which established jurisdiction using shallow subsurface hydrologic connections for adjacency. The preamble identifies a shallow subsurface hydrologic connection as lateral water flow over a restricting layer in the top soil horizons, or a shallow water table which fluctuates within the soil profile, sometimes rising to or near the ground surface but moving quickly through the soil impacting surface water directly within hours or days. See also the Technical Support Document, Sections VII and IX.

For additional detail regarding issues associated with shallow subsurface connections, see the summary response for Confined Surface and Shallow Subsurface Connections (3.5).

3.1. GENERAL DEFINITION

Following are the specific general definition comments and the agency responses:

Tennessee Valley Association (Doc. #17470)

- 3.1 The Proposal also indirectly revises the definition of "adjacent" which is defined as "bordering, continuous or neighboring" with the introduction of a new definition for "neighboring". It is defined as "waters located within the riparian area or floodplain" of a water identified as a TNW, interstate water, territorial sea, impoundment or tributary or "waters with a shallow subsurface connection or confined surface hydrologic connection to such a jurisdictional water". However, there is no discussion of what constitutes such a connection or where the interface between jurisdictional waters and groundwater begins and ends. Subsequently, the terms "riparian area" and "floodplain" are defined and it appears that all waters in the floodplains or riparian areas are to be deemed jurisdictional. The applicable flood interval is not prescribed and this determination as well as what falls in to the riparian area category is left to be based on "best professional judgment" by the Agencies. It is our opinion that these definitions are ambiguous, overly broad, and prone to misrepresentation. This is problematic in that it perpetuates the current lack of specificity and clarity necessary to make these determinations in a consistent manner.

As such TVA is concerned that the Proposal does not provide the regulatory certainty required by the regulated community – especially those that the electric utility industry require in order to conduct normal business operations as well as to complete necessary upgrades to generating facilities and transmission infrastructure. (p. 3)

Agency Response: See essay above.

Pennsylvania Fish and Boat Commission (Doc. #4826)

- 3.2 Under the definition of "other waters" in the proposed rule, the PFBC suggests that isolated wetlands without a significant nexus, not adjacent to or outside the floodplain or outside the riparian zone of a navigable water, interstate water, or territorial sea are considered by the agencies as jurisdictional "neighboring" waters. The interpretation of neighboring waters in the proposed rule has been identified as, "those waters having a significant effect on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas." The PFBC suggests that these waters should be protected as "neighboring" waters if threatened or endangered species are present for some part of their life cycle or if these waters are used by a biological community that has a significant effect on the integrity of the watershed. These waters may be similar to "adjacent" waters that perform similar functions in the landscape independent of their spatial arrangement or lack of a significant nexus in the watershed. The states can provide the agencies with scientific documentation that support the jurisdictional protection of these waters which could be critical to extant or disjunct populations. Loss of these habitats will likely contribute to range fragmentation of such populations and habitat fragmentation of suitable habitats creating isolated populations and loss of genetic diversity. (p. 2-3)

Agency Response: See essay above. In addition, the rule now provides that all waters within specific distance limits are jurisdictional by rule as "neighboring". Thus, the type of case-specific considerations suggested by commenter would not be appropriate in the "neighboring" category. Further, the agencies do not believe the presence of endangered species alone provides a sufficient basis for finding a water jurisdictional, and the commenter does not provide any relevant legal or scientific basis for doing so.

The agencies would appreciate all data that the states, tribes, other entities, and the general public can provide the agencies regarding the physical, chemical, or biological quality or resources associated with an aquatic system. The agencies can use that data, where appropriate, when determining if there is a significant nexus between an aquatic resource and the downstream traditional navigable water, interstate water, or territorial seas.

Attorney General of Texas (Doc. #5143.2)

- 3.3 Under the proposed rulemaking, "adjacent" waters are-by rule-subject to federal Clean Water Act jurisdiction. The federal agencies retain the regulatory definition of "adjacent" as meaning "bordering, contiguous or neighboring." Id. at 22199. However, the agencies propose for the first time a regulatory definition of "neighboring" as meaning "waters located within a riparian area or floodplain of [a jurisdictional water] or waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water." Id. at 22199. Under this proposed definition, it is difficult to envision any lands-especially those that lie near the coast-that are not potentially within the ambit of federal jurisdiction. This broad and overreaching definition would impose virtually no limit on federal jurisdiction, despite the fact that the Rapanos plurality disapproved of the federal agencies' reliance on this sweeping definition as "extended beyond reason to include, inter alia, the 100-year floodplain of

covered waters." Rapanos, 547 U.S. at 746. As a result, States and landowners will be subject to the threat of assertions of federal jurisdiction over their property simply because a lone federal bureaucrat deems them to be. (p. 3)

Agency Response: See essay above.

Alaska State Legislature, Alaska Senate Leadership (Doc. #7494.1)

- 3.4 The agencies should clarify: if wetlands are physically divided, they may be geographically "adjacent" but not "continuous" in the sense of being the "same jurisdictional wetland. (p. 2)

Agency Response: As discussed in the preamble and rule, under the definition of "adjacent waters," waters separated by a berm or other similar feature remain "adjacent." In addition, for purposes of determining whether a water is "adjacent," artificial features (such as roads) do not divide a water; rather, the water is treated as one entire water. Finally, if any part of a water is within the distance thresholds established in the definition of "neighboring," the entire water is "adjacent."

Virginia Department of Transportation (Doc. #12756)

- 3.5 On p.22208 of the preamble and p.22263 of the proposed rule, the agencies intend to change "adjacent wetlands" to "adjacent waters" and provide a definition to the term "neighboring." This change extends the lateral reach of Clean Water Act jurisdiction to uplands by first proposing to define waters within floodplains and riparian areas with discrete confined surface or shallow subsurface connections as jurisdictional. It is noted that the proposed rule states, "Absolutely no uplands located in riparian areas and floodplains can ever be WOUS subject to jurisdiction of the Clean Water Act." As such this statement should be codified in the proposed rule so there can be no future misinterpretation by agency staff. The proposed rule states in part, "Application of the terms "riparian area," "floodplain" and "hydrologic connection" would be based in part on the best professional judgment and experience applied to the definitions contained in the rule." This statement lends itself to subjective interpretation by individual regulators in the field and does not accomplish the purported strong intent of the proposed rule to provide greater consistency, clarity, and certainty to the regulated public and the regulators as to which waters are or are not subject to Clean Water Act jurisdiction. (p. 7-8)

Agency Response: See essay above. With regard to the concern that uplands will be captured by the regulation without the change to the rule suggested by the commenter, the agencies did not make the change because it is unnecessary. The language of the rule (as well as the CWA) clearly states that only water, not land, falls with the definition of "waters of the United States."

- 3.6 On p.22207, third column, the preamble states that 'adjacent' as defined in the agencies' regulations has always included an element of reasonable proximity. If this is the case, please define what the agency considers "reasonable proximity." (p. 8)

Agency Response: See essay above. As noted in the essay, while the term "reasonable proximity" is not used in the rule, and is, therefore, not defined, the agencies have incorporated reasonable proximity into the rule by establishing

distance limitations in the definition of adjacency.

New Mexico Department of Agriculture (Doc. #13024)

- 3.7 The qualifying separations between Waters of the U.S. and adjacent waters, including "manmade dikes or barriers, natural river berms, beach dunes, and the like," are clear. However, without guidance on the size and extent of the separations, the term adjacent is still unclear. (p. 11)

Agency Response: See essay above. Because “bordering” and “contiguous” waters are not separated by the features described by the commenter, whether the waters at issue are “waters of the U.S.” would be governed by the definition of “neighboring,” which now has specific distance limits.

Washington Department of Ecology (Doc. #13957)

- 3.8 Washington recommends that Corps and EPA work with the State and tribes to develop regionally appropriate definitions of "floodplains," "riparian areas," and "contributing flow." In addition, methods for determining their physical extent are needed so that the state and federal agencies have a common understanding of how these terms apply in Washington. (p. 4)

Agency Response: See essay above. For information on “contributing flow,” please see **Tributaries Compendium (Topic 8)**.

North Carolina Department of Environment and Natural Resources (Doc. #14984)

- 3.9 Withdrawal and further limitation of the definitions of "neighboring," "riparian area," and "floodplain," all of which are overly broad and effectively limitless within any particular parcel of property. For example, does a period of high water flow include Category IV hurricanes? If so, the proportion of eastern North Carolina which constitutes WOTUS may be absurd. Under the definition of "riparian area," "direct influence" is undefined. How much influence and how direct must the influence of subsurface hydrology be on (undefined) "ecological processes"? Does that area extend to the extent of the watershed? The imprecision of the terms "area," "influence," "community structure," "shallow subsurface connection," "present climatic conditions," among others, gives overly wide latitude to regulators to claim authority over waters that have minimal connection to navigable waters. (p. 7)

Agency Response: See essay above.

Arctic Slope Regional Corporation (Doc. #15038)

- 3.10 At 172 million acres, Texas is a very big state, but its total acreage is still less than the number of acres of wetlands in Alaska. According to the U.S. Fish and Wildlife Service (“USFWS”), “Alaska encompasses an area of 403,247,700 acres, including offshore areas involved in this study. Total acreage of wetlands is 174,683,900 acres. This is 43.3 percent of Alaska’s surface area. In the lower 48 states, wetlands only occupy 5.2 percent of the surface area.”¹ Put differently, nearly half of Alaska—the largest state in

¹ Jonathan V. Hall, W.E. Frayer and Bill O. Willen, Status of Alaska Wetlands at 3 (U.S. Fish and Wildlife Service

the United States, by a wide margin—stands to be affected by this Proposed Rule. Alaska has more wetlands than all of the other states combined.²

While USFWS uses an expansive definition of “wetlands” in its study, it is no more expansive than the jurisdictional waters categories added by the Agencies to the WOTUS definition in the Proposed Rule. Compare, for example, the USFWS’s definition of wetlands with the Agencies’ definition of “riparian area”:

Definition of wetlands used by USFWS in Status of Alaska Wetlands ³	Definition of “riparian area” proposed by the Agencies ⁴
“Technically, wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. Wetlands must also have one or more of the following three attributes: 1) at least periodically, the land supports predominantly hydrophytes; 2) the substrate is predominantly undrained hydric soil; and 3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year.”	“The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.”

If anything, the USFWS definition of wetlands is narrower than the Agencies’ definition of “riparian area” because the former does not even include the Agencies’ additional jurisdictional water categories of “tributaries” and bordering, contiguous and “floodplain” areas. So the size of Alaska’s wetlands is roughly equivalent to, or perhaps slightly smaller than, the area the Proposed Rule would regulate as “riparian areas”.

As noted above, under the Proposed Rule, “riparian areas” are jurisdictional waters.⁵ As the Agencies make clear, once waters are jurisdictional “waters of the United States,” there is no further argument or analysis:

The agencies propose to define “waters of the United States” in section (a) of the Proposed Rule for all sections of the CWA to mean: Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional ‘waters of the United States’ by rule—no additional analysis would be required.⁶

1994).

² Id.

³ Status of Alaska Wetlands, at 11 (emphasis added).

⁴ 79 Fed. Reg. at 22,271 (emphasis added).

⁵ “Waters of the United States” include “adjacent” waters, which include “neighboring” waters, which include “riparian areas.”

⁶ 79 Fed. Reg. at 22,188-89.

Whether intended or not, the Agencies' proposed definition of "riparian area" creates the very real risk that any development within Alaska, in an area larger than Texas, constituting more than 43% of Alaska's land mass, would fall within CWA §404 jurisdiction for permits to dredge and CWA §402 jurisdiction for discharge pollutants⁷ Even under their most aggressive rules, interpretations, policies and practices in the past, including those struck down in *SWANCC* and *Rapanos*, the Agencies have never before extended their reach to such magnificent extents.

Agency Response: See essay above. The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter's assertions, consistent with *SWANCC* and *Rapanos*, the agencies have narrowed the definition of "waters of the United States" compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Florida Department of Environmental Protection (Doc. #15080)

- 3.11 Similar to tributaries, the federal agencies intend to assert jurisdiction over every water meeting the definition of "adjacent." 79 Fed. Reg. at 22,206. Under the proposed definition, waters need not be adjacent to a core federal water for the agencies to assert jurisdiction; the federal agencies also intend to assert jurisdiction over waters that are adjacent to tributaries. 79 Fed. Reg. at 22,207.

The Department asks that the federal agencies clarify whether the degree of connectivity between a potentially adjacent water body and a core federal water itself (as opposed to a tributary) is relevant to whether the agencies intend to claim jurisdiction over the potentially adjacent water. If so, is there opportunity to refine the jurisdictional category to account for variability in the degree of connectivity between the tributary and core federal water?

Agency Response: See essay above. 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)).As the commenter points out, adjacent waters are jurisdictional by rule. The record for today's rule demonstrates that waters adjacent to an (a)(1)-(5) water have a significant nexus to an (a)(1)-(3) water. See also the Other Waters compendium.

⁷ See, e.g., 79 Fed. Reg. at 22,215-16 (noting that the list of proposed ecoregions for the analysis of "other waters" "does not include regions in Alaska or Hawaii . . .") and at 22,231 (explaining that approximately "59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally" but failing to explain why statistics excluding Alaska should be used to justify regulations that will not exclude Alaska).

Ohio Department of Natural Resources, et al. (Doc. #15421)

- 3.12 MRM: According to FR, Page 22193: Waters of the US” include the following: “All waters, including wetlands, adjacent to traditional navigable water, interstate water, the territorial seas, impoundment or tributary.” The rule proposes to change “adjacent wetlands” to “adjacent waters.” All adjacent waters, rather than simply adjacent wetlands, would automatically be “waters of the United States.” FR, Page 22264: Tributary is defined as “The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3).” While the above add more clarity and reduce subjectivity, the Division has a specific concern that water-filled coal mine strip pits could be declared jurisdictional under the provisions of the above definition, resulting in an impediment to the remaining provisions of the Rahall Amendment to the Clean Water Act.

The agency seemed to feel that a definition for ‘adjacency’ was not adequate in itself to address influence from “adjacent floodplain or riparian areas”, so therefore created an additional definition (from within adjacent) for “neighboring”. Seems redundant and adds to confusion and still does not clarify how adjacency to floodplains and riparian areas will be reviewed for being jurisdictional or not. (p. 13)

Agency Response: See essay above. “Adjacent waters” do not include any water excluded under paragraph (b) of the rule. For example, if the coal mine strip pit qualifies as a water-filled depression created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water, the pit would be excluded. If the pit is created by impounding a tributary or other water under paragraph (a) of the rule, the pit may be jurisdictional under the rule. The commenter does not provide enough detail to assess concerns regarding the Rahall amendment and, in any event, the Rahall amendment addresses permitting requirements for remining operations and thus is beyond the scope of today's rule.

Massachusetts Department of Environmental Protection (Doc. #19133)

- 3.13 Massachusetts also supports the proposed definition of "adjacent wetlands" to include adjacent waters such as ponds and oxbow lakes, as well as wetlands. We also strongly support the new definition of "neighboring" to include riparian area and floodplain of the abovementioned waters and tributaries, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional waters. We recommend that the issuing authority be given latitude to determine when waters with shallow subsurface hydrologic connection are present when a site is not within a riparian or floodplain area. We also agree that the definition of confined surface connections should include permanent, intermittent, or ephemeral examples.

The Massachusetts Wetland Protection Act, M.G.L. c.131, section 40 and its

implementing regulations at 310 CMR10.00 provides regulatory jurisdiction over the "Riverfront Area" of most rivers and streams in Massachusetts, defined as an area of land between a river's mean annual high water line measured horizontally outward from the river and a parallel line located 200 feet away.⁸ The Riverfront Area may include or overlap other resource areas such as wetlands or streams, and these Areas are likely to be significant to the protection of private or public water supply; groundwater; providing flood control; preventing storm damage; preventing pollution; protecting land containing shellfish; protecting wildlife habitat; and protecting fisheries.

The Massachusetts Wetland Protection Act also provides regulatory jurisdiction over Bordering Land Subject to Flooding. These lands are areas with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes, the boundary of which is the estimated maximum lateral extent of flood water which will theoretically result from the statistical 100-year frequency storm.⁹ These areas are likely to be significant to flood control, storm damage prevention and the protection of wildlife habitat.

We consider riparian and floodplain areas to provide crucial connections between resource areas and the abovementioned waters and tributaries and support the language in the Proposed Rule. (p. 3)

Agency Response: See essay above. The Agency notes that waters that would have been adjacent under the proposed rule, but which are not under the final rule, may nonetheless be determined "waters of the United States" on a case-specific basis under subsection (a)(7) or (8).

Additionally, the agencies emphasize that they fully support efforts by States and Tribes to protect under their own laws any additional waters, including locally special waters that may not be within the Federal interests of the CWA as the agencies have interpreted its scope in the rule. In promulgating the "adjacent waters" limits, the agencies balanced protection and clarity, scientific uncertainties and regulatory experience, and established lines that are, in their judgment, reasonable, implementable, and consistent with the statute and its goals and objectives.

Sean Parnell, Governor, State of Alaska (Doc. #19465)

- 3.14 The preamble discussion does not provide the necessary context for considering whether subsurface connections have a role to play in determining jurisdiction. There is an over emphasis on the mere existence of connections without discussion of the importance of the connections. While one can consider the entire world as an interconnected ecosystem under sufficiently large time scales, it is established practice to consider different subdivisions (e.g., atmosphere, oceans, lands, biosphere, etc.). Likewise, the hydrologic cycle has defined elements including surface waters, groundwater, atmosphere, and biological life. These divisions have utility despite the challenge of drawing bright lines in all circumstances (e.g., the vadose zone of soil where all the elements of the

⁸ 310 CMR 10.58 (2) (a) 3.<http://www.mass.gov/eea/agencies/massdep/water/regulations/310-cmr-1000-wetlands-protection-act-regulations.html#2>

⁹ See 310 CMR 10.57(2) for further text on regulatory definition

hydrological cycle are present and are not easily separable).

The proposed rule does not adequately define physical differences and does not even consider timescale differences when trying to establish the jurisdictional boundaries between surface water and groundwater. Arguably, timescale differences in flow are the most significant differentiator between ground water and surface water. Any definition of shallow subsurface hydrologic connection must address flow timescales. Any determination of jurisdiction for waters upstream or upgradient of a shallow subsurface hydrologic connection must likewise consider flow timescales, in addition to considering the significance of any effects on downstream waters. Note that groundwater, including shallow subsurface water, is under the clear jurisdiction of states.

The definitions of “neighboring” and “riparian area” are inconsistent. Neighboring uses the phrase “with a shallow subsurface hydrologic connection” while riparian uses where “subsurface hydrology directly influences ...” There should be consistency in the definitions that only significant effects on the characteristics of downstream traditionally navigable waters are important. This would require a definition for shallow subsurface hydrologic connection. This would also require that the riparian area definition language use threshold language for when there is a significant effect on the characteristics of traditional navigable waters rather than the indiscriminate “influences.”

Additionally, in the definition of “neighboring,” the phrase “or confined surface hydrologic connection” is unnecessary, adds confusion, and should be struck. If such a connection exists, under the proposed rule that would be considered under the definition of tributary. (p. 24-25)

Agency Response: See essay above.

- 3.15 Under the proposed rule, the agencies determined that all wetlands that are bordering, contiguous, or neighboring to a traditional navigable water or tributary (including perennial, intermittent, and ephemeral streams) have a significant nexus with traditional navigable waters and are therefore proposed to be jurisdictional by rule. The significant nexus finding is based on the conclusions of the draft Connectivity Report (EPA 2013). The proposed rule also removes the specific exclusion of wetlands adjacent to “waters that are themselves wetlands.” This change would mean a wetland could be found to be jurisdictional based on it being adjacent to another wetland (and also, therefore, excluded from a state-managed 404 program). Example: Wetland A is now jurisdictional because it is adjacent to wetland B that was determined to be jurisdictional. The State objects to this arbitrary expansion of federal jurisdiction, and the potential impact it would have on a state managed 404 program. (p. 27)

Agency Response: The agencies have revised the definition of “adjacent” to provide greater clarity and consistency. Consequently, the agencies deleted a parenthetical from the existing “adjacent wetlands” regulatory provision. The phrase “other than waters that are themselves wetlands” was intended to preclude asserting CWA jurisdiction over wetlands that were simply adjacent to a non-jurisdictional wetland. Such waters do not meet the definition of “adjacent” under the rule since waters must be adjacent to an (a)(1) through (a)(5) water, so the phrase is unnecessary and confusing. With this change, the agencies are protecting all waters that meet the definition of “adjacent” as “waters of the United States,”

and eliminating confusion caused by the parenthetical. For example, where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary's ordinary high water mark are jurisdictional because they are "neighboring" to the tributary, regardless of the wetlands' position relative to each other. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as the TSD.

Allen Boone Humphries Robinson LLP (Doc. #19614)

- 3.16 The Proposed Rule also broadens the definition of "adjacent" to include waters that are not actually adjacent within the customary meaning of the word but rather are merely "neighboring," as defined. The result is not only overbroad, it is also unclear. The agencies proposed definitions of "adjacent," "neighboring," "riparian area" and "floodplain" are ambiguous and unworkable, likely to make case-specific determinations complicated, prolonged, and burdensome. Once again, the Proposed Rule creates greater confusion and will inevitably lead to more protracted litigation. (p. 7)

Agency Response: See essay above.

City of Thornton (Doc. #7328)

- 3.17 Thornton is concerned that the new definitions of: "adjacent water" in proposed rule § 383.3 (c)(1) that includes waters separated by man-made barriers; "neighboring" in proposed rule § 383.3 (c)(2) that includes riparian areas and floodplains; and "significant nexus" in proposed rule § 383.3 (c)(1) which is very broad, could bring these lined gravel pit reservoirs under CWA jurisdiction because they are located near the South Platte River. The proposed rule should (but currently does not) recognize water within a lined facility, such as the City's gravel pit reservoirs, is physically separated from the river. Thornton is concerned that should these man-made storage facilities fall under CWA jurisdiction, its pre-treatment programs that were designed to help the City provide high quality drinking water could be considered a "discharge" under the CWA Section 404(b)(1). CWA regulation would trigger additional permitting and regulatory requirements, and would limit Thornton's ability to timely respond to water quality issues in its gravel pit reservoirs and provide high quality drinking water to its customers. (p. 2-3)

Agency Response: See essay above.

Murray County Board of Commissioners (Doc. #7528)

- 3.18 We recommend that the agencies limit the definition of adjacent waters to those wetlands that are adjacent to navigable waters, interstate waters, and territorial seas, and for which a significant nexus between the adjacent wetland and the navigable water is established. (p. 7)

Agency Response: See essay above.

- 3.19 We recommend the agencies only consider as jurisdictional-by-rule those wetlands that are adjacent to navigable waters, and not bootstrap the adjacency requirement demanded by the Supreme Court through tenuous connections of non-navigable waters. Additionally, "other waters," as defined by the proposed rule, fail to meet the

jurisdictional requirements of the Clean Water Act's language, its history, and current precedent, including Rapanos. (p. 9)

Agency Response: See essay above.

Hamilton County Engineer's Office (Doc. #8669)

- 3.20 It is believed that the term "adjacent" should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain if jurisdictional waters as either excluded or subject to the "significant nexus" test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 3)

Agency Response: See essay above.

City of Chesapeake (Doc. #9615)

- 3.21 The Rule proposes to revise the existing jurisdictional category of "adjacent wetlands," which currently limits jurisdiction to only wetlands, to include "adjacent waters." By Rule, adjacent waters would have a significant nexus; therefore, all adjacent waters would be subject to regulatory oversight under the CWA without the need for a case-specific significant nexus analysis. The proposed category of adjacent waters may significantly expand regulatory oversight under the CWA for features that were not previously subject to regulation under the CWA; therefore, the City of Chesapeake will not support the expansion of regulatory oversight under the CWA further into the watershed unless there is more than speculative or insubstantial scientific evidence that a significant nexus exists between a special aquatic resource and a TNW. (p. 4)

Agency Response: See essay above.

Clark County Regional Flood Control District (Nevada) (Doc. #11726)

- 3.22 From the above definitions it is apparent that the Agencies are seeking to exert Clean Water Act jurisdiction over normally dry land surfaces and not only "waters of the United States". Alluvial fans are land forms which are both erosional and depositional surfaces by definition. These and other normally dry land surfaces which may be subject to infrequent inundation by high water flows would be "waters of the United States" subject to Clean Water Act protection by rule. (p. 3)

Agency Response: Consistent with the statute and case law, the final rule regulates as "waters of the United States" only those waters that are traditional navigable waters, interstate waters, territorial seas, or waters that have a significant nexus to those waters (or impoundments of those waters), which includes "tributaries", "adjacent" waters, as defined under the rule, and others determined to have a significant nexus on a case-by-case basis. The rule does not categorically regulate or exclude alluvial fans. Rather, a specific alluvial fan would be a "water of the US" only if it fits within the definition of one of the regulated waters and was not excluded. For example, 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 final rule because it would not form the physical indicators required under the definitions of “ordinary high water mark” and “tributary.” See Tributary Compendium. 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 final rule recognizes that not all waters have a significant nexus to a traditional navigable waters, an interstate water, or a territorial sea. As a result, the final rule does not place all ephemeral features or occasionally or seasonally wet areas under federal jurisdiction.

- 3.23 It is not sufficient that there is evidence that water has flowed through an area at some time in the past, or that a floodplain is inundated during periods of high flows for that area to be regarded as a "waters of the United States". Normally dry land surfaces and land forms are not "waters", and the Agencies should not regulate them as if they were. (p. 4)

Agency Response: See above response.

City of Palo Alto, California (Doc. #12714)

- 3.24 The proposed rule would categorically include all "waters" within a floodplain or riparian area as waters of the U.S. The rule does not enumerate criteria for defining nor does it identify boundaries for these areas, yet asserts jurisdiction over all "waters," which are also undefined, because these waters are neighboring or adjacent to other jurisdictional waters. The rule assures that the EPA will use its best professional judgment to determine the boundary for these areas. This lack of specificity requires that every activity, including public improvements in flood protection, infrastructure, and facility maintenance, engage federal and state agencies in any land use decision within an area that is undefined. (p. 3)

Agency Response: See essay above.

Board of Commissioners of Carbon County, Utah (Doc. #12738)

- 3.25 It is most apparent to us that the proposed rule would significantly expand the scope of navigable waters under the guise of the Clean Water Act (CWA). It would give the federal government through agency fiat more unconstitutional authority to regulate all waters including small and remote drainages; many of which are not even wet or considered waters under any common logic. In adopting this proposed rule, "waters of the U.S." would allow the federal government veto power over farming and other land uses contravening Congressional exclusions placed into the Act in 1976. It would negatively impact agriculture and energy, the two main historic and cultural occupations of Carbon County and of many areas in this country. EPA’s overlying Modus Operandi (Method of Operation) in this Administrative branch supported fiat is to use unproven and non-peer reviewed science to support such rhetoric to conclude non-riparian/non-floodplain wetlands that are not connected to a river network or stream channel still hold

connectivity within a watershed to downstream navigable rivers. There is no literature we reviewed that provides sufficient information to evaluate the degree of connectivity (absolute or relative) of these non-riparian particular wetlands. Further it is in direct contravention of two recent Supreme Court decisions restricting EPA's and Corp of Engineer's earlier attempts to breach that wall. (p. 1-2)

Agency Response: See essay above. Also, the agencies disagree with the commenter's assertion that the categorical findings for "adjacent waters" are unsupported. The agencies determined based on a review of the science, the agencies' expertise and experience, the intent of the CWA, and the law, that "adjacent waters," as defined in the rule, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are "waters of the United States" as a class and without the need for any additional analysis. The scientific and legal basis for this determination is explained in the preamble and TSD. The agencies determined also that today's rule is consistent with Supreme Court precedent. See the preamble and TSD.

Further, if a water covered under paragraph (a) is also covered under paragraph (b) of the rule, the water is excluded under the definition.

Association of California Water Agencies (Doc. #12978)

- 3.26 The broad terminology used to define "adjacent" allows for sweeping jurisdiction over every wet feature in a floodplain, or riparian area, or that has a shallow, but unquantified, subsurface hydrologic connection to jurisdictional (a)(1) through (a)(5) waters. This expansive definition is not supported by language in the CWA or established by Supreme Court precedent. If the Agencies retain their use of the terms "riparian areas" and "floodplain," they should at a minimum clarify how the boundaries of a riparian area and a floodplain would be determined. For example, the Agencies could reference a specific map that will be used to determine whether a waterbody is in a floodplain, such as a map showing the 100-year floodplain (i.e., areas with a 1% risk of flooding in any given year). The most obvious choice for such a map would be the Flood Insurance Rate Map (FIRM) produced by the Federal Emergency Management Agency (FEMA). No federal agency currently identifies "riparian areas," so prior to implementing this portion of the "adjacent" definition the Agencies should release guidance documents for public review and comment. (p. 13)

Agency Response: See essay above.

Colfax Soil & Water Conservation District, New Mexico, et. al. (Doc. #13886)

- 3.27 Specific comment was requested concerning whether in-channel wetlands should be included with tributaries or adjacent waters. Logically, they seem better positioned in the realm of adjacent waters. Placing them in the category of tributaries runs contrary to that definitions requirements for a bed, banks and an ordinary high water mark. (p. 1)

Agency Response: As suggested by the commenter, as described more fully in the preamble and TSD, the agencies to provide greater clarity are treating these features solely under the "adjacent waters" category.

Board of County Commissioners of Otero County New Mexico (Doc. #14321)

- 3.28 The Proposed Rule should be withdrawn and reissued with “adjacent waters” limited to those adjacent waterbodies maintaining a permanent surface water connection with an (a)(1) through (a)(5) water. (p. 16)

The agencies’ definition of “neighboring” to include those waters located in the “riparian area” or “floodplain” of an (a)(1) through (a)(5) water will undoubtedly include waters with absolutely no “significant nexus,” as that term is defined, to the larger water. For example, this could include an isolated pond located in the 100 year floodplain of a major tributary and containing: no surface connection, no subsurface connection, and no nexus. Yet, because it is “neighboring” it is included. This logic of inclusiveness—to the complete disregard of navigable—was challenged and struck down by the Supreme Court in SWANCC. See SWANCC, 531 U.S. at 172. If such language is to stay, then the confines or sideboards of “floodplain” must be appropriately defined and not left to “the best professional judgment.”

“Neighboring” should also remove those last clause caveats regarding “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” This type of investigation will require significant resources to make what are really case-by-case determinations of connection *but not* the significance of the connection. To leave the clause in place serves only to muddy EPA’s and USACE’s efforts toward clarity. Further, it is abrasive to all that the agencies would go to great links to find a shallow subsurface connection, but not make a similar determination of its significance.

Agency Response: See essay above. The agencies did not adopt the commenter’s suggested approach because the record before the agencies demonstrates that a broader set of waters (i.e., those identified as jurisdictional in the rule) have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas.

Bangor Area Storm Water Group Hampden, Maine (Doc. #14543.1)

- 3.29 The proposed rule increases confusion over jurisdictional waters by defining water adjacent to jurisdictional waters as bordering, contiguous or neighboring. However, these terms are not defined independently of one another. This will cause confusion around what the term, “riparian area” includes. Additionally the proposed rule’s definition of the term “floodplain” does not agree with the definition used by FEMA for their floodplain management activities. Definitional disagreements will open municipalities and other entities to delays and disputes and potentially lead to longer approval times for 404 permitting for projects involving adjacent waters.

Request: The BASWG requests that EPA provide definitions of the terms “adjacent,” “neighboring,” and “bordering” in ways that do not rely on circular definitions (defining one term using another), provide additional clarification of the term “riparian” and change the definition of “floodplain” to agree with FEMA’s definition used in the context of floodplain management. (p. 2)

Agency Response: See essay above.

Jefferson Parish, Louisiana (Doc. #14574)

- 3.30 Thus, categorically, it is difficult for us to determine which wetlands would be nonadjacent to listed waters. And, on a case-by-case basis, it is difficult for us to determine which wetlands could lack a "nexus" to other unknown "similarly situated waters" (including other wetlands) in a broad watershed region. Wetlands could then virtually never be considered "isolated" under the proposed regulation, which conclusion would then run contrary to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), which held isolated waters are not regulated under the Clean Water Act. We are again left to the whim of individual regulators to determine which lands will come under federal control. This is not the clarity and certainty the new rules are supposed to bring. (p. 4)

Agency Response: See essay above. 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." First, the rule identifies at paragraph (a)(7) five subcategories of waters (prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that the agencies have determined are "similarly situated" for purposes of a significant nexus determination. Second, at paragraph (a)(8), the Rule provides that non-adjacent waters within 4000 feet of the high tide line or OHWM of an (a)(1)-(5) water or within the 100-year floodplain of an (a)(1)-(3) water, whichever distance is greater, are subject to a case-specific significant nexus determination.

The agencies have retained only in specified circumstances the current practice of case specific significant nexus determinations. Therefore, the agencies disagree that the rule is overly broad. The agencies have also provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity. The agencies' interpretation of the Supreme Court rulings in *SWANNC* and *Rapanos* is addressed in the Technical Support Document (TSD).

- 3.31 Based on the proposed definition of adjacent, the Proposed Rule will reach any isolated waters within the floodplain or riparian area of a traditional navigable water, or a tributary to a traditional navigable water. These terms are not defined in the Clean Water Act but are instead borne of the Supreme Court's decisions and the EPA and ACOE's efforts to draft a rule based on those decisions. In this case, the agencies have gone too far. The Proposed Rule goes further than Justice Kennedy's decision would allow by extending jurisdiction to waters that have only a biological, chemical, or physical connection to a traditional navigable water, rather than a combination of the three. This exceeds EPA's authority and will result in the capture of a multitude of isolated waters that were formerly outside the jurisdiction of the Clean Water Act. (p. 42)

Agency Response: See essay above. With respect to the commenter's assertion that the agencies are limited to asserting jurisdiction over only waters with a biological, chemical, and physical connection to a traditional navigable water, see

the Significant Nexus compendium and the TSD.

- 3.32 The Proposed Rule's definition of "adjacent" is based on EPA's survey of scientific studies. As noted in the Proposed Rule, that survey is not yet complete. When it is complete, EPA intends to issue a final rule based on a determination that the waters defined as "adjacent" per se have a significant impact on the physical, chemical or biological integrity of traditional navigable waters or tributaries to traditional navigable waters. We question EPA and ACOE's ability to make such a finding. No amount of study will say with certainty whether every adjacent water in the United States has a significant impact on the physical, chemical or biological integrity of traditional navigable waters or tributaries thereto unless and until every such water is studied. Until EPA and the Army Corps conduct a study that is that broad, they will lack the substantial evidence necessary to adopt the Proposed Rule. (p. 44)

Agency Response: The agencies disagree with the commenter's assertion that there is not sufficient literature on which to make a categorical findings for "adjacent waters." The agencies determined based on a review of the science, the agencies' expertise and experience, the intent of the CWA, and the case law, that "adjacent waters," as defined in the rule, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are "waters of the United States" as a class and without the need for any additional analysis. The scientific and legal basis for this determination is explained in the preamble and TSD.

City of Buckeye, Arizona (Doc. #14591)

- 3.33 Section I.a.vi. of the draft proposed rule ("All waters, including wetlands, adjacent to a water identified in paragraphs (a)(l) through (5) of this section") states that all waters adjacent to WOTUS are WOTUS. The definition of the term "adjacent" includes the term "neighboring". The definition of the term "neighboring" includes waters located within the riparian area or floodplain of a WOTUS. Under this rule language, it appears that constructed urban SCMs in the riparian areas or floodplains of WOTUS would be considered WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable. (p. 3)

Agency Response: **Response:** See essay above. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see the Exclusions Compendium (Topic 7).

San Joaquin County Board of Supervisors (Doc. #15017.1)

- 3.34 Under this definition, waters in a riparian area or floodplain of jurisdictional waters already are assumed to have a "significant nexus" to navigable waters and would automatically be jurisdictional without the need to determine "adjacency". The uncertainty arises when the agencies use their judgment to decide "adjacency" of waters.

We believe that the term "adjacent" should only apply to waters in the riparian area or

floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the "significant nexus" test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 4)

Agency Response: See essay above. Although the rule no longer contains provisions addressing shallow subsurface connections, the agencies did not, as suggested by the commenter, ignore shallow subsurface water connectivity in determining adjacency. While the commenter provided no basis for that suggestion, the record for today's rule demonstrates assessing such connections may be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today's rule and the TSD.

New York City Law Department (Doc. #15065)

- 3.35 "Adjacent" and "Riparian": The Proposed Rule would define all waters that are "adjacent" to five specified categories of waters as jurisdictional. The proposed definition of "adjacent" is "waters located within the riparian area or floodplain of a water identified in [the five specified categories], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water." A "riparian area" is defined as "an area bordering a water where surface or subsurface hydrology directly influence ecological processes and plant and animal community structure in that area." While this definition of a "riparian area" is scientifically valid, as a practical matter it may be difficult to determine the extent of riparian areas. Inconsistent application of the term "riparian area" could greatly influence the extent of neighboring, and therefore adjacent, wetlands that would be "waters of the United States" under the Proposed Rule. EPA and the Corps should provide a method in the accompanying narrative for how "riparian areas" will be consistently identified. (p. 3)

Agency Response: See essay above.

National Association of Counties (Doc. #15081)

- 3.36 Under current regulation, only those wetlands that are adjacent to a "waters of the U.S." are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines "adjacent as "bordering, contiguous or neighboring."¹⁰ Under the rule, adjacent waters include those located in riparian or floodplain areas.¹¹

Expanding the definition of "adjacency," will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety,

¹⁰ 79 Fed. Reg. 22199.

¹¹ 79 Fed. Reg. 22199.

we would encourage the agencies to assess the unintended consequences. (p. 9-10)

Agency Response: See essay above. The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Consistent with SWANCC and *Rapanos*, the agencies have narrowed, not expanded, the definition of “waters of the United States” compared to the longstanding, existing definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Lea Soil and Conservation District Board of Supervisors (Doc. #15144.1)

- 3.37 Section (a)(6) and associated definitions: The Proposed Rule should be withdrawn and reissued with “adjacent waters” limited to those adjacent waterbodies maintaining a permanent surface water connection with an (a)(1) through (a)(5) water. (p. 4)

Agency Response: See essay above. Although the rule no longer contains provisions addressing shallow subsurface connections, the agencies did not, as suggested by the commenter, ignore shallow surface connections in determining adjacency. While the commenter provided no basis for that suggestion, the record for today’s rule demonstrates that assessing such connection may be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

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

- 3.38 The Agencies should revise the rule to state that floodplains, riparian areas due to geographic location would not be jurisdictional and alleviate the concerns of regulation of land and inconsistent application of “best professional judgment” by the local agencies (p. 5)

Agency Response: The agencies disagree with the commenter that if the waters are separated by land then the adjacent water should be non-jurisdictional under the CWA. However, the agencies agree with the commenter that there is a gradient of connectivity and have asserted jurisdiction by rule or will assert jurisdiction on a case-by-case basis only when that connection and the downstream effects are significant and more than speculative and insubstantial. Further detail can be found in elsewhere in this response to comment document, the rule, preamble and TSD.

Environmental Protection and Growth Management Department County (Broward County) (Doc. #15395)

- 3.39 “The Board...supports legislation that:”

“Clarifies the basis and scope of CWA jurisdiction, including a more descriptive definition of the jurisdictional waters included within the term.” Broward County finds that the proposed rule significantly clarifies the basis and scope of jurisdiction. In contrast to the current regulation, the proposed rule specifically excludes certain waters and features from jurisdiction; defines additional terms, including “neighboring” and “tributary”; and establishes a “significant nexus” standard for evaluating—on a case-by-

case basis—if “other waters” should fall under CWA jurisdiction because they affect the chemical, physical, or biological integrity of recognized waters. (p. 2)

“Establishes specific standards that protect wetlands having significant ecological functions or hydrological connections to navigable waters.” Broward County finds that the proposed rule, by clarifying that the waters defined as “adjacent waters” (including, but not limited to, wetlands) have a “significant nexus” to recognized waters of the US, maintains or improves protection for wetlands under the CWA. Additionally, the “significant nexus” standard provides a scientifically-determinable basis for establishing hydrological connection to recognized waters. Current language establishing jurisdiction over “other waters” based on the waters’ effect on interstate commerce is much more amorphous and lacks scientific rigor. (p. 2)

Agency Response: As described more fully elsewhere, the agencies have revised the definition of “adjacent” in response to comments seeking greater clarity, consistency, and certainty. That narrowing, and the case-by-case analysis under the final rule, are based on, among other things, application of the “significant nexus” test and thus continue to meet the goals articulated by this commenter.

Southern California Water Committee (Doc. #16170)

- 3.40 Accordingly, it is necessary to specifically exclude stormwater treatment control BMPs, spreading grounds, and other beneficial projects such as green infrastructure from the definition of “adjacent.” SCWC provides suggested amendments to the exclusions in section II below to achieve this purpose. (p. 5-6)

Agency Response: The agencies have excluded stormwater control features providing they meet the definition in paragraph (b) of the rule. Please see the Exclusions Compendium (Topic 7).

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

- 3.41 To address the issues identified in this letter the Federal Agencies should: [...]

Clarify that “adjacent” waters are limited to adjacent wetlands; the only type of water body the Supreme Court has indicated can be categorically regulated on the basis of adjacency. (p. 2-3)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” inappropriately broadens the scope of the definition of “waters of the United States.” Also, see the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent. In addition, the agencies have excluded stormwater control features providing they meet the definition in paragraph (b) of the rule.

City of Beaverton’s, Oregon (Doc. #16466)

- 3.42 [W]ith the proposed rule’s broad definitions of “tributary,” “floodplain,” “riparian area,” and “other waters,” which EPA proposes to categorically consider as jurisdictional water, virtually every water body not expressly exempted could be designated as a

WOTUS. Portions of the City are defined as a floodplain by the Federal Emergency Management Agency as a result of their mapping process for the National Flood Insurance Program. To automatically assume that all waters within those "floodplains" are WOTUS, even though the proposed rule provides no definition of floodplain, does not take into account any scientific linkage, nor is it mindful of Federal agency limitations as FEMA does not develop flood maps for this purpose. (p. 2)

Agency Response: See essay above. As discussed in the preamble and TSD, all determinations that specific categories of waters will be jurisdictional by rule (as opposed to case-by-case) were made on a scientifically and legally supported finding of a significant nexus with traditionally navigable waters, interstate waters, or the territorial seas. Although FEMA has not developed its flood maps for the purposes of determining CWA jurisdiction, for the reasons discussed in the preamble and TSD, use of such maps, where available, is appropriate.

Brady Township Supervisors, Clearfield County, Pennsylvania (Doc. #16480)

- 3.43 We believe that the term "adjacent" should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable, and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the "significant nexus" test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 3)

Agency Response: See essay above. Although the rule no longer contains provisions addressing shallow subsurface connections, the agencies did not, as suggested by the commenter, ignore shallow subsurface connectivity in determining adjacency. While the commenter provided no basis for that suggestion, the record for today's rule demonstrates that assessing such connection can be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today's rule and the TSD.

San Bernadino County, California (Doc. #16489)

- 3.44 "Adjacent Waters" and "Other Waters", separated by Berms and Barriers: The proposed Rule bases the evaluation of "adjacent waters" and "other waters" from a natural, pristine setting. Watersheds that have been historically modified for flood control purposes should not use the same evaluation metric. In modified urban watersheds, many facilities are divided by berms/barriers, including concrete-hardened structures, and have no hydrologic connectivity to downstream navigable waters, notwithstanding their locations within a watershed with navigable receiving waters. (p. 3)

Agency Response: See essay above. The agencies disagrees with this comment for the reasons discussed in the preamble and the TSD.

- 3.45 [I]t is necessary to clearly and specifically exclude stormwater structural BMPs, spreading grounds, and other beneficial projects such as green infrastructure from the definition of "adjacent." DPW provides suggested amendments to the exclusions in Subsection B below to achieve this purpose. (p. 24)

Agency Response: See essay above. With respect to the jurisdictional status of stormwater control and wastewater recycling features as waters of the U.S., please see the Exclusions Compendium (Topic 7).

City of Oceanside, California (Doc. #16509)

- 3.46 Other types of facilities that could be impacted are spreading grounds. Like other municipalities in California, the City is considering to operate infiltration basins that are commonly referred to as "spreading grounds." Generally, spreading grounds consist of "spreading" recycled water, imported water, storm water, and other water across basins for infiltration. These spreading grounds recharge underground drinking water aquifers, and are an essential part of City's efforts to manage its water resources. If they fall within the "adjacent" category, these spreading grounds could become a WOTUS and become subject to extensive regulation under the CWA. Accordingly, it is necessary to specifically exclude storm water structural BMPs, spreading grounds, and other beneficial projects such as green infrastructure from the definition of "adjacent." (p. 4)

Agency Response: See essay response and comment response above.

Snowmass Water and Sanitation District (Doc. #16529)

- 3.47 The proposed rule would expand the concept of adjacency well beyond the confines of established law. The seminal case on "adjacency" is the Supreme Court decision in *United States v. Riverside Bayview Homes, Inc.* that regarded a wetland adjacent to a river as jurisdictional where it was "inseparably bound up" with traditional navigable waters. The proposed rule would expand the concept of adjacency by defining ponds or wetlands in surrounding riparian zones and floodplains as "neighboring" and thus as automatically jurisdictional "adjacent" waters. In some instances, these may not abut or be bordering or contiguous to any waters of the U.S., and may possess only attenuated connections to traditional navigable waters. The literature and case studies cited in the Connectivity Report provide too small a sample to demonstrate that all such waters have a significant nexus. Accordingly, this approach is overly broad and lacking clear legal support. (p. 6)

Agency Response: See essay above. The rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD. As explained more fully in the preamble and TSD, based on a review of the scientific literature, the agencies' expertise and experience, and the law, the agencies determined that the categories of waters defined as adjacent are integrally linked to the chemical, physical, or biological functions of waters to which they are adjacent and downstream to the traditional navigable waters, interstate waters or the territorial seas. Therefore, the agencies determined that the waters defined as adjacent have a significant nexus with traditional navigable waters, interstate waters or the territorial seas and are thus "waters of the United States."

The commenter did not provide a basis for the assertion regarding the Connectivity Report, so the Agency is unable to evaluate it. Further, the agencies determined based on a review of the science, the agencies' expertise and experience, the intent of

the CWA, and the law, that “adjacent waters,” as defined in the rule, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” as a class and without the need for any additional analysis. The scientific and legal basis for this determination is explained in the preamble and TSD.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenters' view that EPA has expanded its jurisdiction, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Hot Springs County Commissioners (Doc. #16676)

- 3.48 Adjacent and Neighboring: The definitions provided in the proposed rule for an adjacent water and neighboring water each continue to expand the possibility of waters that could be automatically considered a water of the U.S. While the previous rule established that “adjacent” only referred to wetlands, the proposed rule expands that to include all waters adjacent to jurisdictional water. Further, the term neighboring establishes that adjacent could be located within a riparian area or floodplain, and may only be connected by a “shallow subsurface hydrologic connection”¹² This again calls into question the applicability of the ditch exemption discussed above. (p. 7)

Agency Response: See essay above. Contrary to the commenter’s assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

With regard to ditches, adjacency only applies where that ditch is determined to meet the definition of tributary, as defined in the rule, and not excluded under paragraph (b). Furthermore, where the ditch meets the definition of a tributary and it is not excluded under paragraph (b), adjacent waters to that tributary would also be jurisdictional. Additional support is provided in the preamble to today’s rule and the TSD. Note, also, that the agencies revised the ditch exclusions in the final rule to address commenters’ concerns about their applicability. See Ditch Compendium (Topic 6).

City of Palo Alto, Office of the Mayor and City Council (Doc. #16799)

- 3.49 We ask that a final rule include science-based criteria and greater clarity of adjacent and neighboring “waters” and a definition of floodplain and riparian areas that are not entirely arbitrary. The Federal Emergency Management Agency (FEMA) expends over \$100 million annually identifying floodplains, and recognizes the authority of local government to adopt the appropriate ordinances to manage land uses within the

¹² At 22,263

designated floodplain. This proposed rule grants full discretion to EPA to exercise best professional judgment to identify a floodplain and imposes the full force of the Clean Water Act on any land use decision that could affect undefined "water" within that floodplain or riparian area. (p. 3)

Agency Response: See essay above.

City of St. Petersburg (Doc. #18897)

- 3.50 The new definitions of "Adjacent" and "Neighboring" are overbroad and potentially ambiguous. Adjacent waters would include waters which border, are contiguous to, or neighbor waters of the U.S., even if they are separated by dikes, barriers, berms, or dunes. The latter part of the definition addressing separate, discrete waters appears to run directly antithetical to the plain meaning of "significant nexus" and any reasonable notion of hydrologic connectivity. Further, and more troublesome for the City (and any of its Floridian brethren), is the definition of neighboring. This definition includes "waters with a shallow subsurface hydrologic connection" which could lead to a slippery slope in the classification of jurisdictional waters in Florida. The City, like most of Peninsular Florida, is underlain by subsurface karst topography, comprising the surficial, intermediate, and Floridan aquifers. As evidenced by the good (springs), the bad (sinkholes), and the ugly (coastal saltwater intrusion), the region's water table is nearly always at or near shallow subsurface elevations. Jurisdictional determinations could be difficult to make based on delineation of breaks in surface and subsurface connectivity, with significant added costs sure to stem from the additional outlay of effort required to make such determinations underground. Evaluation of subsurface connectivity would be a major expansion of the EPA's purview, historically, under the CW A. (p. 2)

Agency Response: See essay above. With respect to the commenter's concerns regarding potential burdens associated with identifying and assessing shallow subsurface connections, any such assessments will be conducted only in the context of case-specific significant nexus analyses. The agencies have considerable experience assessing shallow subsurface connections under the current rule and have not found the effort overly burdensome. For example, tools to assess shallow subsurface flow include reviewing the soils information from the NRCS Soil Survey, which is available for nearly every county in the United States. Further, it is important to note that, unlike under the proposed rule, a shallow surface connection alone does not determine jurisdiction. There are likely to be cases where other factors render a water jurisdictional, making identification of a shallow subsurface connection unnecessary. Also, where shallow subsurface connections are identified, there may be cases where the nexus to the relevant downstream water is determined not to be significant.

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

- 3.51 We believe that the term "adjacent" should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the

“significant nexus” test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 6)

Agency Response: See essay response.

Board of Supervisors, Sutter County, California (Doc. #19657)

- 3.52 We believe that the term "adjacent" should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the "significant nexus" test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 7)

Agency Response: Please see essay response.

- 3.53 To address these issues, we request that the agencies make the following changes to the Proposed Rule:

Revise the proposed definition of "adjacent" in 33 C.F.R §328.3(~)(1) to exclude: "waters separated from a water of the United States by a berm capable of providing flood control protection for a 100-year or greater storm event and which drain or discharge into waters of the United States, if at all, exclusively by mechanical pumping. (p. 8)

Agency Response: See essay above. In addition, the commenter provides no scientific or legal basis for its suggested exclusion.

Further, the final rule expressly excludes artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds from regulation as waters of the United States.

North Dakota Water Resource Districts Association (Doc. #5596)

- 3.54 Though the agencies assert no expansion of Federal jurisdiction, the agencies expressly state that the reason "adjacent wetlands" is now termed "adjacent waters" is because the term, "adjacent wetlands" limited agency authority and expansion of jurisdiction was needed. Under the "adjacent waters" discussion, the term "neighboring" is introduced which expands jurisdiction further to "riparian areas" and "floodplains" with no definition of the same. The Association is concerned that the definition of these areas is proposed to be left to the "best professional experience and judgment" of the agencies who have historically interpreted these terms broadly. The Association recommends the deletion of "neighboring" from the proposed rule as it concerns "adjacent waters." (p. 2)

Agency Response: See essay response. In addition, as discussed elsewhere, the agencies have revised the definition of adjacent to provide more clarity, consistency and certainty.

National Association of Conservation Districts (Doc. #12349)

- 3.55 EPA is proposing that adjacent waters are per se jurisdictional without the need for a site-specific “significant nexus” test. The rule’s per se jurisdiction over “adjacent waters” is inconsistent with historic USACE practice, and would invariably result in an

expansion of jurisdiction with regard to certain types of waters.

Agency Response: The commenter is unclear regarding what is meant by “historic” USACE practice. Please see TSD, Section 1, for a discussion of how the scope of today’s rule compares to past rules and practices.

- 3.56 EPA proposes a new concept of “fill and spill” that would result in the jurisdiction of prairie potholes and other currently non-jurisdictional, isolated water bodies.¹³ The agency has also stated for the first time that a biological connection, e.g., via migratory waterfowl, would be sufficient to establish jurisdiction. In a historical context and in theory, the “migratory bird rule” (which was struck down) granted broad expansive authority that could have reached nearly any and all water bodies; in practice, however, the Corps asserted jurisdiction over isolated wetlands that were more ecologically significant. We believe that jurisdiction should be based wholly on hydrologic connection, and any biological connection should be weighed in light of its ecological significance.

Agency Response: The agencies did not limit “adjacent” waters to those with a hydrological connection because, as discussed in the preamble and TSD, “adjacent” waters have a significant nexus even where such a connection is not present. See also the Other Waters, Significant Nexus and Science compendiums.

- 3.57 EPA also introduces new definitions (e.g., “adjacent,” “neighboring,” “riparian areas,” and “floodplain,”) that are generally broad in scope and without geographic limit. This creates even greater ambiguity and concern by those who believe the proposal reflects an expansion of jurisdiction, notwithstanding the agency has requested comments on how to improve clarity and predictability. The following questionable wording should be addressed.

Adjacency:¹⁴ “bordering, contiguous, or neighboring.” There needs to be clarity in the proposed rule as to whether a physical connection is required.

- 3.58 Neighboring:¹⁵ “located within the riparian area or floodplain ... or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water.” Clarity is required in terms of parameters, criteria and specific standards, for determining “shallow” for the purposes of “shallow subsurface hydrological connection.” Riparian area:¹⁶ “directly influence the ecological processes and plant and animal community structure.” This definition supports a pre-SWANCC application of the strength of the ecological connection for

¹³ Fill and spill as described as follows: For purposes of this rule, “fill and spill” describes situations where wetlands or open waters fill to capacity during intense precipitation events or high cumulative precipitation over time and then spill to the downstream jurisdictional water. Report at 5-62 (citing T.C. Winter and D.O. Rosenberry, “Hydrology of Prairie Pothole Wetlands during Drought and Deluge: a 17-year Study of the Cottonwood Lake Wetland Complex in North Dakota in the Perspective of Longer Term Measured and Proxy Hydrological Records,” Climatic Change 40:189-209 (1998); S.G. Leibowitz, and K.C. Vining, “Temporal connectivity in a prairie pothole complex,” Wetlands 23:13-25 (2003). Water connected through such flows originates from adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface.” 76 Fed. Reg. at 22208.

¹⁴ 40 CFR 230.3(u)(1).

¹⁵ 40 CFR 230.3(u)(2).

¹⁶ 40 CFR 230.3(u)(3).

purposes of USACE determinations. Only those with very strong ecological connections based upon clearly defined parameters, criteria and threshold standards should be considered.

Floodplain:¹⁷ “inundated during periods of moderate to high water flows,” noting that local input and generations of perspective should be consulted in specific floodplains at the local level. As such, NACD requests that EPA and USACE take adequate time to obtain local input for the development of parameters, criteria, and defined standards for each of the above definitions, including “significant nexus.”(p. 5-6)

Agency Response: See essay above. EPA revised the proposed rule to address the input from many commenters. Additional information is also provided in the preamble to today’s rule as well as in the TSD for defining “significant nexus.” While the agencies expect that this rule will significantly reduce the need for case-specific jurisdictional determinations, the analysis of the “significant nexus” factors set out in the rule for such determinations will be substantially informed by local information.

Western Coalition of Arid States (Doc. #14407)

- 3.59 With the proposed rule’s regulation of adjacent wetlands and non-wetland waters, the agencies extend jurisdiction to an entirely new category of waters. The broad terminology used to define “adjacent” allows for sweeping jurisdiction over every wet feature in a floodplain, or riparian area, or any wet feature that has a shallow, but unquantified, subsurface hydrologic connection to jurisdictional (a)(1) through (a)(5) waters. The breadth of the category of adjacent waters is also compounded by numerous ambiguities in the proposed terminology that, in practice, will also result in confusion and unpredictability by most permitting agencies and field personnel. (p. 4)

Agency Response: **Response:** See essay above. See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.” Further, the scientific and legal basis for regulating non-wetland waters as adjacent are explained in the preamble and TSD.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenters view that EPA has expanded its jurisdiction, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

County Commissioners Association of Pennsylvania (Doc. #14579)

- 3.60 Other terminology used throughout the proposed rule only adds to the confusion about which waters will be considered to be Waters of the U.S. For instance, one of the supposed bright-line categories of jurisdiction is a water that is “adjacent” to a

¹⁷ 40 CFR 230.3(u)(4).

traditional navigable water, interstate water or territorial sea. Yet the definition of “adjacent” contains even more vague terms – bordering, contiguous or neighboring, the latter of which leads us to the floodplain or riparian area of a jurisdictional water. There are further references to “aquatic systems” incorporating navigable waters. As we have noted previously, all of these terms only highlight the interdependence of hydrological systems and implies that virtually every water has a nexus in some way to a traditional navigable water, interstate water or territorial sea. The proposed rule should be considerably clearer on which waters will be considered in the aggregate. (p. 6)

Agency Response: See essay above. With respect to “bordering” and “contiguous”, the commenter does not explain its assertion of ambiguity; as discussed in the preamble, those terms are well understood and the agencies continue to interpret them and implement them consistent with the current policy and practice.

For a discussion of how similarly situated waters in the region will be identified, see Other Waters Compendium.

- 3.61 In order to determine if a water or wetland is “neighboring” under the proposed rule, one must be able to accurately define the limits of the “riparian area” and the “floodplain.” This will be challenging given the definitions provided in the proposed rule and that the proposed rule makes allowances for “neighboring” waters to also occur outside of the riparian area or floodplain.

The proposed rule does not define “present climatic conditions” and does not describe how a floodplain would be delineated. For example, in September of 2013 (assumed to be current climatic conditions) extensive severe flooding occurred along many rivers and streams along the Front Range of Colorado. Does that flood event define the floodplain for determining “neighboring”? Floodplains are typically defined by the frequency a flood is predicted to inundate up to a specific elevation (e.g., a 100-year floodplain). For many areas in the U.S., there is reliable information on the extent of floodplains (at least along major drainages). However, the proposed rule does not reference or recommend use of existing floodplain mapping and flood hazard products produced by the Federal Emergency Management Agency. Since the proposed rule does not define moderate to high water flows, the flow levels are open to interpretation. Hydrologists typically define such flows by their predicted recurrence interval (e.g., a 10-year flood event). It is also noted that in many arid regions, geomorphologic floodplains do not exist along braided channels because extreme variability of discharges prevents the repetitive over-bank flows needed for floodplain construction (Graf 1988, p. 297). As currently proposed, it would be difficult for professionals, let alone the regulated public, to accurately delineate the floodplain to determine if a water or wetland is neighboring, and it is unlikely that professionals and agency personnel will be able to consistently apply and independently replicate floodplain delineations following the proposed definition.

Similarly, the term “riparian” would benefit from additional definition. The EPA SAB Panel also noted “...that the definition of riparian area in the proposed rule is problematic because it is based on hydrologic flows and not the host of other functions that riparian areas provide” (EPA SAB Panel 2014). Most riparian definitions incorporate soil, biotic, and hydrologic criteria that allow practitioners to determine the boundaries of the riparian

area in a consistent manner (similar to how the Corps and EPA determine wetland boundaries). For example, the U.S. Forest Service (USFS) uses the following: “the edge of the riparian area corresponds to: 1) substrate attributes – the portion of the valley bottom influenced by fluvial processes under the current climatic regime, 2) biotic attributes – riparian vegetation characteristic of the region, and 3) hydrologic attributes – the area of the valley bottom flooded at the stage (water surface elevation) of the 100-year recurrence interval flow” (USFS 2014).

The proposed rule states “[I]t is the agencies’ intent that the definitions in this proposed rule provide as much clarity and regulatory certainty as possible.” Use of the terms “floodplain” and “riparian” in the proposed rule do not provide regulatory certainty and are not clarifying. Under the proposed rule, waters and wetlands occurring in a floodplain or riparian area of (a)(1) through (5) waters are assumed to have a confined surface or shallow subsurface connection to the jurisdictional water. This presumption (as noted by the underscored “or” in the definition above) may not always be true and should be a rebuttable presumption. (p. 27-28)

Agency Response: See essay above. The agencies agree with the commenter that not all waters in the floodplain or in riparian areas will have a “significant nexus” to traditional navigable waters, interstate waters or the territorial seas. Because the agencies deleted the term and definition of “riparian area” from the definition of “adjacent” because it did not provide the desired clarity, the agencies did not adopt the “rebuttable presumption” approach advanced by the commenter. However, the final rule advances the same goals by drawing lines within which waters are “adjacent” and thus jurisdictional by rule and providing for case-by-case determinations for non-adjacent waters located within 4000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) or within the 100-year floodplain of an (a)(1)-(3) water (whichever is the greater distance). Case-specific determinations are also required for waters identified in section (a)(7) regardless of distance.

As discussed in the preamble, the agencies will, as commenter suggested, make use of the work done by other agencies regarding floodplains. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain.

Wyoming County Commissioners Association (Doc. #15434)

- 3.62 The definitions provided in the proposed rule for an adjacent water and neighboring water each continue to expand the possibility of waters that could be automatically considered a water of the U.S. While the previous rule established that “adjacent” only referred to wetlands, the proposed rule expands that to include all waters adjacent to jurisdictional water. Further, the term neighboring establishes that adjacent could be located within a riparian area or floodplain, and may only be connected by a “shallow subsurface hydrologic connection.”¹⁸ This again calls into question the applicability of the ditch exemption discussed above. (p. 7-8)

¹⁸ at 22,263

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.” Further, the scientific and legal basis for regulating non-wetland waters as adjacent are explained in the preamble and TSD. In addition, as discussed elsewhere, the agencies have revised the definition of “adjacent” to provide more clarity, consistency and certainty.

With regard to ditches, adjacency only applies where that ditch is determined to meet the definition of tributary, as defined in the rule, and not excluded under paragraph (b). Furthermore, where the ditch meets the definition of a tributary and it is not excluded under paragraph (b), waters adjacent to that tributary would also be jurisdictional. Additional support is provided in the preamble to today’s rule and the TSD. Note, also, that the agencies revised the ditch exclusions in the final rule to address commenters’ concerned about their applicability. See Ditch Compendium (Topic 6).

Coalition of Local Governments (Doc. #15516)

- 3.63 The Coalition supports the alternative of only including those waters within a floodplain, which have a clear nexus to navigable waters and which excludes groundwater. These definitions are consistent with the plurality holding in *Rapanos* and further prevents the EPA and Corps from extending its authority into the state regulated groundwaters. See *Rapanos*, 547 U.S. at 742, 784-85 (Holding that only wetlands with a continuous surface connection to “waters of the United States” are considered adjacent to such waters).

Riparian areas are defined by their vegetation, not by flowing water. According to the Forest Service (FS), Bureau of Land Management (BLM), and the National Resource Conservation Service (NRCS), riparian areas are identified by the unique soil characteristics and the distinctive vegetation communities that are influenced by free or unbound water in the soil. FS Manual 2500, Section 2526.05 (May 26, 2004); BLM, Riparian Area Management - Process for Assessing Proper Functioning Condition, at 7 (last revised 1998) (citing BLM Manual 1737); Montgomery, Gerald L., NRCS, Working Paper No. 13 - Riparian Areas Reservoirs of Diversity (Feb. 1996), available at http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/survey/geo/?cid=nrcs143_014206. They do occur along watercourse or water bodies in most cases, but in the west they are often found near isolated pools of water overlaying alkali soils. Therefore, riparian areas should not be used to define the area included within “adjacent waters” to the “waters of the United States.”

Further, the hydrologic systems are not completely mapped out and not well-understood in the scientific community. This is because some aquifers are connected and others are not depending on the geologic strata, permeability, and amount of waters, among other factors. Therefore, wetlands and other waters that are not within floodplains will have varying effects on downstream waters. As the Proposed Rule recognizes, “[b]ecause such wetlands occur on a gradient of connectivity, it is difficult to generalize about their effects on downstream waters. Generalization for this class is further complicated because, for certain functions . . . downstream effects are due to wetland isolation, rather than connectivity.” 79 Fed. Reg. at 22223, 22225 (summarizing conclusions from EPA’s Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis

of the Scientific Evidence (2013) (hereinafter “Report”). Further, “given a geographically isolated wetland for which a surface water connection cannot be observed, it is difficult to assess its degree of connectivity with the river network without site-specific data.” Id. at 22226.

Therefore, jurisdictional “waters of the United States” should not include waters that are adjacent due to some type of subsurface hydrological connection. It is not supported by the science and is contrary to Supreme Court precedent. See *Rapanos*, 547 U.S. at 732-35, 739, 742, 784-84 (J. Scalia’s Plurality Opinions and J. Kennedy’s Concurring Opinion) (both opinions concluding that a hydrologic connection is insufficient to establish the required nexus with navigable waters). (p. 10-11)

Agency Response: See essay above.

The Agency disagrees that only waters in the floodplain have a significant nexus; the record for today’s rule demonstrates that the non-floodplain waters that are (by rule) or may be (by case-specific determination) jurisdictional under the definition have (or may have, in the case of individual determinations) a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. Nothing in this comment suggests otherwise.

The Agency disagrees that only continuous surface connections may be considered in determining a significant nexus. Although the definition of “adjacent” no longer contains provisions addressing shallow subsurface connections, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in case-specific significant nexus determinations for waters that are not “adjacent” but are either waters identified in (a) (7) or (a)(8), for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections may be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

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 demonstrated to be significant and more than speculative and insubstantial. 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. As noted above, 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 provide similar functions and function together in affecting downstream traditional navigable waters, interstate waters, or the territorial seas.

In the final rule, the agencies in (a)(7) identified five specific types of waters-- prairie potholes, Carolina and Delmarva Bays, Pocosins, western vernal pools in California, and Texas coastal prairie wetlands -- the agencies determined are

“similarly situated” by rule in a single point of entry watershed. For waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, a case-specific jurisdictional determination is required. Waters beyond these limits are not regulated. Please see the preamble and TSD for additional detail.

- 3.64 The proposed rule does not regulate land, but it does propose to regulate all “[a]djacent waters only if they are located in the floodplain or riparian zone of a jurisdiction water” 79 Fed. Reg. 22208. This expands the scope of the EPA’s jurisdiction into waters and wetlands that have no connection to a traditional navigable water. As was discussed supra Section IV.C, there is also an issue of defining “adjacent” and “neighboring” as including waters located within a “riparian area.” A riparian area is defined by the vegetation, not by water sources. (p. 20)

Agency Response: See essay above.

Washington State Water Resources Association (Doc. #16543)

- 3.65 The proposal would, for the first time, categorize “all” adjacent “waters” as jurisdictional by rule, as compared to the prior reference to adjacent “wetlands”. The concept of adjacency will, in turn, be expanded by adding a new definition of “neighboring,” which includes all “waters located within the riparian area or floodplain.” Riparian area will be loosely defined to include an area bordering a water with a surface or subsurface hydrological connection to a TNW. The existence of such a connection will be based upon the best professional judgment (BPJ) of agency personnel and can be established, contrary to the Court’s holding in SWANCC, through an examination of ecological processes and plant and animal communities in the area. Actual “water quality” impacts need not be demonstrated. The “floodplain” area, in turn, is essentially undefined relative to the spatial or temporal extent of high flow events, e.g., a ten year high flow event versus a one-hundred year event. (p. 4)

Agency Response: See essay above. The agencies agree with the commenter’s point that all adjacent waters will be categorically jurisdictional by rule, as the scientific and legal basis support this finding; this finding is presented in the preamble and TSD. For a discussion of what may be considered in a significant nexus analysis, see the Significant Nexus Compendium as well as the preamble and TSD.

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

- 3.66 The existing regulations extend jurisdiction explicitly over “adjacent wetlands,” an exertion of jurisdiction upheld in Riverside Bayview Homes for wetlands that directly abutted traditional navigable-in-fact waters. Never, though, has it been asserted that any purported feature be categorically jurisdictional based merely on proximity, as does the Proposed Rule. Further, it would be impossible to make such a conclusion scientifically, based upon substantial evidence, given the Proposed Rule’s deferral of foundational aspects of the analysis as newly defined. (p. 15)

Agency Response: See essay above.

The agencies disagree with the commenter’s assertion that there is not sufficient literature to make a categorical finding for “adjacent waters.” As described fully in the TSD and preamble, based on the science and their technical expertise and experience, the agencies determined it is appropriate to protect all adjacent waters as defined in the rule, because those waters are functioning as an integrated system with the downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect such downstream waters.

- 3.67 As noted, the Proposed Rule carries forward the existing regulations’ definition of “adjacent.” However, the term is no longer limited to “wetlands,” but would instead envelop the entire undefined universe of “waters.” Proposed Rule at 22,263. Based on ambiguous and fatally deferred criteria, virtually any wet feature could be rendered jurisdictional.

Though the definition of “adjacent” was pre-existing, a core component of it – “neighboring” – is newly defined in the Proposed Rule. “Neighboring” includes the concepts of “floodplain” and “riparian area” which also are respectively defined in the Proposed Rule and attach as a jurisdictional hook affiliated with “any (a)(1) through (a)(5) water” Id.

So let’s break this down further – not only for traditionally recognized navigable waters, but also for the expansively defined universe of “tributaries” under the Proposed Rule, any feature within the “floodplain” or “riparian area,” of such jurisdictional feature is also categorically jurisdictional.

It is not so much what the definitions of “floodplain” and “riparian area” include that are problematic, but what they fail to include. The Proposed Rule expressly defers to the future “best professional judgment” of the Agencies’ personnel in the field the bounds of each of those definitional concepts underpinning exertion of categorical jurisdiction. Proposed Rule at 22,209. For example, what degree or interval of floodplain is the basis of the assessment? 100-year? 500-year? 5-year? The Proposed Rule expressly refuses to decide or direct. Id.

Comments by members of the Scientific Advisory Board (SAB) panel bear out the speculative and uncertain nature of the analysis in the face of such foundational variables remaining undefined: “There are considerable differences in the scope of protection depending upon whether regulators consider a one-year or 500-year flood return interval to delineate a floodplain.”¹⁹

And as if the void left in the Proposed Rule by the lack of specificity as to those two foundational qualifiers for jurisdiction were not enough, the Proposed Rule states that inclusion within an unspecified floodplain or riparian area need not actually be shown after all if there is a “shallow subsurface hydrologic connection” or “confined surface hydrologic connection.” Proposed Rule at 22,263 (defining “Neighboring”). How shallow? How significant must the connection be? How frequently must it be connected? And at what point does a “shallow subsurface hydrologic connection” become expressly excluded groundwater under the Proposed Rule? See Proposed Rule at 22,263 (excluding groundwater from jurisdiction).

¹⁹ SAB Comments on Proposed Rule at 15.

The preamble for the Proposed Rule provides that the agencies will “assess the distance between the water body and tributary” to determine if they are within “reasonable proximity.” Id. at 22,207. With deferral of the expressly foundational basis for the exertion of categorical jurisdiction, how can the agencies credibly and defensibly proclaim the requisite significant nexus justifying

Further, the preamble for the Proposed Rule states that the “confined surface connections” referred to in the definition of “neighboring” as a component of “adjacent” “consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches.” Id. at 22,208. However, “[g]ullies and rills and non-wetland swales” are expressly excluded from potential jurisdiction under the Proposed Rule. Id. at 22,263. How can these features be sufficient for establishing jurisdiction yet be expressly non-jurisdictional in and of themselves? And if they form the sole basis for finding jurisdiction, though remaining non-jurisdictional themselves, is it then legally permissible to fill them for the sole purpose of severing the purported basis for jurisdiction? (p. 19-21)

Agency Response: See essay above. As defined in the rule, adjacent waters include only wetlands, ponds, lakes, impoundments, and similar waters. See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.” Additionally, the scientific and legal basis for regulating these waters as adjacent are explained in the preamble and TSD.

In addition, the Agency reiterates that the CWA only applies to “waters of the United States.” For further information on how the agencies will consider non-jurisdictional features in analyzing case-specific significant nexus determination, see the preamble and the Exclusions Compendium.

Greater Houston Partnership (Doc. #14726)

- 3.68 The terms riparian area and floodplain are also defined using the term bordering, which makes the cascade of definitions circular. GHP is concerned that the use of these circular definitions will create delays and challenges as project sponsors and regulatory agencies debate the extent of federal jurisdiction during CWA Section 404 permitting for vital new public infrastructure, manufacturing facilities, and recreational facilities adjacent to jurisdictional waters that support the social, economic, and environmental well-being of the Houston region. GHP suggests that the terms neighboring, riparian area, and floodplain be removed from the proposed rule. GHP suggests that the adjacent be more clearly defined to mean waters that border or abut a jurisdictional water as described in current EPA and USACE guidance published after the Rapanos and Carabell decisions. (p. 2)

Agency Response: See essay above. Although the guidance is not within the scope of today’s rulemaking, the agencies note that the commenter’s characterization of the EPA and USACE guidance is inaccurate. In any event, the Agency did not revise the definition of “adjacent” in the manner suggested by the commenter because, as explained elsewhere in the record for today’s rule, it would exclude many waters that have a “significant nexus” to traditionally navigable waters,

interstate waters and the territorial seas.

Golf Course Superintendents Association of America et al. (Doc. #14902)

- 3.69 In the new “adjacent waters” category, waters and wetlands can be regulated if they are “located within the riparian area or floodplain” of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have “a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” See 79 Fed. Reg. at 22,262-63. The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the Agencies’ “best professional judgment” to determine the appropriate area or flood interval. *Id.* At 22,208. The proposal also fails to provide the limits of “shallow subsurface hydrological connections” that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the Agencies. Essentially, the EPA needs to ensure consistency with these definitions as they are applied to floodplains, hydrologic connections for jurisdiction throughout the U.S. in lieu of individual judgments. We understand variability within environments but this part of the proposed rule does not provide significant clarity for consistent and fair determinations. (p. 11)

Agency Response: See essay above.

- 3.70 The proposed approach is certain to include many features that will now be considered “adjacent waters.” Also, 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 expanded jurisdiction could have major impacts for a majority of golf facilities which rely on ponds for their operations (for example: channels, ponds, and waterways that convey and store water for either irrigation or stormwater management). The agencies should revise the proposed rule such that only functional wetlands should be jurisdictional based upon clearly defined and outlined steps to determine adjacency. Again, the Agencies need to ensure consistency with their definitions as they are applied to floodplains, hydrologic connections for jurisdiction throughout the U.S. in lieu of individual judgments. We understand variability within environments but this part of the proposed rule does not provide significant clarity for consistent and fair determinations. (p. 15)

Agency Response: See essay above.

- 3.71 The golf industry does not believe the Agencies can make the sole argument for expansion of federal jurisdiction based on what is believed to be physical connectivity alone. This is not the solution to prevent pollution. Pollution prevention does include science based best management practices that prevent contaminants from reaching waters. Turfgrass on golf courses have been recognized as efficient filters for runoff. That green space when developed and managed using BMPs is a valuable asset. (p. 17)

Agency Response: See essay above. As discussed elsewhere in this document and in the record, today’s rule does not result in an expansion of the agencies’ jurisdiction under the CWA. In addition, the rule does not deem the waters jurisdictional based on “physical connectivity alone.” The factors the Agency used to determine whether waters have a significant nexus to traditional navigable

waters, interstate waters, and the territorial seas are explained elsewhere in this document, in the preamble, and in the TSD.

With respect to BMPs, this rule is a definitional rule and thereby does not alter the substantive requirements of existing federal agency CWA regulatory permit programs (e.g., what types of BMPs might be imposed in an NPDES or CWA 404 permit). Thus, if a feature is determined to be a “water of the United States” that feature is jurisdictional and may require a permit under the CWA. Conversely, if a feature is determined not to be a “water of the United States” that feature is not jurisdictional and does not require a permit under the CWA.

Aluminum Association (Doc. #15388)

- 3.72 Adjacent waters are defined by the rule as any waters “bordering, contiguous, or neighboring.” Neighboring includes any waters “within the riparian area or floodplain.” The concern with this definition is that many waters, particularly retention ponds, storm water ponds, and small drainage ditches, are located at or near a navigable water’s edge. Sometimes these waters are monitored and part of a CWA permit. This rule may require water to meet water quality standards as it enters these ponds and ditches instead of when the water exits the ponds and ditches. These privately owned ponds and ditches should not be considered WUS simply because of their location. (p. 4-5)

Agency Response: See essay above. As previously mentioned elsewhere, only adjacent waters would be subject to the CWA under this provision, where they are not excluded in paragraph (b) of the rule. Some of the examples presented in paragraph (b) include: ditches, erosional features, puddles, groundwater, stormwater control features, wastewater recycling structures, etc.

Steel Manufacturers Association and Specialty Steel Industry of North America (Doc. #15416)

- 3.73 The loose understanding of “neighboring” is quite similar to the history of the term “adjacent,” which by some interpretations involves a side-by-side physical relationship while by other interpretations involves mere proximity. Therefore, a determination of these circumstances is essentially reduced to a battle of scientific experts representing the interests of each side in a regulatory enforcement action. The proposed rule attempts to “address” the ambiguity of “adjacency” with the equally ambiguous term, “neighboring.” (p. 8)

Agency Response: See essay above.

- 3.74 Several different types of waters are affected by these definitions and may now be jurisdictional waters of the United States despite their isolated or seasonal nature. Lakes and ponds could be considered “adjacent” bodies of water alongside wetlands under this proposed rule—but there is no description of what features such lakes and ponds must have to be considered “adjacent” bodies of water. 79 Fed. Reg. at 22,206. The Supreme Court has found that isolated ponds are not “waters of the United States” and do not justify the invocation of ecological factors to characterize them as such. See SWANCC, 531 U.S. at 167; Rapanos, 547 U.S. at 742.

The same issue arises for wetlands, jurisdiction for which is assessed through the same “adjacency” requirement. The Supreme Court has previously stated that only wetlands

with a continuous surface connection to "waters of the United States" in their own right are properly adjacent and thus possess a sufficiently significant nexus to justify CWA jurisdiction. *Rapanos*, 547 U.S. at 742. The specific inclusion of groundwater as a potential basis for finding adjacency lends even more uncertainty. (p. 8)

Agency Response: See essay above.

EPA disagrees that shallow subsurface connections should not be considered in a significant nexus determination for the reasons (both legal and scientific) discussed in the preamble and TSD.

Idaho Association of Commerce & Industry (Doc. #15461)

- 3.75 In addition to lack of the upland pit exemption in the permit itself, EPA's approach is especially problematic when considering the expansion of the criteria for "adjacency" by vaguely defining the terms "neighboring," "riparian," and "floodplain" and allowing "adjacency" jurisdiction to be established through a "shallow subsurface" connection. The EPA states that these terms were added to provide greater "consistency and clarity and certainty" but admit that "application" of these terms would be based "in part on best professional judgment." For example, the definition of "floodplain" has no clear limit and the determination of the appropriate flood interval may vary depending on the size of the tributary involved. In some cases, an agency reviewer could use the 10-year flood interval zone while another reviewer looking at essentially the same kind of tributary could use the 100-year interval. A reviewer who uses a 100-year flood interval zone could find that wetlands and waters within that large floodplain--a considerable distance from a traditional Navigable Water would become jurisdictional "by rule" as "neighboring" without any site specific analysis. Another reviewer might apply only the 10-year frequency flood and could find that wetlands or waters the same distance from a similar stream are not jurisdictional "by rule." The 100-year flood zone areas could literally encompass hundreds of square miles.

The arbitrariness of relying on best professional judgment is especially problematic in applying the shallow subsurface test to establish adjacency. While EPA attempts to distinguish groundwater, that distinction is very vague and difficult to implement on the ground. For example, one agency reviewer could find that groundwater from a tributary has a "shallow subsurface" connection because it occasionally reaches the 12-inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system of a similar stream could find that the subsurface water was deep groundwater although it occasionally inundates that root zone. The reviewer in the former case could then establish adjacency over a large area of the landscape, whereas the latter reviewer would not. The rule itself is extremely confusing and misleading with respect to the groundwater/shallow subsurface "alleged" distinction by its definition of groundwater. In many areas of the Mountain West Division, excavating sand & gravel in an upland area leads to groundwater. The proximity of sand and gravel deposits to rivers and streams generally indicate higher ground water levels, often within 3-6 feet of native ground. If shallow groundwater connections established adjacency, then how does industry determine where shallow groundwater ends and deeper groundwater begins? Virtually all alluvial groundwater could be determined to connect to streams and rivers. Will the potential of a shallow subsurface connection to a regulated water lead to

monitoring and mitigation? The practical consequences of the variations of "best professional judgment" over a rule that conflicts within itself are staggering. Moreover, this nebulous distinction creates an almost impossible burden for industry to determine if "subsurface flow" is unregulated groundwater. The proposed rule does state that "a determination of adjacency based on shallow subsurface ...connection outside the riparian or floodplain area required clear documentation." However, the reality is that we would essentially have to prove lack of jurisdiction, not the reverse. (p. 12-13)

Agency Response: See essay response. See "Subsurface Connections" essay elsewhere in this section of the compendium.

Business Council of Alabama (Doc. #15538)

- 3.76 The EPA/Corps definition and inclusion of "neighboring" "adjacent waters" and "other waters" will result in numerous projects having to be scrutinized to try to determine if a significant nexus exist. Some of these "waters", including wetlands, are likely to change hydrological characteristics and "connectivity" during most any flood period of 10 years or more. These changes may occur due to anthropogenic and non-anthropogenic causes. Even after performing detail field observations it may still be uncertain as to whether certain areas within a project area have a significant nexus so additional delays could result due to having the Corps perform a case by case determination of the site(s). As a result, WOTUS (including wetlands) and "connections" may appear for a short period of time only to be displaced by uplands for several years thereafter. So an area within the floodplain that may have been an upland in past years could certainly transition into a wetland or water of the U. S. that would then trigger a Corps permit by the most recent field evaluation. The more a floodplain and a stream is subjected to anthropogenic effects (e.g. development, city, county, or state manipulation of road construction, stream channelization, and installation of concrete flumes) the greater the likely that changes will occur affecting hydrological characteristics of the floodplain. To make the interpretation of "adjacency" more confusing within a floodplain the proposed rule states on page 22209 "...the agencies retain the general existing definition of adjacency and have never interpreted the term to include wetland that are a great distance from a jurisdictional water." After this statement the proposed rule goes into a lengthy and confusing discussion on the definition of "neighboring". This definition does not offer clarification on this issue and the wording of "great distance" but instead brings up several other parameters (i.e. reasonably proximate) that would make it almost impossible for an environmental consultant to contest the final interpretation of the agencies. The proposed rule mentions the need to make "case-specific analysis" in many situations which conflicts with their goal of providing "greater regulatory certainty" in the final rule. The types of situations that may have to be submitted to the Corps include, but are not limited to, the following: [...]

The EPA/Corps explains on pg. 22208 that in addition to surface hydrological flow paths there are lateral shallow subsurface hydrologic connections from forested areas over restrictive layers that impede vertical flow of water. The proposed rule goes on to state that these shallow subsurface flows are not WOTUS and also that water does not have to be present continuously in the shallow subsurface soils. These areas are used as an example to show connectivity and satisfy the requirements for "adjacency" from higher

gradient "other waters" to tributaries. Again, this seems to be an over-reach of power and interpretation by the EPA. If in fact these shallow subsurface waters are used in the context of their argument then these shallow surface soils should clearly exhibit the characteristics of a jurisdictional wetland with hydric soils and hydrophytic vegetation. But they state that these shallow connecting areas are not WOTUS. In the southeast U. S. these areas would be very difficult to identify in years of drought conditions or in years of normal rainfall and the distances of these "flow paths" could be hundreds of feet from upgradient isolated wetlands or pools of collected water. The proposed rules discussion of using these subsurface hydrological flow paths does not seem to qualify in most instances as "reasonable proximity" and does not add clarity to the process of the determination of WOTUS. (p. 2-4)

Agency Response: See “Subsurface Connections” essay elsewhere in this section of the compendium.

Changing hydrological and other characteristics is sometimes a possibility but not a reason to forgo regulation based on connectivity. Nor is this a new issue. The CWA 404 program recognizes that site characteristics can change; Corps Regulatory Guidance Letter (RGL) 05-02 reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis. In any case, because many waters of the US are categorically so defined, there should be many fewer situations in which a case-specific analysis of significant nexus is needed under the final rule.

Federal Water Quality Coalition (Doc. #15822.1)

- 3.77 These new definitions do not reflect current practice. Currently, not all waters in a floodplain are considered jurisdictional.²⁰ Currently, “riparian area” is a concept used in mitigation, not jurisdiction. In its Nationwide Permit Program, the Corps defines “riparian area” as land.²¹ Recognizing the ecological value of riparian areas, under Condition 23 of the Nationwide Permits, restoration of a riparian area can be used to mitigate impacts to wetlands, but riparian areas and wetlands are not one and the same.²² Currently, Corps districts do not consistently use surface connections outside a defined channel to establish jurisdiction.²³ And, as discussed above, even if a subsurface connection could be used to establish jurisdiction, proximity to navigable water would be highly relevant.²⁴

²⁰ GAO-04-297, at 17-18 (identifying only one Corps district that used location in the floodplain alone, without other evidence, as a basis for establishing jurisdiction over a wetland). Even in that District (Galveston) jurisdiction was not automatic. See Galveston District guidance, *supra* n. 19.

²¹ 77 Fed. Reg. 10184, 10289 (Feb. 21, 2012) (“Riparian areas are lands adjacent to streams, lakes, and estuarine/marine shoreline

²² *Id.* at 10285.

²³ GAO-04-297, at 18. It is unclear what is meant by the term “confined” in defining a surface connection, and whether or not that requires a channel.

²⁴ See *supra* notes 18-20 and accompanying text.

In contrast, in the proposed rule, the agencies claim that all water features that meet the proposed definition of “adjacent waters” have a “significant nexus” to navigable or interstate waters or the territorial sea and therefore are per se jurisdictional. This is an expansion of federal jurisdiction.

The proposed change from “adjacent wetlands” to “adjacent waters” and broad expansion of the concept of “adjacent” have caused tremendous uncertainty regarding the status of wetlands, ponds, water storage systems, and water conveyances that lie in a floodplain or riparian area or that have a groundwater connection, however distant, or where water can move overland to a navigable water. (p. 14-15)

Agency Response: See essay above

- 3.78 With respect to adjacent waters, the agencies assert: [T]ributaries and their adjacent waters, and the downstream traditional navigable waters, interstate waters, and territorial seas into which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into any component of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, or biological integrity of these waters.²⁵ Despite this broad assertion, the agencies do not cite any studies support the conclusion that pollution discharged into water located in a floodplain affects the navigable water associated with that floodplain. The SAB Panel noted this omission: The SAB generally finds that literature on the connectivity of waters and wetlands in floodplain settings included in the Report is limited in scope (i.e., focused largely on headwater riparian wetlands) and should consider the gradient of connectivity that is a function of the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections.²⁶ According to Dr. Murphy: The definition of and inclusion by rule of adjacent waters also is inconsistent with the published literature, the Connectivity report or the SAB review. Once again, the concepts of ‘connectivity,’ ‘spatial and temporal scale,’ ‘connective flowpaths,’ ‘disturbance ecology’ and ‘ecological function’ are implicitly defined as dichotomous conditions or parameters and this violate the idea of a gradient in connectivity that is found throughout the SAB and at the heart of ecological theory and practice. The definition of significant nexus used in the Proposed Rule is scientifically flawed and does not employ modern concepts of scientific significance and statistical inference.²⁷ (p. 50)

Agency Response: See essay above and Science Compendium (Topic 9).

- 3.79 Under Riverside Bayview, “adjacent waters” must be limited to wetlands that are part of a continuum that establishes the point at which the water ends and land begins. The legal basis for this recommendation also is protection of navigable waters from pollution. The technical basis would be a determination of the point at which water ends and land begins. Consistent with Riverside Bayview, wetlands would meet this definition only if they are not separated from the jurisdictional water by dry land, including berms and levees, so “other waters” would not be a separate category.²⁸ Any determination that dry

²⁵ 79 Fed. Reg. at 22261.

²⁶ SAB Report Review, at 39.

²⁷ SAB Rule Review, at 95.

²⁸ The Carabell case that was consolidated with Rapanos addressed a man-made drainage ditch that ran along one

land between jurisdictional water and a wetland or other water is somehow part of that continuum would not be legally or technically justified, so wetlands or water beyond that separation cannot be part of the jurisdictional water.

This definition would clarify the scope of federal jurisdiction and would significantly relieve the confusion caused by the proposed rule. Under this definition, the agencies will not have to define the term “waters” because they would no longer be proposing to regulate “all waters.” They will not have to define “floodplain” or “riparian area” because location in these geographic areas would not be a basis for asserting federal jurisdiction. This will greatly alleviate the concerns over the regulation of land and arbitrary and inconsistent jurisdictional determinations applying “best professional judgment.”

The agencies also would not have to define “shallow subsurface hydrologic connection” or “confined surface connection” because these too would not be used to establish jurisdiction. Abandoning these new bases for jurisdiction will mean that the agencies do not have to justify how water regains its status as a “water of the U.S.” after it recharges from groundwater to surface water or after it flows over land. It will also alleviate concerns that the agencies will try to argue that all water is connected every time it rains. These changes will also alleviate concerns that many stormwater ponds, spreading basins, reservoirs, irrigation canals, and cooling ponds or lagoons, and even puddles or other standing water could become jurisdictional waters of the U.S. under the proposed definition of “adjacent waters.”

Finally, these changes will replace the term “significant nexus” with a quantifiable impact on navigable water, removing the concern expressed by some members of the SAB Panel that: “The definition of significant nexus used in the Proposed Rule is scientifically flawed and does not employ modern concepts of scientific significance and statistical inference.”²⁹ Removing the term “significant nexus” from the regulatory language also addresses the concerns expressed above that the agencies are attempting to read “water quality” out of the CWA and regulate based on the life cycle of species. Under these changes, movement of a beaver between a stream to a farm pond or the movement of an alligator from a river to a golf course water trap will not make the farm pond or water trap a water of the U.S. (p. 65-66)

Agency Response: In addition, as discussed elsewhere in this document, the Agency has taken a different approach to addressing concerns that the proposed definition of “adjacent” does not provide an appropriate level of clarity, consistency and certainty. For concerns regarding the term “significant nexus,” please refer to Significant Nexus Compendium (Topic 5).

Water Advocacy Coalition (Doc. #17921.1)

- 3.80 With the proposed rule’s regulation of adjacent wetlands and non-wetland waters, the agencies extend jurisdiction to an entirely new category of waters. The broad terminology used to define “adjacent” allows for sweeping jurisdiction over every wet feature in a floodplain or riparian area, or that has a hydrologic connection to a

side of the wetland, separated from it by a 4-foot-wide man-made berm. 547 U.S. at 729. By remanding the case, both the plurality and Justice Kennedy determined that separation by a berm could not be ignored.

²⁹ SAB Rule Review, at 95.

jurisdictional water. This proposed category of “waters of the United States” goes too far and would result in regulation of nonwetland features with insubstantial connections to TNWs. The breadth of the category is compounded by numerous ambiguities in the proposed terminology that, in practice, will result in confusion and unpredictability. (p. 58)

Agency Response: See above essay.

- 3.81 There is nothing in the proposed rule that limits or explains what can be considered “waters” that can be adjacent. In a footnote, the agencies state that the agencies use the term “waters” “in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems,” and the agencies also note that “waters” “do[es] not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.” Id. at 22,191 n.3. Again, this broad language indicates that the agencies intend to treat essentially every water feature as a “water” that could be jurisdictional by virtue of its adjacency. As discussed in the Appendix to these comments, the proposed rule’s inclusion of adjacent non-wetland waters is an impermissible expansion of agency jurisdiction that is not in line with case law or the agencies’ previous practices. Contrary to the agencies’ statements that they are not regulating any new categories of waters,³⁰ this is a clear change from the current regulations and even from the agencies’ 2008 Rapanos Guidance. (p. 59)

Agency Response: See above essay.

Additionally, the agencies have determined the class analysis designation for “adjacent waters” is supported by the science, the agencies’ expertise and experience, the intent of the CWA, and the law. Note that the legal analysis is provided in the TSD.

- 3.82 Treating all “waters, including wetlands” as jurisdictional whenever they are located in a floodplain or riparian area will sweep in many additional features that have only remote and insubstantial connections with TNWs. Nearly every city and county in the U.S. has these areas, which may include ponds and lakes with liners installed to isolate them from groundwater, thus severing potential subsurface connection. Waters that used to be considered “isolated” and therefore beyond the scope of CWA jurisdiction will now be “adjacent” and thus categorically jurisdictional. The proposed rule does not provide limits for the floodplain and riparian areas, but leaves determination of the appropriate distance or floodplain interval to the agencies’ “best professional judgment.” Id. at 22,209. As noted by Dr. Emily Bernhardt of the SAB Panel, “There are considerable differences in the scope of protection depending upon whether regulators consider a 1 year or 500 year flood return interval to delineate a floodplain.”³¹ There is no limiting principle to this theory of jurisdiction. The proposed rule gives the agencies broad discretion to use whatever flood interval they choose, including the most commonly

³⁰ See, e.g., Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule, Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure, Panel 1, 113th Cong. 19-20 (June 11, 2014) (statements of Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, and Deputy Administrator of the U.S. EPA, Bob Perciasepe).

³¹ SAB Panel Comments on Proposed Rule, Exhibit 7 at 19.

defined and mapped floodplain, the 100-year floodplain.³² As we have previously noted, this goes well beyond what is generally understood by the term “adjacent.”³³ Under a 100-year floodplain standard, a water or wetland situated miles away from a TNW, which has a hydrologic connection with the river or stream once every 100 years, could be considered “adjacent.” Exhibit 10, for example, depicts the 100-year FEMA floodplain for Miami-Dade County. Any wet feature within this floodplain area could now be deemed jurisdictional as “adjacent” to the Atlantic Ocean, including those waters that are miles away.³⁴ Such a water or wetland may have scarcely any nexus with the TNW, much less a “significant nexus.” Similar problems would occur with a 10-year, 25-year, or 50-year floodplain because in each instance, the area would be expected to be flooded by the subject stream very infrequently and would be far too remote in time to support a “significant nexus” determination or jurisdiction by rule.³⁵ (p. 60)

Agency Response: See above essay.

- 3.83 If the agencies cannot assert jurisdiction based on the broad floodplain and riparian area concepts, they will assert jurisdiction if waters have a “shallow subsurface hydrologic connection or confined subsurface hydrologic connection” to a TNW, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,207. Again, the proposed rule does not provide any limit for these connections, but states that the agencies will use best professional judgment to determine if the waterbody at issue is within “reasonable proximity” of the jurisdictional water. *Id.* at 22,207-08. This will likely result in circumstances where landowners feel compelled to retain consulting geologists at significant cost to model potential groundwater flow paths as a tool in refuting an agency claim of jurisdiction based on a difference of opinion regarding shallow subsurface connections. A situation of dueling professional opinions would likely result, which runs contrary to the stated goal of simpler jurisdictional decisions. Categorically asserting jurisdiction over waters based on a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water is overbroad and amounts to the “any hydrological connection” standard rejected in *Rapanos*. Already, several groups have been drawing on this language in citizen suits to try to force the agencies to assert jurisdiction over isolated features with insubstantial

³² The proposed rule states, “It should be noted that ‘floodplain’ as defined in today’s proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule.” 79 Fed. Reg. at 22,236.

³³ WAC Comments on 2011 Draft Guidance, Exhibit 1 at 85.

³⁴ Exhibit 10, FEMA 100-Year Flood Zone for Miami-Dade County, Florida. See also Exhibit 11, Pinellas County, Florida 100 Year Floodplain; Exhibit 12, Callaway County, Missouri FEMA Floodplain Map; Exhibit 13, Phoenix, Arizona Floodplain; Exhibit 14, Northern California Floodplain. All wet features within these expansive floodplain areas could now be categorically jurisdictional as “adjacent waters.”

³⁵ Moreover, making a jurisdictional determination on the basis of a more frequent flow event would result in additional costs for property owners since, unlike the 100-year floodplain, there are typically not publicly available maps of the 10-year through 50-year floods. Additionally, FEMA’s 100-year floodplain maps are often based on “approximate” studies, especially in rural/remote areas, and they are often in some state of revision due to ongoing land development projects in urban/suburban areas. Thus, the regulated community would likely incur additional costs spent verifying or updating FEMA’s maps should those become the jurisdictional basis used by one or more regulatory offices. These types of updates typically require the services of civil engineers and specific flow models.

connections to navigable waters based on these subsurface connections.³⁶ For example, a group recently argued that a sugar beet facility’s interior, on-site ponds are waters of the United States because the ponds “seep into the groundwater under the Facility,” and “[t]he groundwater underneath the Facility is hydrologically connected to the South Platte River,” a jurisdictional water of the United States.³⁷ This provision opens the door to essentially limitless jurisdiction under the guise of adjacency, even to constructed agricultural ponds.

Ponds within a floodplain or riparian area, or that have subsurface hydrological connections to jurisdictional waters, should not be per se jurisdictional. Neither the Connectivity Report nor Appendix A of the preamble provides scientific support for a finding that such features categorically have a “significant nexus” with navigable waters.³⁸ Allowing for such jurisdiction would have major impacts for countless industrial facilities that rely on internal industrial ponds for their operations. In addition, this provision could mean that recharge ponds that are part of water reclamation and reuse facilities are jurisdictional waters of the United States.³⁹ These isolated features fit squarely within the holdings of SWANCC and Baykeeper, and are beyond the scope of CWA regulation. (p. 60-61)

Agency Response: See essay above. In addition, regarding footnote 38, see the Science and Significant Nexus compendiums, preamble and TSD for a discussion of the science supporting the categorical “significant nexus” determination for adjacent waters.

- 3.84 Waters: What is a “water”? The agencies’ vague footnote explanation of “waters” that can be “waters of the United States” based on adjacency is essentially limitless. See 79 Fed. Reg. at 22,191 n.3. It gives the agencies leeway to include any wet feature as a “water.” Why is this critical definition not part of the proposed regulation text? (p. 62)

Agency Response: See above essay.

- 3.85 Wetlands: The proposed rule does not change the definition of “wetlands” from current regulations. In practice, the Corps relies on the 1987 Wetland Delineation Manual (and its regional supplements) for determining when an area is a wetland subject to regulation. Neither the 1987 Wetland Delineation Manual (and its regional supplements) nor the National Wetland Plant List, however, have ever been subject to notice and comment rulemaking. Indeed, the Corps recently announced that it is in the process of considering changes to the manual⁴⁰ If the agencies are considering changes to the standard for “wetlands,” why are those changes not part of this rulemaking process? (p. 62)

³⁶ Bridget DiCosmo, Citizen Suits Draw on EPA’s CWA Jurisdiction Rule to Boost Enforcement, InsideEPA.com, June 6, 2014, <http://insideepa.com/daily-news/citizen-suits-draw-epas-cwa-jurisdiction-rule-boostenforcement>.

³⁷ See *WildEarthGuardians v. Western Sugar Cooperative*, No. 14-cv-01503 (D. Co. filed May 29, 2014).

³⁸ Appendix A of the preamble purports to address connections between “adjacent” non-wetland waters and jurisdictional waters, but the science discussed and cited focuses solely on oxbow lakes. 79 Fed. Reg. at 22,237. There is no science cited here that discusses industrial ponds or any other non-wetland features that could now be jurisdictional on the basis of “adjacency.”

³⁹ See Exhibit 15.

⁴⁰ Bridget DiCosmo, Agencies’ Workgroup Eyes Changes to Key Delineation Guides InsideEPA.com, Apr. 30, 2014, <http://insideepa.com/daily-news/agencies-workgroup-eyes-changes-key-wetlands-delineation-guides>.

Agency Response: Issues pertaining to the existing definition of wetland are outside the scope of today's rulemaking.

- 3.86 Given the major issues identified with the definitions associated with the “adjacent” category, the agencies should reassess this category of regulated waters. As we have noted in previous comments, the term “adjacent” has caused longstanding problems.⁴¹ And now the agencies have tried to extend the adjacency concept to more waters. The agencies should not try to force this already problematic concept of “adjacency” to cover other waters they want to protect. Instead, the agencies must return to regulating only adjacent wetlands. For these nonwetland waters the agencies seek to regulate, the agencies should revise the proposed rule to focus on characteristics within these non-wetland waters that should be protected and regulate based on those characteristics rather than geographic area. (p. 65)

Agency Response: See essay above.

- 3.87 The agencies' approach of leaving crucial terms like “floodplain” and “shallow subsurface connection” vague and subject to the best professional judgment of the agencies will likely result in the agencies issuing guidance to the field to explain, for example, what flood interval is appropriate, or how deep a “shallow subsurface connection” can be. Clarifying these vague terms via later guidance outside of the rulemaking process allows the agencies to insulate key components of the proposed rule from challenge or judicial review. The agencies should not have to issue guidance to explain the meaning of their proposed rule. Definitions of key terms and concepts should be clear and subject to public comment as part of this rulemaking. (p. 63)

Agency Response: See essay above.

Water Advocacy Coalition (Doc. #17921.14)

- 3.88 One example of the major problems with the Agencies' categorical approach is the Proposed Rule's treatment of adjacent waters. The Proposed Rule treats all adjacent waters (including wetlands, oxbow lakes, and industrial ponds) as similarly situated. But whether adjacent or not, these features do not necessarily have similar functions and therefore should not be treated as similarly situated. This is because although different types of adjacent waters may perform similar types of ecological functions, the degree to which they influence the integrity of downstream waters will likely differ substantially between different types of waters. Again, without a consistent framework for evaluating “strength” of association or “significance” of connection, the Proposed Rule incorrectly considers all functions as similar and/or strong enough to render all adjacent waters jurisdictional. (p. 174)

Agency Response: Please see Significant Nexus Compendium and TSD for the agencies' views discussion of the science supporting the definition of “adjacent” under today's rule.

Action United (Doc. #18859)

- 3.89 We support the Agencies' determination that all adjacent wetlands are "Waters of the

⁴¹ See WAC Comments on 2011 Draft Rule, Exhibit 1 at 84; FEPP Comments on 2003 ANPRM, Exhibit 3 at 39.

U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost. (p. 2-3)

Agency Response: The final rule reflects the agencies' agreement with the commenter's view that wetlands serve important functions.

American Society of Civil Engineers (Doc. #19572)

- 3.90 The proposed rule replaces the existing definition "adjacent wetlands" with "adjacent waters." ASCE's primary concern with the proposed rule is that adjacent waters may be connected through "surface or shallow subsurface connections."⁴² ASCE represents members from across the country who expressed concern that "shallow subsurface connections" can have vastly different meanings in state with varying topography. For example, karst formations in Florida may have very different shallow subsurface connections than a state with much less permeable subsurface hydrologic features. We encourage EPA and USACE to consider clarifying the definition of "shallow subsurface connections". (p. 8)

Agency Response: See essay in Shallow Subsurface Connection section of this compendium.

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

- 3.91 The proposed definition of adjacent suggests that any wetland or other water body located within an undefined floodplain, a riparian area, or having a subsurface hydrologic connection to a navigable water (their intent must have been near surface ground water) would be jurisdictional. Even close proximity of an isolated water may be construed as having a significant nexus. The term adjacent is not needed and should be removed. (p. 2)

Agency Response: See essay above. Because the commenter did not provide support for the view that the term "adjacent" should be entirely removed, the agencies took no action based on this comment.

Coalition of Real Estate Associations (Doc. #5058.2)

- 3.92 In addition to its broad tributary definition, the Agencies' proposed new definition of "adjacent waters" could improperly capture certain MS4s. Under the proposal, all waters that are located within a floodplain or riparian area are considered adjacent waters and are "by rule" WOTUS.⁴³ Thus, to the extent that any part of an MS4 system is located in a riparian area or floodplain, that portion of the MS4 might be deemed a WOTUS. Similarly, a portion of the MS4 system may have more than an insubstantial physical (including subsurface flow), biological, or chemical connection to a traditional navigable water. In that instance, that portion of the MS4 could be found to have a "significant

⁴² Id. At 210

⁴³ 22,207, col. 2.

nexus” and therefore also be deemed a WOTUS. In the CORE Association’s view, express exclusion of MS4s is thus necessary in light of the confusion that would arise by sweeping storm sewer systems into CWA jurisdiction by virtue of the “adjacent waters” and “significant nexus” definitions. (p. 18-19)

Agency Response: See essay above and Exclusions Compendium.

Kerr Environmental Services Corp. (Doc. #7937)

- 3.93 Definition of Adjacent We recommend eliminating the following phrases as there is no connection to these phrases and the court decision language that gave rise to the concept of adjacency: “riparian area or floodplain...or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection.

We are unaware of any recent legal cases that justify the need to expand or clarify the term “adjacent” as this term has stood since 1986.

The definition of flood plain is insufficiently vague and does not have any scientific basis for determinations of adjacency in the regulatory context. For example, is the return interval of the flood 2 years, 10 year, 100 year, and 1,000 year? Wetlands in a 100 year floodplain we believe are too geographically remote from the tributary to be considered adjacent to the subject tributary, since the flood events do not control the form or function of the wetland/water within the floodplain. Floodplains of other flood frequencies are not mapped and have no ability to be demarcated in the field with accuracy. Vegetation does not change with these flood frequencies, nor do soils in our experience. The return interval of a flood event that has demonstrable influence on adjacent wetlands and waters will differ for streams/rivers of different scales, valley types and geology. The use of the term flood plane will jeopardize consistency and predictability in field application. The definition of riparian area is insufficient and vague. Its lack of clarity will jeopardize consistency and predictability in field application.

The concept of “shallow subsurface hydrologic connection” would be unprecedented and brings into the regulatory sphere “groundwater” as a nexus to interstate commerce for the CWA, yet the CWA does not regulate groundwater. This phrase must be eliminated.

Attempting to apply “confined surface hydrologic connections” for adjacency determinations is illogical as it would potentially regulate heretofore isolated wetlands as adjacent simply because a man-made non-jurisdictional drainage connects to a downstream jurisdictional determination. Isolated Wetlands are regulated by States and should not be pulled into jurisdiction by the federal government through a new form of adjacency determinations not mandated by legislation or legal precedent. (p. 5-6)

Agency Response: See essay above. For the reasons discussed there, the agencies disagree that the floodplain is irrelevant to determinations of adjacency. The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter’s assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Ronald D. Farris, Farris Law Group PLLC (Doc. #10199)

- 3.94 Also unclear are the vague and undefined concepts such as "floodplain," "riparian area," and "shallow subsurface hydrologic connection" to identify "adjacent waters." These are just a few examples of the ambiguity and uncertainty created by the proposed rule. Unfortunately each of these examples fails to provide the necessary clarity on which to base a regulatory program and will likely cause confusion, inconsistency, and litigation from third parties (p. 2)

Agency Response: See above essay.

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

- 3.95 The agencies' categorical regulation of all "adjacent waters" is not consistent with Justice Kennedy's concurring opinion in Rapanos and should be scaled back. Adjacent waters that are categorically regulated should be limited to waters of the types the agencies discuss in the preamble, and should not include ephemeral washes that do not qualify as tributaries. (p. 7)

Agency Response: See essay above. It is unclear which waters "of the types the agencies discuss in the preamble" the commenter is referring to and are thus unable to respond to that point. However, as the commenter suggests, the agencies would not assert jurisdiction over ephemeral washes, unless they meet the definition of tributary, as defined in the rule.

CEMEX (Doc. #19470)

- 3.96 Adjacent waters cannot and should not be considered tributaries. (p. 3)

Agency Response: Any water feature that is not excluded under paragraph (b) and that meets the definition of "tributary" is a tributary. Some features, such as wetlands, will lack the characteristics of a tributary (e.g. bed and banks) and so will only be jurisdictional as adjacent or case-specific waters.

Texas Mining and Reclamation Association (Doc. #10750)

- 3.97 [O]n-site waters in the mining industry could constitute "adjacent" jurisdictional waters because the Agencies have broadly defined the term "neighboring" (as used in the definition of "adjacent") such that every water feature located within the riparian area or floodplain of a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment or tributary could be deemed a "water of the United States."⁴⁴ Indeed, some water management structures on mine sites in Texas are constructed adjacent to jurisdictional waters, but are designed and operated specifically to sever any surface connection (or eliminate any "significant nexus") between the mine's water within the permit and off-site undisturbed waters, at least until after the mine water is treated to meet the NPDES effluent limits and is discharged from the mine.

Furthermore, any water feature that has a confined shallow surface hydrologic connection to such a jurisdictional water" would also itself be per se jurisdictional.⁴⁵ Given that

⁴⁴ 22,263

⁴⁵ 22,263

application of these definitions is left to the "best professional judgment" of agency staff,⁴⁶ and that therefore agency staff are free to choose, among other things, which flood interval to use in applying the definition of "neighboring" and "floodplain," many on-site waters that are contained in structures specifically designed and operated to bear little or no connection to downstream "waters of the United States" are likely to be captured. Likewise, insubstantial subsurface hydrologic connections between water features on mine sites and remote, downstream waters of the United States could give rise to claims of CWA jurisdiction, whether by agency personnel or citizen plaintiffs. (p. 9)

Agency Response: See essay above.

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

- 3.98 Revise the "adjacency" criteria by limiting the term to adjacent wetlands, not waters and deleting the use of "shallow subsurface" and "floodplain" as a basis for finding "adjacency" jurisdiction. The distinction between "shallow subsurface" and "groundwater" is too imprecise and prone to abuse in the field, and cannot provide any clarity to aggregate operators on the reach of "adjacency" under the CWA. It would also impose an additional burden on landowners to monitor groundwater levels seasonally to prove the absence of CWA jurisdiction thus reversing the burden of proof under the CWA, which rightfully resides with the agencies. (p. 56-57)

Agency Response: See essay above.

National Mining Association (Doc. #15059)

- 3.99 [O]n-site waters in the mining industry could constitute "adjacent" jurisdictional waters because the Agencies have broadly defined the term "neighboring" (as used in the definition of "adjacent") such that every water feature located within the riparian area or floodplain of a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary could be deemed a "water of the United States."⁴⁷ Indeed, some water management structures on mine sites are constructed adjacent to jurisdictional waters, but are specifically designed and operated to sever any surface connection between mining water inside the permitted area and offsite undisturbed waters, or to limit any surface connection to a permitted NPDES discharge point. (p. 14)

[A]ny water feature that has a "shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water" would also itself be per se jurisdictional.⁴⁸ Given that application of these definitions is left to the "best professional judgment" of agency staff,⁴⁹ and that therefore agency staff are free to choose, among other things, which flood interval to use in applying the definition of "neighboring" and "floodplain," many on-site waters that bear little or no connection to downstream "waters of the United States" are likely to be captured. Likewise, insubstantial subsurface hydrologic connections between water features on mine sites and remote, downstream "waters of the United States" could give rise to claims of CWA jurisdiction, whether by

⁴⁶ 22,263

⁴⁷ 22,263

⁴⁸ 22,263

⁴⁹ 22,209

agency personnel or citizen plaintiffs. (p. 14-15)

Agency Response: See essay above.

American Petroleum Institute (Doc. #15115)

- 3.100 With respect to wetlands, the 2014 Proposed Rule would assert jurisdiction over all wetlands and other waters “adjacent” to navigable waters and jurisdictional tributaries. The definition of adjacency creates interpretive challenges, despite the agencies’ efforts to define adjacency. Under API’s suggested jurisdictional rule, wetlands that lack a continuous surface connection to a navigable water are per se not jurisdictional. It would be easy to identify such wetlands. It would also be easy to identify wetlands that share a continuous surface connection to a navigable water. For those wetlands, a landowner could request a significant nexus determination to determine jurisdiction. Although such determinations would require case-by-case interpretation by the permitting authority, not all wetlands share a continuous surface connection to a navigable water, and therefore the need for such jurisdictional determinations should be relatively infrequent, especially compared to the agencies’ current practice. (p. 19)

Agency Response: See essay above.

The Agency did not adopt the commenters’ approach as it would exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial sea. See the preamble and TSD for the agencies’ basis for determining that the waters covered by today’s definition of “adjacency” have the required “significant nexus.”

- 3.101 Likewise, the extent of the categorical jurisdiction for adjacent waters depends on the extent of floodplains or riparian areas, neither of which is objectively defined in the Proposed Rule. Thus any analyst trying to estimate the changes in jurisdiction has to make an assumption whether the Agencies will use a 100-year floodplain, 500-year floodplain, or some other floodplain as a basis. The results will vary dramatically as a result. (p. 52)

Agency Response: See essay above.

Ohio Coal Association (Doc. #15163)

- 3.102 The Proposed Rule's definition of "neighboring" leaves the door open for distant isolated bodies of water to be deemed jurisdictional based solely on insignificant subsurface hydrologic connections. This open-ended language does not further the Agencies' stated goal of promulgating a rule that is clear and understandable. Further, the Proposed Rule's assertion of jurisdiction over tenuous subsurface connections is akin to the "any hydrologic connection" standard rejected by the U.S. Supreme Court in *Rapanos*. A clearer approach would be to eliminate this shallow subsurface hydrologic connection language altogether from the definition of "neighboring." This approach would appropriately leave the regulation of shallow subsurface hydrologic connections to the individual states. A one-size-fits-all federal regulation cannot account for the variance in conditions throughout the country. Individual states, most of which regulate groundwater as a "water of the state", can effectively regulate subsurface connections, taking into account a given location's unique characteristics. (p. 3)

Agency Response: See essay above.

Independent Oil and Gas Association of West Virginia (Doc. #15406)

- 3.103 [T]his blanket approach to "adjacent waters" is fundamentally inconsistent with Supreme Court precedent and would expand the scope of the Agencies' jurisdiction beyond that contemplated by Congress when the CWA was enacted. Further, these layered definitions introduce considerable subjectivity into the analysis and are so confusing as to be nearly indecipherable—they certainly do not further the Agencies' stated goal of simplifying and clarifying CWA jurisdictional determinations. Finally, the required analysis of subsurface hydrology and "current climatic conditions" will unreasonably complicate and delay the completion of jurisdictional determinations by ensuring that they cannot be completed by a walk-through and survey of the affected property and a reasonable buffer. (p. 7)

Agency Response: See essay above.

Halliburton Energy Services, Inc. (Doc. #15509)

- 3.104 The proposed definitions of "riparian area" and "floodplain" are vague, confusing and lacking reasonably determinable boundaries to ensure that Agency assertions of CWA jurisdiction are not limitless. These definitions therefore create conditions for overly expansive jurisdictional claims. For example, while floodplain boundaries are available through FIRM maps and other sources, the proposed rule does not specify what flood frequency is relevant for jurisdictional purposes. Moreover, floodplains can be very broad, particularly in certain areas of the country. The definition of "riparian area" is even vaguer and ripe for expansive interpretation given the relative ease with which Agency representatives would likely discern "influences" on "ecological processes" and "community structure". In addition, riparian areas as defined would be virtually impossible for an ordinary landowner to identify. In fact, the manner in which Agency personnel might apply the terms "riparian" and "floodplain" and the notions of confined surface or subsurface connections, and therefore "neighboring" and adjacent," in the field could be entirely inconsistent with other expert opinions.

Nor do the concerns about the proposed extent of "adjacency" end there. The Agencies' proposal to provide further definition for the concept of "adjacency" will do little or nothing to provide clarity for landowners and other members of the regulated community because even beyond the ambiguities in the terms "floodplain" and "riparian," the preamble makes clear that adjacency is not limited to floodplains and riparian areas. Rather "adjacency" extends to wetlands and water bodies outside of floodplains and riparian areas that have shallow subsurface connections to navigable waters or tributaries. For these areas, distance remains the key determinant. However, as under the current regulations, while the Agencies acknowledge that a point may be reached where a water may be hydrologically connected to a navigable water or tributary yet not significantly influence that water body's chemical, physical and biological integrity, they provide no meaningful guidance regarding "how far is too far." In addition, HESI is concerned that the Agencies are seeking to establish federal jurisdiction through non-jurisdictional features such as shallow subsurface connections. As with the proposed definition of tributaries, it is as if the Agencies will not recognize a limit on their jurisdiction if there is

any conceivable connection at all.

Thus, the proposed definition of “adjacent” may provide some clarity to landowners that a particular water will be considered adjacent to a tributary and therefore jurisdictional but will rarely, if ever, provide clarity for a landowner that a wetland or water body is not adjacent. As a result, a landowner could achieve certainty only through formal jurisdictional determinations with the attendant significant and burdensome delays. (p. 5-6)

Agency Response: See essay above.

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

- 3.105 Throughout Appalachia, pre-law coal mining operations left numerous unreclaimed mining benches in mountainous upland terrain. Over time, small, isolated wetland features have formed on many of these upland benches. Given that wetlands in uplands are relatively rare, small in size, and lack observable surface or subsurface hydrologic connections to traditionally navigable waters, Alpha encourages the agencies to add wetlands in uplands to the list of waters and features that are categorically not “waters of the United States.” Exempting wetlands located in uplands that do not contribute perennial flow to traditional navigable waters is logically consistent with the agencies’ proposed exemption of “ditches excavated wholly in uplands” that contain standing or pooled water but do not contribute perennial flow to traditional navigable waters. See 79 Fed. Reg. 22,203 (“[W]ater that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation.”)

In the event the agencies do not categorically exempt wetlands located in uplands from jurisdictional waters, Alpha encourages the agencies to clarify that jurisdictional determinations of isolated wetlands located outside of floodplains and riparian areas require case-by-case evaluations.

The preamble proposes to regulate wetland features located outside of floodplains or riparian areas as “adjacent”—and therefore categorically jurisdictional—if those wetlands have a surface or shallow subsurface hydrologic connection to traditionally navigable waters. 79 Fed. Reg. 22,207. The preamble does not explain why isolated wetlands located outside of floodplains and riparian areas should be evaluated as per se jurisdictional “adjacent waters” rather than as “other waters” requiring case-by-case evaluations. In fact, the preamble concedes that the relationship between these isolated unidirectional wetlands and navigable waters must be individually evaluated, often with considerable difficulty. See 79 Fed. Reg. 22,211 (“A determination of adjacency based on shallow subsurface or confined surface hydrologic connection outside the riparian area or floodplain requires clear documentation.”) and 22,210 (“Shallow subsurface connections are also relevant, yet are more difficult to identify and document.”). EPA’s draft Connectivity Report reiterates the need for site-specific data to evaluate isolated wetlands:

[F]or a geographically isolated wetland for which a surface water connection cannot be observed, it is difficult to assess its degree of connectivity with the river network without site-specific data.

Draft Connectivity Report, p. 1-14.

Even if a surface or subsurface hydrologic connection is established between a non-floodplain or non-riparian wetland and navigable waters, the significance of that connection depends on variables such as precipitation and climate.

In circumstances where a particular water is outside of the floodplain and riparian area of a jurisdictional water, a connection can be established by confined surface or shallow subsurface hydrology that makes the water neighboring, and thus adjacent. *** [T]his relationship can be reduced as the distance between water bodies increases because of various factors, such as soil characteristics, geology, climate, precipitation patterns, etc. The distance between water bodies may be sufficiently great that even the presence of an apparent hydrologic connection may not support an adjacency determination. The greater the distance, the less likelihood that there is an actual shallow subsurface or confined surface connection because of the greater potential for the water to infiltrate the soil to deeper groundwater, or for transmission losses

79 Fed. Reg. 22,210-11.

In fact, the SAB noted that groundwater connectivity between a non-floodplain wetland and traditional navigable waters “varies considerably” and explained that “some hydrologically and spatially disconnected wetlands may need to be considered on a case-by-case basis,” and identified EPA’s lack of understanding of how hydrological connections from disconnected wetlands impact downstream navigable waters as “an important research need for [EPA].” SAB Report 10/17/14, p. 55.⁵⁰

Given the agencies’ lack of understanding of the connection between traditional navigable waters and isolated, unidirectional wetlands located outside of floodplain and riparian areas, the scarcity of isolated wetlands outside of floodplains and riparian areas, and the difficulty of documenting hydrologic connections between these distant waters, the agencies should make clear that wetlands located beyond floodplains and riparian areas can only be deemed jurisdictional after an in-depth investigation. (p. 10-12)

Agency Response: See essay response; the final rule does provide for case-specific determinations for some waters that do not meet the definition of “tributary” or “adjacent.” See also *Shallow Subsurface Connection* essay elsewhere in this compendium.

Coeur Mining, Inc. (Doc. #16162)

- 3.106 [U]nder the proposed rule, waters and wetlands are regulated if they are “located within the riparian area or floodplain” of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have “a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” See 79 Fed. Reg. at 22,262-63. The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the Agencies’ “best professional judgment” to determine the appropriate area or flood interval. *Id.* at 22,208.

⁵⁰ U.S. EPA, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA-SAB-15-001 (Sept. 17, 2014).

The proposal also fails to provide the limits of “shallow subsurface hydrological connections” that can render a feature jurisdictional but again leaves that analysis to the best professional judgment of the Agencies. Id. (p. 2)

Agency Response: See essay response.

Barrick Gold of North America (Doc. #16914)

- 3.107 The agencies proposed these definitions to provide greater certainty and clarity in determining Clean Water Act jurisdiction, but they would not succeed in doing so. Neither definition contains criteria or metrics that would make it possible for a regulated person or entity to determine that waters on its property are “adjacent.” The definitions are so broad and vague, and their application so overtly left up to “best professional judgment,” that inconsistency and uncertainty in application of the proposed rule are guaranteed. Clarity, if it is ever achieved, would come only after years and maybe decades of individual agency determinations, or the publication of clarifying guidance, or both. As such, these proposed definitions do not really describe an identifiable limit on Clean Water Act jurisdiction. They are at best a framework, the all-important details of which will be provided later. The latter two bases for “adjacency” – confined surface connection or shallow subsurface connection – are not defined in the proposed rule, and the preamble discussion of those concepts demonstrates that they too will not provide the certainty the agencies promise. Indeed, the inclusion of these bases in the definition of adjacency is redundant, because the agency has already included non-channelized features with a hydrologic connection to a jurisdictional water in the definition of tributary. 79 Fed. Reg. at 22,271.13 The agencies explain that in such cases, they will “also assess the distance between the water body and the tributary in determining whether the water body is “adjacent,” and reassure that “[a]djacent” as defined in the agencies’ regulations has always included an element of reasonable proximity.” 79 Fed. Reg. at 22,208. However, as with riparian areas and floodplains, “proximity” will be left to the best professional judgment of the local Corps or EPA official making a jurisdictional determination. There is nothing in the rule itself that would provide clarity or certainty regarding such connections. (p. 20-21)

Agency Response: See essay above.

Dominion Resources Services, Inc. (Doc. #16338)

- 3.108 [U]nder the proposed rule, waters and wetlands are jurisdictional if they are “located within the riparian area or floodplain” of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have “a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies’ best professional judgment to determine the appropriate area or flood interval. The proposal also does not define the limits of “shallow subsurface hydrological connections” that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agency staff. Under the proposed rule, ditches, groundwater (as a shallow subsurface connection) and erosional features (i.e., gullies, rills, and swales) can serve as a hydrological connection that would render a feature a jurisdictional “adjacent water”. (p. 6)

Agency Response: See essay above.

- 3.109 The proposed rule asserts jurisdiction over “[a]ll waters, including wetlands, adjacent to” a traditional navigable water, interstate water, territorial sea, impoundment, or tributary and gives the agencies broad discretion to exert jurisdiction over waters and features that were previously considered to be “isolated.” For the first time, the proposed rule extends the concept of jurisdiction by virtue of adjacency to non-wetland waters. The definition of “adjacent” refers to a separate definition of “neighboring”. Through the definition of “neighboring” essentially all waters within the floodplain or riparian area of jurisdictional water or waters that have a shallow subsurface hydrological connection to a jurisdictional water have a significant nexus and will be jurisdictional by rule. In addition to the expansion of jurisdiction, the definition of “neighboring” introduces uncertainty by not providing clear metrics to define what is the “riparian area”, “floodplain” or “shallow subsurface connection”. Without clear metrics, determination of these features will be subjective based on individual agency staff and difficult for the regulated community to predict.

The proposed approach will impose jurisdictional status to 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 could be used to assert jurisdiction over any wet area, including on-site ponds and impoundments, which does not meet an exemption. We make the following recommendations regarding the definition of “adjacent”:

Consistent with the current definition of WOTUS, we request that the agencies revise the proposed definition of “adjacent” waters such that only wetlands can be jurisdictional by virtue of adjacency; and

We request that the agencies establish in the rule or preamble, clear and quantitative metrics for determination of riparian area, floodplain (e.g., specific recurrence interval) and the extent of a “shallow subsurface connection” (e.g., depths and lengths of connection). Additionally we request, these clarifications be provided for public comment as part of future proposed rulemaking. (p. 9)

Agency Response: See essay above. In addition, the agencies’ response to comments asking that any revisions to the proposal undergo an additional round of public comment is in the TSD.

Gas Processors Association (Doc. #16340)

- 3.110 The definition of “adjacent,” meaning waters that are “bordering, contiguous, or neighboring,” remains unchanged. 79 Fed. Reg. at 22199. EPA and the Corps, however, propose for the first time a definition of “neighboring” to mean “waters located within a riparian area or floodplain of a [jurisdictional water]... or waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water.” Id. This expanded definition fails to place predictable limits on the agencies’ lawful jurisdiction over “adjacent waters.”

EPA and the Corps rely on the agencies’ “best professional judgment” in determining whether a particular wetland is “adjacent” under the existing definition. EPA and the

Corps acknowledge that the best professional judgment standard may result in uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an “adjacent” water. The agencies then request comments on whether there are other reasonable options for providing jurisdiction over waters with these types of connections.

One of the options EPA and the Corps provide is “asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance.” *Id.* at 22208 (emphasis added). This option is untenable because it would extend EPA’s and the Corps’ jurisdiction over waters of the United States “beyond parody” like in *Rapanos*. A mere hydrological connection is not sufficient because the plain meaning of “adjacent” refers solely to physical proximity. (p. 3)

Agency Response: See essay above.

Pennsylvania Aggregates and Concrete Association (Doc. #16353)

- 3.111 The use of groundwater to establish connections is a problem under the proposed rule. Every type of jurisdictional determination begins with what one can see. There is no way to determine characteristics of subsurface water visually even with mapping. Groundwater has historically been excluded from the scope of the CWA, and is state, not federally regulated. And, rightfully, the proposed rule excludes groundwater, including groundwater drained through subsurface drainage systems. But there is significant confusion surrounding the distinction between groundwater and “shallow subsurface hydrological connections.” Allowing for jurisdiction to be established via groundwater connections can create liability and permitting obligations not previously required.

Because concrete plants use settling basins, regulation of groundwater is a concern for PACA. The concern with the new rule is the introduction of the use of “shallow subsurface connections” to justify jurisdiction, which could make groundwater subject to federal permitting.

Furthermore, the proposed rule allows for groundwater to serve as a connection to establish adjacency under paragraph (a)(6) or for purposes of a significant nexus analysis for “other waters” under paragraph (a)(7). Again, letting jurisdiction be established via groundwater connections will create liability and permitting obligations not previously required and without sound scientific support. “Shallow subsurface connections” needs to be clearly define and the agencies should make it clear that groundwater connections cannot be used to establish jurisdiction. (p. 7)

Agency Response: See essay above. For additional discussion, see the *Shallow Subsurface Connection* essay in this compendium.

Kentucky Oil and Gas Association (Doc. #16527)

- 3.112 As examples of areas in the rule lacking clarity, KOGA points to two examples. First, the proposed rule states, “Absolutely no uplands located in ‘riparian areas’ and ‘floodplains’ can ever be ‘waters of the United States’ subject to the CWA.” However, in the very next paragraph, the proposed rule states, “However, there are some

neighboring waters that might be located outside of the riparian zone or floodplain, such as wetlands immediately next to a highly incised and manipulated stream that no longer has a riparian area or floodplain” (page 22207). Second, the proposed rule states, “Those waters and features that would not be ‘waters of the United States’ are: ... gullies and rills and non-wetland swales” (page 22193). Further into the proposed rule, it states, “... confined surface connections consist of permanent, intermittent, or ephemeral surface connections through direction flowpaths, such as (but not limited to) swales, gullies, rills, and ditches” (page 22208). With these examples, it is clear that nearly every water feature will be subject to Clean Water Act jurisdiction and that the agencies have utterly failed in their attempts to provide clarity. These types of issues must be resolved in the final rule so that federal regulators as well as the regulated community have a clear understanding of what are and are not waters of the United States. (p. 2-3)

Agency Response: First, only adjacent waters would be jurisdictional under this provision, and they are further clarified in today’s rule and the TSD. However, if a water is excluded under paragraph (b) of the rule, it is excluded even where it meets the definition of a water under paragraph (a). Some example exclusions include: ditches; erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; puddles; and groundwater, including groundwater drained through subsurface drainage systems. Also, the agencies reiterate that only waters can be “waters of the United States.” Please see the Shallow Subsurface Connection essay in this compendium for a response to the balance of this comment.

Lafarge North America (Doc. #16555)

- 3.113 In our reading, and contrary to the claims of the EPA and the Corps, the proposed rule will actually cause more confusion than clarity. The agencies "categorical" inclusion of all tributaries defined by an observed "mark" on the landscape and its regulation of wetlands and waters adjacent to tributaries based on vague "neighboring," "riparian," "floodplain" and "shallow subsurface" connection criteria makes it virtually impossible to know what areas are regulated and what areas are not. (p. 3)

Agency Response: See above essay.

As explained elsewhere in the record for today’s rule, in response to comments like this one, the agencies have further clarified the definition of “tributary.” See Tributary Compendium (Topic 8).

Virginia Poultry Federation (Doc. #16604)

- 3.114 The proposed rule retains the definition of “adjacent waters,” but expands it further with new definitions for “neighboring waters,” “riparian areas,” and “floodplain.” Prior to the proposed rule, “adjacent waters” have been considered wetlands that actually abut navigable waters because there is a significant nexus between the wetlands and the jurisdictional water. Under the proposed rule, non-wetlands can be considered jurisdictional waters of the U.S. The term, “neighboring,” includes waters located in the riparian areas or floodplains of a major navigable water or tributary or water with a shallow subsurface hydrologic connection. This could include nearly all waters within the geographic area of a floodplain. (p. 6)

Agency Response: See above essay.

Barrick Gold of North America (Doc. #16914)

3.115 In all other ways, the proposed rule introduces uncertainty into the Clean Water Act program. For instance, the agencies propose that “adjacent waters,” like tributaries, would be categorically included as “waters of the United States,” and they include a definition that is supposed to make clear which waters are “adjacent.” Before this proposed rule, the concept of “adjacency” in the agencies’ regulations was limited to wetlands. The agencies propose now for the first time to expand the concept to all waters, and in doing so must modify what “adjacency” means. The modification comes in the form of a definition of the word “neighboring,” which occurs in the “adjacent” definition but which has not been defined previously. 79 Fed. Reg. at 22,268. As with the tributary definition, the agencies purport to achieve certainty with the definition of “adjacent,” but they achieve whatever clarity might result by making the category so broad that it can only be described as over-inclusive. Again, if this is certainty, it comes at the expense of legality. And, as we explain in further detail below, whatever certainty is promised by defining “adjacent” (and related terms) is quickly undermined by the agencies’ preamble discussion of adjacency. See *infra* Section V. There, the agencies emphasize that waters with a shallow subsurface connection or confined surface connection nevertheless may not be “adjacent” if they are too far from a tributary or other jurisdictional water. 79 Fed. Reg. 22,208. How far is too far? The agencies do not answer this question in the preamble, meaning that the answer will be determined in the field on a case-by-case basis. Similarly, for waters located in floodplains, “the agencies would use best professional judgment to determine which flood interval to use....” 79 Fed. Reg. at 22,209. (p. 10-11)

Agency Response: See above essay.

3.116 The agencies proposed these definitions to provide greater certainty and clarity in determining Clean Water Act jurisdiction, but they would not succeed in doing so. Neither definition contains criteria or metrics that would make it possible for a regulated person or entity to determine that waters on its property are “adjacent.” The definitions are so broad and vague, and their application so overtly left up to “best professional judgment,” that inconsistency and uncertainty in application of the proposed rule are guaranteed. Clarity, if it is ever achieved, would come only after years and maybe decades of individual agency determinations, or the publication of clarifying guidance, or both. As such, these proposed definitions do not really describe an identifiable limit on Clean Water Act jurisdiction. They are at best a framework, the all-important details of which will be provided later.

The latter two bases for “adjacency” – confined surface connection or shallow subsurface connection – are not defined in the proposed rule, and the preamble discussion of those concepts demonstrates that they too will not provide the certainty the agencies promise. Indeed, the inclusion of these bases in the definition of adjacency is redundant, because the agency has already included non-channelized features with a hydrologic connection to a jurisdictional water in the definition of tributary. 79 Fed. Reg. at 22,271.⁵¹ The

⁵¹ The definition of tributaries includes “wetlands, lakes, and ponds ... if they contribute flow.” 79 Fed. Reg. 22,271.

agencies explain that in such cases, they will “also assess the distance between the water body and the tributary in determining whether the water body is “adjacent,” and reassure that “[a]djacent’ as defined in the agencies’ regulations has always included an element of reasonable proximity.” 79 Fed. Reg. at 22,208. However, as with riparian areas and floodplains, “proximity” will be left to the best professional judgment of the local Corps or EPA official making a jurisdictional determination. There is nothing in the rule itself that would provide clarity or certainty regarding such connections. (p. 20-21)

Agency Response: See essay above.

- 3.117 [A]djacency under the proposed rule would not function in practice as a category of covered waters. Rather, adjacency would be determined on a case-by-case basis by local EPA and/or Corps officials. Barrick requests that the agencies reconsider how proximity and quantity and frequency of flow could be addressed in ways that make adjacency determinations more predictable and certain (p. 21)

Agency Response: See essay above.

Washington Cattlemen’s Association (Doc. #3723.2)

- 3.118 The WCA opposes EPA’s definition of “adjacent” and “neighboring” under the “adjacent waters” category because we believe it will allow EPA full jurisdiction over all activities that occur in riparian areas and floodplains by claiming jurisdiction over all open waters in those geographical areas. (p. 2)

Agency Response: See essay above.

Montana Wool Growers Association (Doc. #5843.1)

- 3.119 The Proposed Rule should categorically exclude all adjacent waters that do not share a permanent surface water connection with an (a)(1) or (a)(3) water; or the Proposed Rule should categorically exclude all adjacent waters that do not occur within the floodplain or riparian area of an (a)(1) or (a)(3) water. Section (a)(6) increases the Agencies’ workload by adding complex scientific analyses that cannot be performed by laypersons. A subsurface hydrologic connection exists where there is lateral subsurface water flow, such as: (1) “steeply sloping forested areas with shallow soils”; (2) “soils with a restrictive layer that impedes the vertical flow of water”; (3) “karst systems”; or (4) where an adjacent water contacts “the same shallow aquifer” as a Section (a)(1) through (a)(5) water. 79 Fed. Reg. at 22208. This requires the Agencies to consider “a combination of physical factors ... including (but not limited to) stream hydrograph, soil surveys, and information indicating the water table in the stream is lower than in the shallow subsurface.” 79 Fed. Reg. at 22208. The complexity prevents the regulated public from determining whether activities require permits. It also requires the Agencies to conduct more jurisdictional assessments. The problems contradict the Agencies’ stated goal of making CWA jurisdiction more clear and understandable. (p. 6-7)

Agency Response: See above essay.

Neither the preamble to the proposed rule nor the Connectivity Report discuss instances of hydrologic connectivity that do not result in the movement of water towards waters more traditionally considered jurisdictional.

The agencies did not adopt the categorical exclusions suggested by the commenter because, as shown in the TSD and preamble, those approaches would exclude a great number of waters with a “significant nexus” to traditional navigable waters, interstate waters, and the territorial seas, as well as interstate waters themselves.

National Farmers Union (Doc. #6249)

- 3.120 The agencies should also provide clarity to the regulated community by stating in the final rule, "mere proximity to a jurisdictional water is not cause for a determination that a water is jurisdictional as 'neighboring' or 'adjacent,' and a scientifically-verifiable, substantial surface connection must be present for any water outside a floodplain or riparian zone to be found jurisdictional." (p. 6)

Agency Response: See above essay. The agencies did not adopt the commenter’s suggested approach as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas. See Other Waters Compendium (Topic 4).

Starke County Farm Bureau (Doc. #6792)

- 3.121 We are also concerned with the provision of the rule which creates a category of “adjacent waters.” Adjacency is broadly defined. The reference to “neighboring” waters which may be remotely located from a jurisdictional water raises the question of whether those “waters” will have any impact, let alone a significant affect, upon the jurisdictional water. Additionally, the use of gullies, rills and non-wetland swales to serve as the connection to those features and the jurisdictional water raises the possibility that the gullies, rills and swales could be subject to regulation. If it is not the intention of the rule to regulate gullies, rills and non-wetland swales as connections to jurisdictional waters, then this should be specifically stated and not left open to other future interpretations. (p. 1)

Agency Response: The agencies’ demonstration that waters defined as “adjacent” in the final rule have significant nexus to traditional navigable waters, interstate waters, or the territorial seas can be found in the preamble and TSD. The final rule expressly excludes erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways from regulation as waters of the United States. These features are not waters of the US even if they would otherwise meet the definition of "adjacent." However, as explained in the preamble and Exclusions Compendium, such features may be considered in determining whether other waters have a significant nexus to downstream navigable waters, interstate waters or territorial seas.

Alameda County Cattlewomen (Doc. #8674)

- 3.122 The Category “Adjacent Waters” Wraps Every Open Water in a Floodplain and Riparian Area Under Federal Jurisdiction, Making the Category Virtually Limitless The agencies definition of “adjacent” captures every open water in a floodplain and riparian area, despite whether they are isolated or have a significant connection to downstream waters, contrary to Justice Kennedy’s concurring opinion in Rapanos (Rapanos, J. Kennedy,

concurring, at 21-22, "...the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far"). Similarly, the agencies' interpretation that their authority is so great to categorically command every open water in a boundless floodplain or riparian area to be a federal water, regardless of connection, cannot stand. In his concurring opinion Justice Kennedy cites Riverside Bayview Homes regarding the Corps inclusion of adjacent wetlands as waters of the U.S. In that case as well as Justice Kennedy's opinion, adjacent wetlands that abut a navigable-in-fact water can be jurisdictional because they have such a close connection to that navigable-in-fact water.⁵² (p. 12)

Agency Response: See above essay.

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

- 3.123 [B]y adding wetlands to the adjacent waters able to be regulated, EPA AND USACE have set up a virtually unending chain of wetlands "connected" to wetlands "connected" to wetlands that can be regulated across the countryside with no clear means of establishing significance of that connection and thus legal authority. This scenario is prevented under the current statute by 40 CFR 230.3(s)(7) which excludes jurisdiction over wetlands connected to wetlands, but that language is removed in the proposed rule. (p. 4-5)

Agency Response: The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter's assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of "waters of the United States" compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

The agencies have revised the definition of "adjacent" to provide greater clarity and consistency. To that end, the agencies deleted a parenthetical from the existing "adjacent wetlands" regulatory provision. The phrase "other than waters that are themselves wetlands" was intended to preclude asserting CWA jurisdiction over wetlands that were simply adjacent to a non-jurisdictional wetland. Such waters do not meet the definition of "adjacent" under the rule since waters must be adjacent to an (a)(1) through (a)(5) water, so the phrase is unnecessary and confusing. With this change, the agencies are protecting all waters that meet the definition of "adjacent" as "waters of the United States," and eliminating confusion caused by the parenthetical. For example, where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary's ordinary high water mark are jurisdictional because they are "neighboring" to the tributary, regardless of the wetlands' position relative to each other. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as the TSD.

- 3.124 [T]he proposal to automatically include all waters "adjacent" to jurisdictional waters is

⁵² *Rapanos*, J. Kennedy, at 8-9.

flawed due to the EPA and USACE's failure to ensure all of these waters have significant nexus to jurisdictional waters before including them in the same category that Justice Kennedy described in *Rapanos*. The specific functions of wetlands described in that decision, as stated earlier, may not be shared by some other categories of waters, so to include them in a broad swath of adjacency proving their connection does not follow the science the agencies claim to follow. If the Supreme Court had intended to include all categories of waters adjacent to jurisdictional waters as falling within the purview of the Clean Water Act, they certainly had the opportunity to do so in *Rapanos*. That inclusion is absent. (p. 6)

Agency Response: See essay above and response to prior comment.

National Sorghum Producers (Doc. #10847)

- 3.125 In assessing the validity of assigning the term “adjacent” with such a sweeping definition, we would again first refer to the parcels of land in question in the *Rapanos* case where Justice Kennedy concurred with the plurality opinion in holding that EPA and the Corps had not made the case for jurisdiction. Of note, Justice Kennedy distinguished one of the parcels of property in the *Rapanos* case where he agreed that federal jurisdiction could not be found with a parcel of property in a previous case, *United States v. Riverside Bayview Homes, Inc.* where jurisdiction was upheld. Justice Kennedy noted that while both wetlands were located a mile from the same popular fishing and boating lake, referenced earlier, the lands at issue [in *Bayview*] formed part of a wetland that directly abutted a navigable-in-fact creek.” For Justice Kennedy, the different outcomes in these two cases appear to have hinged on adjacent meaning adjacent. In *Bayview*, the wetland abutted a clearly jurisdictional water while in *Rapanos* the wetland was a mile from the jurisdictional water, joined to it by a ditch, a continuously flowing drain, and creek with a berm (i.e. man-made barrier) standing between the parcel of land and the ditch. In *Rapanos*, Justice Kennedy also observed that, “mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters. Here again there appears to us to be considerable sunshine between the proposed rule and what Justice Kennedy had in mind in *Rapanos*. (p. 4-5)

Agency Response: See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent.

Iowa Corn Growers Association (Doc. #13269)

- 3.126 ICGA remains concerned that the term adjacent will push the jurisdictional limits further upland. The Agriculture Water Mapping Initiative analysis referenced in the National Corn Growers Association comments and also attached here, shows that Iowa has over 3 million acres of floodplains. The streams data used in the mapping analysis are from the publicly available US Geological Survey’s National Hydrography Database (NHD), which is the same source of data that EPA uses for its online mapping tools. By making these floodplains categorically WOTUS, it greatly expands the reach of the EPA regardless of whether these waters are currently jurisdictional or not. (p. 4)

Agency Response: See above essay.

Because, as the commenter points out, the 100-year floodplain can be extremely wide in some areas of the country, particularly near large rivers, the agencies chose to provide increased clarity and certainty while ensuring that waters that provide important functions significantly affecting the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas are protected by establishing a 1,500-foot maximum distance for neighboring waters in the rule. Waters within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark are adjacent without regard to the presence of berms or other barriers.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter's assertions, consistent with *SWANCC* and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Iowa Corn Growers Association (Doc. #13269)

- 3.127 The rule proposes the definition of adjacent to include waters that are not actually adjacent within the customary and dictionary meaning of the word, but instead are merely neighboring. The term neighboring is further defined by two more defined terms: “riparian area” and “floodplain.” A riparian area is one where the surface or subsurface hydrology directly influences the ecological processes as well as the established plant and animal communities in that area. This description will likely lead to case-by-case determinations since the concept of influencing the ecosystem in the undefined “area” bordering a water is a broad and far reaching standard. (p. 4)

Agency Response: See above essay.

- 3.128 [T]he definition of adjacent is too broad, impermissibly relying on groundwater connections to capture neighboring waters that are not actually adjacent and otherwise would not fall under the CWA. Not only is this overboard, it is unclear. EPA admits it does not have direct jurisdiction over groundwater; however, it uses a groundwater connection to link to upland waters that haven't been jurisdictional, to now include those upland waters while the groundwater itself remains untouched. The Agencies admit they do not have the authority to regulate groundwater between two presumed jurisdictional waters, but finds that an upland water is jurisdiction through the non-jurisdictional groundwater, linking it to another jurisdictional water. Instead, this should be viewed as a separation supported by *SWANCC*. Not only is this entire interpretation overly broad; it is also very confusing and unclear as to where the Agencies' authority comes from to infer that a groundwater connection could make something categorically WOTUS. (p. 4)

Agency Response: See the *Shallow Subsurface Connection* essay elsewhere in this document. Also, see the *Legal compendium*, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent.

Irvine Ranch Water District (Doc. #14774)

- 3.129 The definition of "Adjacent" should be narrowed. The definition of WOTUS should be expressly stated to be the ordinary high water mark only and that floodplains, riparian areas and/or shallow hydrologic connections are not jurisdictional WOTUS. If that is not possible, IRWD requests water infrastructure facilities (including construction, maintenance, and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of WOTUS. (p. 5)

Agency Response: The Agency did not adopt the commenters' approach to adjacency as it would, as demonstrated in the preamble and TSD, exclude many waters that have a "significant nexus" to traditionally navigable waters, interstate waters and the territorial seas. However, the final rule does exclude certain water infrastructure conveyances and features. See Exclusion compendium.

North Dakota Soybean Growers Association (Doc. #14594)

- 3.130 Expanding federal jurisdiction through regulating ephemeral streams is the most conspicuous way the rule would expand federal jurisdiction. Less obvious, the proposed rule adds several new definitions that, although critical to understanding the true scope of the rule, are so vague as to allow virtually any interpretation of their limits. These definitions include "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." As noted above, these definitions work in conjunction with one another so that if an area isn't a water body, it may be a tributary. If it is isolated and does not contribute direct flow, flow might nevertheless be indirect, the shallow subsurface water beneath it may be connected to a water body, or it might be in the floodplain, riparian area, or watershed and become significant when combined with other waters." Thus, it will often be impossible for landowners and businesses to escape federal jurisdiction under the revised WOTUS definition. (p. 7)

Agency Response: See above essay.

Also, a stream or similar linear feature would be regulated as a tributary where it meets the definition of a tributary. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of the rule that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. It is important to note that there is no definition at all in the existing regulation. In practice, agencies had generally relied on OHWM to identify tributaries. Now, a bed and banks in addition to an OHWM must be present in the field to meet the definition of a tributary. Note that the significant nexus analyses performed for "adjacent waters" is discussed in the preamble and TSD, and the legal analysis is in section I of the TSD.

The Mosaic Company (Doc. #14640)

- 3.131 The proposed rule seeks to justify assertion of jurisdiction over "adjacent" non-wetlands by the statement that, "Prior to SWANCC, adjacent non-wetland waters were often jurisdictional under the 'other waters'" provision. 79 Fed. Reg. at 22,207. Regardless of

the agencies' historic position on non-wetland adjacent waters, the SWANCC Court rejected such a practice and held that regulation of these isolated waters was beyond the scope of the agencies' authority under the Act. SWANCC, 531 U.S. at 168. Thus, this rulemaking cannot recapture waters that the Supreme Court has ruled to be outside CWA jurisdiction. (p. 16)

In addition, the adjacent waters standard is problematic because it allows for jurisdiction based on "adjacency" to drains, ditches, and streams remote from navigable waters and carrying only minor volumes of flow. Justice Kennedy's opinion does not allow for jurisdiction based on "adjacency" to features that are not "major tributaries." Rapanos, 547 U.S. at 780. Justice Kennedy explicitly rejected "the Corps' theory of jurisdiction in these consolidated cases-adjacency to tributaries, however remote and insubstantial ... " Id. With respect to the nonnavigable ditch at issue in Carabell, Justice Kennedy's concurrence stated, "[M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it." Id. at 786. In such situations, he found that "a more specific inquiry" was necessary. Id. Under the proposed rule, wetlands (and non-wetlands) that are adjacent to such remote and insubstantial tributaries would be per se jurisdictional. Asserting per se jurisdiction over any water or wetland within the floodplain or riparian area of a water of the United States directly contradicts Justice Kennedy's opinion. Nor does the Rapanos plurality allow for such an expansive assertion of jurisdiction over "adjacent waters." The plurality found that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." Rapanos, 547 U.S. at 742 (emphasis in original). Thus, the plurality explained, "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of Riverside Bayview, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." Id. With the proposed rule's new definition of "neighboring" and extension of the adjacency concept to non-wetlands, the proposed rule seeks to broaden CWA jurisdiction in a matter that is inconsistent with the Rapanos plurality's and Justice Kennedy's opinions. These opinions rejected the "any hydrological connection" standard and attempts to regulate wetlands based on adjacency to non-navigable tributaries. (p. 16-17)

Agency Response: See essay above. See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent.

Indiana Corn Growers Association (Doc. #14933)

- 3.132 A small depression in a farm field may have standing water in it for a few days. These depressions typically do not have water in them for long enough to constitute defining them as wetlands. Though, it appears the Agencies' broad definition of could include these small low areas as WOTUS. These areas that occasionally pond or become wet should not, in our opinion, be categorically WOTUS as an "adjacent" water. (p. 2)

Agency Response: EPA notes that "puddles" are expressly excluded from the definition of "waters of the U.S." by subsection (b)(4)(G) of the rule.

National Pork Producers Council (Doc. #15023)

- 3.133 We strongly recommend that only wetlands be considered possibly adjacent WOTUS and that the arbitrary and subjective concept of “waters” not be included. What does waters mean in this instance? How much or how little water needs be present, and for how long, for it to be one of these “waters”? It is possible to be quite specific when referring to “tributaries” (as evidenced in the definition in the proposed rule). Similarly, impoundments of tributaries are relatively easily understood, as are wetlands given the extensive history of wetland determinations by the Agencies. This is not the case for “waters,” and we strongly encourage the Agencies not to introduce confusion, uncertainty and lack of clarity to this situation by now adding “waters.” (p. 21)

Agency Response: See above essay.

Klamath Water Users Association (Doc. #15063)

- 3.134 Mere shallow groundwater connectivity should not be used for determining adjacency of riparian areas or floodplains of jurisdictional waters. We believe that the term “adjacent” should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections. This would more properly limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the “significant nexus” test, and would avoid the subjectivity of assessing shallow groundwater connections between adjacent water bodies.

If the current definition of “adjacent” is maintained, the definition of “floodplain” should be further refined. As stated, a floodplain is 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 water flows.” The terms “present climatic conditions” and “moderate to high flows” should be defined to limit the floodplain to those flood events with a more recent history (e.g., a rolling 10- or 20-year interval). Furthermore, the statement in the proposed rule that “uplands in a floodplain are never considered ‘waters of the U.S.’” should be highlighted with a definition of “uplands” being included in the definitions to provide clarity to the proposal. (p. 6)

Agency Response: The Agency did not adopt the commenters’ approach of limiting “adjacent” waters to those with a confined surface water connection, as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas. See above essay.

EPA did not add a definition of “uplands” to the rule because the term is no longer used in the rule.

Colorado Cattlemen's Association (Doc. #15068)

- 3.135 CCA is very concerned that the agencies definition of "adjacent" captures every water in a floodplain and riparian area, despite whether they are isolated or have a significant connection to downstream waters. Similarly, the agencies' interpretation that their authority is so great to categorically command every open water in a boundless floodplain or riparian area to be federal water, regardless of connection, cannot stand.

These definitions would be very problematic in Colorado and create extreme burdens on agriculture producers in the state. CCA encourages the EPA and the Corp to consult Colorado Water Law to see how the regulations in Colorado are working to protect riparian areas and floodplains. (p. 6)

Agency Response: See essay response. The agencies encourage States to protect riparian areas and floodplains under their own authorities.

- 3.136 The term "adjacent" should have the plain meaning of the word if the true intent of the regulation is to provide clarity to the regulated community. Using the common definition of the word allows the vast majority of people to have a shared understanding of its meaning. The term "neighboring" within the agencies' definition of "adjacent" is beyond the common understanding of what would be an "adjacent water" to a TNW.

CCA believes that the agencies expansive definition for "neighboring" in their per se jurisdictional category of "adjacent waters" is beyond the scope of the CWA. Based on the Supreme Court's decisions in *Rapanos* and *SWANCC*, the agencies cannot finalize a regulation that makes any open water within a floodplain or riparian area per se jurisdictional. (p. 6)

Agency Response: See essay above. See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent.

Missouri Farm Bureau Federation (Doc. #15224)

- 3.137 The addition of "adjacent waters" is another troublesome component of the proposed rule. "Adjacent" is defined as "neighboring," which includes features located in the "riparian area" or floodplain of any other jurisdictional water (which now includes ephemerals), or features with a "shallow subsurface...or confined surface hydrologic connection." Whether any of these characteristics exist will be determined in the agency's "best professional judgment."⁵³

Long, linear features, such as ditches, will have a floodplain and riparian areas around them and will often have hydrologic connections to nearby wetlands or ponds. For this reason, the inclusion of small, isolated wetlands, ponds and similar features "adjacent" to ditches would sweep into federal jurisdiction countless small and otherwise remote wetlands and ponds.

The term "other waters" appears to be the catch-all category used by the Agencies to sweep in any other feature that does not already fall under "tributary" or "adjacent waters." The description of what constitutes "other waters" consists of page after page of potential scientific indicators of physical, biological and chemical connections that will be used to make the case for a "significant nexus" to another "water of the U.S." It is reasonable to presume agency personnel will have little difficulty finding a "significant nexus" for even the most minor wet spots. This is not the clarity or certainty sought by

⁵³ The preamble explains that wetlands or ponds that "fill and spill" to ditches or other ephemeral features during intense rainfall would be viewed as having a confined surface hydrologic connection to those features. 79 Federal Register at 22,208-22,209. Such wetlands or ponds would therefore be "navigable waters," no matter how small or distant they are from true navigable waters.

the agricultural community.

SAB reviewer Dr. James Opaluch expressed concerns regarding the report's clarity specific to "other waters" and "significant nexus" (emphasis added):

The EPA Connectivity report should support the proposed rule by providing the scientific basis of determining whether a water body qualifies under the proposed definition of "Waters of the United States". Of concern here is the line of demarcation for "other waters" that do not automatically qualify by their use for commerce, or are interstate waters, tidal water and territorial seas...

In order to provide scientific support under the proposed rule, the EPA report should provide a scientific basis for whether a water body "significantly affects the chemical, physical or biological integrity of a water body". A reasonable scientific basis for a rule would define a method for determining whether or not a water body has a "significant effect on the chemical, physical or biological integrity" of navigable waters, interstate waters, tidal waters or territorial seas, and the effect should not be "speculative".⁵⁴

Responding to the SAB's request for additional comment, the chairperson of the Panel for the Review of the EPA Water Body Connectivity Report summarized the panel's dissatisfaction with the use of "significant" and "significant nexus" as follows (emphasis added):

Panel members generally found that the term "significant nexus" was poorly defined in the proposed rule and that the use of the term "significant" was vague. Panel members commented that the little guidance was provided in the preamble of the rule to interpret these terms. There was agreement among Panel members that it was important to articulate in the proposed rule that (1) "significant nexus" is not a scientific term but rather legal term that requires a policy determination in light of the law and science and (2) the relative strength of downstream effects should inform the conclusions about the significance of those effects for purposes of interpreting the Clean Water Act.⁵⁵

The Agency's proposed jurisdictional expansion (as outlined herein and explained in greater detail in AFBF's comments) will be disastrous for farmers and ranchers because, generally speaking, farm and ranch lands are an intricate maze of ditches, ponds, wetlands and ephemeral drainages. Our farms and ranches have features that contain or carry water only when it rains and may be miles from the nearest true "navigable" water. We also have features like ponds that tend to be wet year round, but are not jurisdictional waters today. Ponds are used for livestock watering, providing irrigation water, or settling and filtering farm runoff. Irrigation ditches carry flowing water to the field throughout the growing season.

Given the breadth of the definitions in the proposed rule, the vast majority of ephemeral drainage features and ditches on crop and pasture lands described above would be categorically regulated as jurisdictional tributaries under the proposed rule. The vast

⁵⁴ Preliminary comments from Members of the Chartered SAB on the SAB Draft Report SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters (August 11, 2014 Draft), September 22, 2014.

⁵⁵ Memo to Dr. David Allen, Chair, EPA SAB, from Dr. Amanda D. Rodewald, Chair, SAB Panel for the Review of the EPA Water Body Connectivity Report, September 2, 2014.

majority of small wetlands, ponds and pools (including, potentially, ephemeral ponds, which some might call “puddles”) would be either categorically regulated as “adjacent” waters or could still be regulated as “other waters.” (p. 3-5)

Agency Response: As described elsewhere in this document, as well as the preamble and TSD, the agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. For responses to the balance of this comment, see the Significant Nexus, Other Waters, and Ditches compendiums, as well as Agency Summary Response 14.2 in the Miscellaneous Compendium (pertaining to concerns regarding potential effects on agriculture).

Union County Cattlemen (Doc. #15261)

- 3.138 We do not agree that clarity has been offered in the rule. Instead the federal register notice was not written with an intent to clarify or justify the changes in definitions. The proposal exemplifies the EPA’s and Corps desire to re-write and put a new spin on the CWA and Supreme Court decisions. We think the definitions of riparian area, floodplain and the meaning of adjacent are sufficient without a new definition. (p. 1)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. For reasons explained elsewhere in the record for today’s rulemaking, the Agency believes these revisions achieve the goal of providing greater clarity, consistency, and certainty. The commenter provides no concrete support for the position that the definition should remain unrevised.

Oregon Association of Nurseries (Doc. #15489)

- 3.139 [A]s also stated in the proposed rule itself, a significant nexus does not arise when such a relationship is “speculative or insubstantial.” By example only, it appears the definitions of “neighboring” waters (as defined as a sub-category of “adjacent” waters) and “tributary” waters in the proposed rule ignore such constraints.

Under the proposed rule, waters which are “adjacent to traditionally navigable waters mean waters “bordering, contiguous, or neighboring.” Assuming for the purposes of these comments that the meaning of bordering and contiguous are straightforward enough, waters defined as “neighboring” do present cause for concern. For a water body to be “adjacent” to traditionally navigable waters by virtue of being “neighboring,” the rule only requires evidence of any “shallow subsurface hydrologic connection or confined surface hydrologic connection” to such waters. Setting aside concerns of how such determinations will be made, the definition appears to ignore the minimum requirement that the hydrologic connection must possess a “significant nexus” to traditionally navigable waters to become jurisdictional waters. In other words, just because a sub-surface or surface hydrologic connection may exist at any level as the definition requires, does not and cannot mean that such water body can and should be necessarily classified as waters of the United States in cases where that connection is “insubstantial or speculative.” To the extent that the definition of “neighboring” seeks to create a standard that would avoid the need for there to be a significant nexus, such definition should be stricken from the rule.

The same concern involving the definition of "neighboring" can equally apply to how the proposed rule includes waters which are "tributary" to traditionally navigable waters. The proposed rule classifies such waters as those water bodies which contribute any amount of flow to traditionally navigable waters. As a result, this definition like others appears to ignore the minimum requirement that the amount of flow provided must possess a "significant nexus" to traditionally navigable waters to become jurisdictional waters. To the extent that the definition of "tributary" - and for that matter, any other definition of waters susceptible to becoming jurisdictional waters by virtue of their relationship to traditionally navigable waters - seeks to 'create a standard that would avoid the need for there to be a significant nexus, such definition should be stricken from the rule. (p. 2-3)

Agency Response: For responses to this comment, see the Shallow Subsurface Connection essay in this compendium and the Tributaries compendium.

Iowa Farm Bureau Federation (Doc. #15633.1)

- 3.140 The definitions of neighboring, riparian and floodplain areas also create much uncertainty. While the definitions create flexibility and discretion for the Agencies to decide whether a landscape feature is a water of the U.S., it does not provide certainty for those who have to comply with the CWA and its implementing regulations. Neighboring is defined essentially as any water located within a riparian or floodplain area of a traditional navigable water or tributary. In footnote 3, the preamble makes clear that the term "water" in this rule doesn't mean just water, but all associated physical, chemical and biological features. The rule creates questions about when the Agencies intend for the "water" to stop being a water of the U.S. and land to begin when the footnote in the preamble says that water includes all associated physical, chemical and biological features.

Riparian areas can be transitional areas, but they can also look a lot like land, not water. (See e.g. Photo E) The rule does not clearly define when the "riparian area" ceases to be riparian. If a landowner purposefully created wildlife habitat and a riparian buffer next to a stream, is he now going to be penalized with his private property being declared jurisdictional? Will he be allowed recreational use of this property without the oversight of the Agencies' regulations such as hunting or 4-wheeling? Will he be allowed to maintain this property by mowing the buffer and using herbicides to keep down the weeds? How far will the riparian area extend as the entire ecological system is connected? Nothing in the rule describes when the riparian or floodplains areas, and thus federal jurisdiction, end. When the EPA says water located in a riparian or floodplain is jurisdictional, how much land is included along with the temporary surface water? Is the land jurisdictional when the water filtrates into the soil or runs off? Contouring the landscape, planting and maintaining a riparian filter strip often impacts the flow and character of a riparian "adjacent" water. Hurdles to the construction and implementation of conservation practices are created by the proposed rule include having to precisely follow NRCS practice standards, having to obtain §402 permits, §404 permits, and §401 certification and developing and complying with the water quality standards applicable to the newly created "water." The purpose of conservation practices such as a filter strip are to improve water quality, but if these barriers exist many of these edge of field practices will not be constructed and there will be fewer of them due to the increased cost and

delays cause by the regulatory system.

The definition of floodplain also does not provide clarity to people wanting to conduct activities in “floodplains.” Alluvial soils, soils that were formed in riparian areas, can also be found in areas that are no longer subject to flooding due to both natural and man-made changes in the stream course. Currently, state and local regulations control land use within a floodplain. There are many legitimate uses of private property located in a floodplain, including growing crops and grazing cattle. It is very difficult to see benefit in adding EPA and Army Corps regulation of the floodplain to something that is already regulated. As this rule does not differentiate between what most people consider to be land and “water” in a floodplain and it does not adequately describe where a floodplain on a particular property might be, the proposed rule is an inadequate definition to create any certainty in the boundaries of regulatory authority.

The definitions of adjacent waters proposed in this rulemaking have no practical application for someone trying to determine if CWA regulations apply to their land. But, even if the Agencies decide to regulate “water” in a riparian or floodplain area, the Agencies explanation of the rule indicates that the rule will include more than just flowing or standing “water” in a floodplain. In the lengthy preamble, the Agencies do not establish that they won’t regulate land near “water” or that they won’t regulate land where water might have been at one time. Because the proposal does not define the limits of CWA jurisdictional waters relative to each of these definitions, landowners and those who want to use their own property, will never be confident of their compliance with the CWA.

The category of adjacent waters has the additional complicating ambiguity of the definition of tributary previously identified. The first layer of ambiguity involving the adjacency definition is the definition of tributary, then the vague definitions of riparian and floodplain areas is layered next, then the definition of neighboring, and then the last layer for determining whether a water is jurisdictional is the definition of adjacency itself. With all of these layers of vague definitions, all of which the Agencies can interpret broadly, the definitions do not provide any clarity and will continue to require case-by-case determinations of an even larger set of activities than the present day. (p. 9-10)

Agency Response: See above essay.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter’s assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

For a response to comments on tributaries, see the Tributaries compendium.

Georgia Paper & Forest Products Association (Doc. #15657)

- 3.141 There is a major expansion of jurisdiction by EPA and the USACOE embodied in the proposed rule. Despite EPA's comments to the contrary, the rule language and its practical effect would clearly and significantly enlarge the jurisdiction of the rule. In

particular, the definition of "Waters of the U.S." is greatly expanded by the change from "wetlands" to "waters" and new expansive definitions of terms like "tributaries", "adjacent", "neighboring", and "riparian areas", among others, that are used in defining "waters". This expansion in jurisdiction is further increased by the concept of "Significant Nexus" to go even beyond those "waters" to include isolated wetlands and non-wetlands and cause a water to be jurisdictional simply because other similar waters are in the same region. These impacts are directly contrary to EPA's stated position on the intent and effect of this rule. The proposal should be changed to eliminate the expansion of jurisdiction as well as prevent the confusion and uncertainty it would create if adopted as proposed. (p. 2)

Agency Response: See above essay.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter's assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of "waters of the United States" compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD. For a discussion of other waters, see Other Waters Compendium (Topic 4)

Huntington Farms (Doc. #16331)

- 3.142 Vague definitions of various terms used in this proposed rule change are of great concern when interpreted by regional field offices of EPA and ACOE. Discretionary, and even subjective, interpretations of terms like "waters," "floodplain," "waste treatment," "subsurface connection," and "uplands" will impact local agricultural operations if not consistently applied in similar fashion and in uniformity. Loose interpretations of these terms, either by regional field offices or through civil actions, could have tremendous impacts on the unique character of our growing region. It is through these feared interpretations that control over features that are generally considered as land are interpreted as water, thus conferring federal control of all remote and unconnected conveyance and collection features. (p. 2)

Agency Response: See essay above.

Dairy Cares (Doc. #16471)

- 3.143 In the Proposed Rule, all types of waterbodies (not just wetlands, as was the case previously) that are "adjacent" to WOTUS would be jurisdictional by rule. In addition to previous definitions of "adjacent" (separated by man-made dikes, berms, dunes, etc.), the category would now include, by rule, all waterbodies located within the riparian area or floodplain of a "traditional" WOTUS. Further, where waterbodies are adjacent to impoundments or tributaries of traditional navigable waters, interstate waters, or territorial seas, under the Proposed Rule these waters would also be jurisdictional by rule. "Neighboring" waters would include "waters located within the riparian area or floodplain" of WOTUS, or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to WOTUS. The new definition does not require any nexus analysis, and thus arguably expands the reach of the CWA to include

entire floodplains or riparian areas that may not have been previously regulated under the CWA.

Similar to our comments above, Dairy Cares is concerned that this expansive definition of “adjacent” could inadvertently capture water-based components of dairy facilities (e.g., lagoons, ditches) that happen to be located near a “traditional” WOTUS, even though the water-based component of the dairy facility has no connectivity with the traditional WOTUS. Such a result could improperly trigger the application of water quality standards, and other regulatory burdens, onto dairy facilities. This would create regulatory havoc on dairies, and would certainly impact the economic viability of such facilities. (p. 5)

Agency Response: See essay above.

Utah Farm Bureau Federation (Doc. #16542.1)

3.144 For farmers and ranchers, uncertainty is increased through overly broad or nebulous terms in the proposed rule including: [...]

- extending the concept of “adjacency” to non-wetlands without providing a limit to “waters” that can be considered adjacent,
- relying on vague and undefined concepts such as “floodplain,” “riparian area,” and “shallow subsurface hydrologic connection” to identify “adjacent waters,” (p. 7)

Agency Response: See essay above.

3.145 The agencies broadly define “adjacent” as “neighboring” which includes features located in the “riparian area” or “floodplain” of any other jurisdictional water, or feature with a “shallow subsurface...or confined surface hydrologic connection.” Under this definition, it is difficult to envision any waters near tributaries, including dry ephemerals, or a coast that are not potentially within the scope of the federal jurisdiction. Additionally, ditches in areas with expanded definitional riparian areas or floodplains around them possessing potential “hydrological connections” likely become jurisdictional based on the agency’s interpretation of the proposed rule. (p. 10)

Agency Response: See essay above. With respect to ditches, see *Ditches Compendium* (Topic 6).

The Walker River Irrigation District (Doc. #16567)

3.146 Under the proposed rule, a water “adjacent” to an interstate water, to a tributary, or to a ditch which is not excluded as a “tributary” would also be a water of the United States. The definition of “adjacent” in the proposed rule includes “bordering,” “contiguous” or “neighboring.” The definition also explains that separation by man-made ditches or barriers will not disqualify a water from being “adjacent.” The definition of “neighboring” is less than clear. It seems to include a water which may be connected by groundwater to the water of the United States. Thus, on the one hand, groundwater “drained through subsurface drainage systems” is excluded from jurisdiction, but a water which has a “shallow subsurface hydrologic connection” to an interstate water or a tributary of an interstate water is considered “adjacent” to it and thus is jurisdictional. The proposed rule is so broad, that water sitting in a field next to a ditch or drain may be

a "water of the United States." (p. 5-6)

Agency Response: See essay above. Although the commenter does not provide any detail about the “water sitting . . . next to a ditch or drain” example, the agencies do note that “puddles” are now expressly excluded from the definition of “waters of the U.S.”

Missouri Corn Growers Association (Doc. #16569)

- 3.147 The proposed rule’s definition of “adjacent” and “neighboring” has made a new category of “adjacent waters” perhaps even more boundless than the “tributary” definition. We believe the proposed rule’s “adjacent waters” concept will include every inch of land in a floodplain and riparian area - no matter how isolated or whether it has any connection to downstream water. We believe this portion of the proposed rule will impact every single river bottom farming operation in the state. This farmland is our most productive cropland in the state. The enclosed Appendix B illustrates the vast amount of cropland that could be captured within the adjacent waters and floodplain terms. The GIS map shows the extent of the 1993 flood (highlighted in light blue-green) within Chariton County, Missouri. (p. 4)

Agency Response: See essay above.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter’s assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Finally, the rule provides that waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.

Montana Stockgrowers Association (Doc. #16937)

- 3.148 The agencies have expanded the category of “adjacent wetlands” to “adjacent waters” and expanded the word “adjacent” to mean any open water within a floodplain or riparian area, the size and scope of both are undefined in the proposed rule and left to the “best professional judgment” of the regulator. The agencies have made the new category of “adjacent waters” virtually limitless, violating the CWA and contradicting the Supreme Court decisions. We recommend the agencies change the “adjacent waters” category to “adjacent wetlands” and not to finalize their definition of “neighboring.”

We have concerns over this category being too vague and broad and ultimately being used as a “catch all” category. We do not believe this is supported by either the plurality or Kennedy’s concurrence for jurisdiction in *Rapanos*. In addition, in the Preamble, “others waters” is defined as “not insubstantial or speculative.” These phrases are not adequate for the regulated community or landowners to be ensured they are not in violation of the CWA. It is our recommendation that this classification be removed from the rule. (p. 8)

Agency Response: See above essay. The agencies did not make the changes to the definition of “adjacent” suggested by commenter as they would exclude from the definition of adjacency many waters the agencies have determined have a “significant nexus” to traditionally navigable waters, interstate waters, and the territorial seas.

See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent and the CWA. For concerns regarding “other waters,” see the Other Waters compendium.

Wilkin County Farm Bureau (Doc. #19489)

- 3.149 The proposed rule leaves it to the agencies “best professional judgment” to determine riparian areas and flood intervals for flood plain identification. If each “adjacency” to a “waters of the United States” via a flood plain or riparian area is arbitrary on a case-by-case basis, farmers, ranchers, and landowners will have no ability to predict whether the features on their property will be deemed jurisdictional (p. 2)

Agency Response: See above essay. In addition, waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.

Airports Council International - North America (Doc. #16370)

- 3.150 On pages 22209, 22236, and 22263 the issue of determining whether a water is included in a floodplain is addressed. The Agency is proposing to use best professional judgment, present climatic conditions, or moderate- to high-water flows, to establish inclusion in a floodplain. However, this approach is open to significant interpretation and overreach.

The proposed change from “adjacent wetlands” to “adjacent waters” and broad expansion of the concept of “adjacent” have caused tremendous uncertainty regarding the status of wetlands, ponds, water storage systems, and water conveyances that lie in a floodplain or riparian area or that have a groundwater connection, however distant, or where water can move overland to a navigable water. The proposed reference to floodplains and other tools to otherwise “connect” waters to make them “jurisdictional” must be further considered and better explained. (p. 4)

Agency Response: See above essay.

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

- 3.151 The Rule proposes a new definition for the term “adjacent.” Under the Rule, all waters, including wetlands, adjacent to a TNW, impoundment or tributary and other waters would be WOUS. The term adjacent includes “neighboring” waters that are either located within the riparian area or floodplain and contain a shallow subsurface hydrologic connection (i.e. shallow groundwater) or confined surface hydrologic connection (i.e., stormwater ditch). Furthermore, the Rule states that an “adjacent” connection exists through a shallow aquifer, and shallow subsurface connections may be found below the ordinary root zone (below 12 inches). The terms “shallow aquifer” and “ordinary root zone” are not defined within the Rule and are speculative. This language is ambiguous and relies heavily on best professional judgment to determine what

constitutes a shallow aquifer connection which can extend to greater than 4-6 feet deep within the dry season. By their very nature, many of the City's stormwater management facilities are located within riparian areas or the floodplains adjacent to WOUS and likely have shallow groundwater connections or are connected to a WOUS by a stormwater ditch; therefore, most of the City's currently non-regulated stormwater management facilities and ditches may become regulated WOUS under this proposed Rule. There is no reasonable option for providing clarity for this type of jurisdiction because of its inherent ambiguity. There are no scenarios where it would be appropriate for EPA to extend CWA jurisdiction over resources "adjacent" to existing WOUS, no matter the distance or landscape position, unless more than speculative or insubstantial scientific evidence is produced through a case-specific analysis that a significant nexus exists between an "adjacent" resource and a WOUS. The City of Chesapeake will not support the expansion of CWA jurisdiction through adjacent water because it may result in less clarity, certainty and predictability for the regulated community, as well as increasing infrastructure maintenance/retrofitting and development costs. (p. 4-5)

Agency Response: See above essay.

Beaufort County Stormwater Utility (Doc. #7326.1)

- 3.152 The proposed regulations provide that all waters (including wetlands) that are adjacent to WOTUS are included. A definition of "adjacent" is provided, and includes neighboring waters. The proposed definition of "neighboring" includes "waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." "Adjacent" as defined in the agencies' regulations has always included an element of reasonable proximity and significant effect. However, reasonable proximity is not defined. (p. 1)

Agency Response: "Reasonable proximity" is not defined in the rule because it is not used in the rule. See above essay for explanation for how reasonable proximity is related to the definition of adjacent.

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15413)

- 3.153 The proposed rule replaces the existing definition "adjacent wetlands" with "adjacent waters". Adjacent waters may be connected through "surface or shallow subsurface connections. Because of the unique karst topography of Kentucky "shallow subsurface connections" can be vastly different to a neighboring state within shared watersheds with much less permeable subsurface hydrologic features. Accordingly, MSD request clarifying the definition of "shallow subsurface connections". (p. 2)

Agency Response: See above essay.

Fresno Metropolitan Flood Control District and California Stormwater Quality Association (Doc. #15484)

- 3.154 In the Proposed Rule, all types of water bodies (not just wetlands, as was the case previously) that are "adjacent" to WOTUS would be jurisdictional by rule. In addition to previous definitions of "adjacent" (separated by man-made dikes, berms, dunes, etc.),

the category would now include, by rule, all water bodies located within the riparian area or floodplain of a "traditional" WOTUS. Further, where water bodies are adjacent to impoundments or tributaries of traditional navigable waters, interstate waters or territorial seas, under the Proposed Rule these waters would also be jurisdictional by rule. "Neighboring" waters would include "waters located within the riparian area or floodplain" of WOTUS, or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to WOTUS. The new definition does not require any nexus analysis and thus arguably expands the reach of the CWA to include entire floodplains or riparian areas that may not have been previously regulated under the CWA.

With respect to stormwater related facilities, this expanded definition of "adjacent" could result in treatment control BMPs, green infrastructure projects, and other multi-purpose benefit projects being classified as a WOTUS if such projects are installed in a floodplain or riparian zone, or are otherwise determined to be "adjacent" to a traditional navigable water. As indicated previously, such facilities are installed so that stormwater agencies can reduce pollutants to the maximum extent practicable, and many such facilities provide for multiple benefits to the environment. For example, green infrastructure projects improve water quality, enhance recreational uses, and help to infiltrate water to groundwater basins for future municipal and domestic uses. However, under the Proposed Rule, such projects could become jurisdictional. Thus, facilities designed and implemented to comply with NPDES MS4 permit requirements would be subject to further regulation as a WOTUS. Such a result undermines the intent and purpose of such facilities, and the stormwater program in general.

In California infiltration basins or "spreading grounds" are operated to infiltrate recycled water, imported water, stormwater, and other water across basins to recharge underground drinking water aquifers. These facilities are essential to California's efforts to manage its water supplies. If included within the "adjacent" category, these spreading grounds could become a WOTUS and become subject to extensive regulation under the CWA.

Accordingly, it is necessary to specifically exclude stormwater treatment control BMPs, spreading grounds, and other beneficial projects such as green infrastructure from the definition of "adjacent." CASQA provides suggested amendments to the exclusions in section II below to achieve this purpose. (p. 7)

Agency Response: See above essay. In addition, with respect to the jurisdictional status of stormwater control and wastewater management features as waters of the U.S., please see the Exclusions Compendium (Topic 7).

Sacramento Stormwater Quality Partnership (Doc. #17005)

- 3.155 In the Proposed Rule, all types of water bodies (not just wetlands, as was the case previously) that are "adjacent" to WOTUS would be jurisdictional by rule. In addition to previous definitions of "adjacent" (separated by man-made dikes, berms, dunes, etc.), the category would now include, by rule, all water bodies located within the riparian area or floodplain of a "traditional" WOTUS. Further, where water bodies are adjacent to impoundments or tributaries of traditional navigable waters, interstate waters or

territorial seas, under the Proposed Rule these waters would also be jurisdictional by rule. "Neighboring" waters would include "waters located within the riparian area or floodplain" of WOTUS, or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to WOTUS. The new definition does not require any nexus analysis and thus arguably expands the reach of the CWA to include entire floodplains or riparian areas that may not have been previously regulated under the CWA. (p. 5)

Agency Response: See essay above.

Duke Energy (Doc. #13029)

- 3.156 The agencies do not clarify what is a "water" for purposes of the revised "waters of the United States" definition. The footnote cited earlier seems to provide the agencies the flexibility to declare that any wet area could be considered as a "water" for purposes of these definitions. (p. 33)

Agency Response: See essay above.

Company (Doc. #14134)

- 3.157 The definitions offered for the newly introduced concepts of riparian area and floodplain are incomplete or ambiguous at best. For instance, the agencies propose to define both terms as areas "bordering" certain waters, but offer no guidance on how this key operative term—bordering—can or should be defined. In addition, the proposal states that "riparian area" and "floodplain" will be determined based on best professional judgment, yet it provides no clear standards or factors by which such decisions will be made. (p. 39)

Agency Response: See essay above.

National Lime Association (Doc. #14428.1)

- 3.158 [N]ot only is there a need for the term "isolated," to be defined in the regulatory text, it is also incumbent that the definitions of both "wetlands" and "isolated" discuss and draw a bright-line distinction between "geographic isolation" and "functional isolation." (p. 10)

Agency Response: The agencies did not add a definition of the term "isolated" to the rule because that term is not used in the rule. The agencies believe that the view that certain waters without a direct hydrologic connection nevertheless have a significant nexus is supported by both the science and the Supreme Court's rulings. While proximity and the presence of a hydrologic connection increases the strength of the impact of the downstream traditional navigable water, interstate water, or the territorial seas, adjacency or a hydrologic connection is not necessary to establish a significant nexus, because, as Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to these (a)(1) through (a)(3) waters. These functional relationships include retention of floodwaters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water, or the territorial seas.

In addition, 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.” Based in part on these findings, the final rule contains 9 relevant factors to be used in case-specific significant nexus evaluations, which include physical, chemical, and biological functions of the water in question.

CPS Energy (Doc. #14566)

- 3.159 We recommend the Agencies reconsider the definition of adjacent waters and limit the jurisdiction to those waters or wetlands described in Rapanos to only those "permanent, standing or continuously flowing" bodies of water that have significant nexus to traditional jurisdictional waters. (p. 4)

Agency Response: See essay above.

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

- 3.160 Metropolitan requests that the Agencies evaluate adjacent waters on a case-by-case basis because many of these water features in the arid west would not significantly affect the (a)(1) through (a)(3) waters and would result in significant additional regulatory burdens on agencies like Metropolitan. (p. 10)

Agency Response: See essay above.

In addition, given the calls for additional clarity, consistency and certainty in the comments, the intent to reduce transaction costs, and the fact that the record before the agencies demonstrates that waters falling within today’s definition of “adjacent” have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, it would be inappropriate to require case-specific determinations for adjacent waters. However, for non-adjacent waters subject to case-specific analysis, waters may only be determined jurisdictional based on a case-specific finding of a significant nexus.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

- 3.161 While "significant nexus" and "riparian areas" are defined terms in the proposed rule, "floodplain" is not. The proposed rule indicates that the determination of what waters are within a floodplain and are adjacent waters due to their shallow subsurface connection will be left to the best professional judgment of the permitting agency. This does not provide a clear, understandable bright line between waters that are adjacent and warrant CWA protections and waters that do not. (p. 3)

Agency Response: See essay above.

Utility Water Act Group (Doc. #15016)

- 3.162 Further confusing the interpretation of “adjacency,” the Proposed Rule states that “the agencies retain the general existing definition of adjacency and have never interpreted

the term to include wetlands that are a great distance from a jurisdictional water.” Id. at 22,209 col. 1. After this statement, the Proposed Rule goes into a lengthy discussion about the definition of “neighboring.” Disappointingly, this definition does not offer clarification on this issue, or clarify “great distance,” but instead notes several other parameters (i.e., reasonably proximate) that would make it almost impossible for a regulated entity to contest any final interpretation of the Agencies. (p. 42)

Agency Response: See above essay.

- 3.163 [M]any of these “waters,” including wetlands, are likely to change hydrological characteristics and “connectivity” during most any flood period of 10 years or more. These changes may occur due to anthropogenic and non-anthropogenic causes. Even after performing detailed field observations, it may still be unclear whether certain areas within a project area are adjacent to a water or have a “significant nexus” to a water. As a result, WOTUS (including wetlands) and “connections” may appear for a short period of time only to be displaced by uplands for several years thereafter. An area within the floodplain that may have been an upland in past years could certainly transition into a wetland or WOTUS that would then trigger the need for a Corps permit by the most recent field evaluation if there are any impacts to the feature(s). The more a floodplain and a stream is subject to anthropogenic effects (e.g., development; city, county, or state manipulation of road construction; stream channelization; and installation of concrete flumes), the greater the likelihood that changes affecting hydrological characteristics of the floodplain will occur. (p. 54)

The Agencies’ reliance on case-by-case determinations and the exercise of discretion and judgment to determine CWA jurisdiction will come at great expense and is completely contrary to one of the stated goals of this Proposed Rule, which is to “make the process of identifying ‘waters of the United States’ *less complicated and more efficient*.” 79 Fed. Reg. at 22,190 col. 3 (emphasis added). Instead, reliance on subjective criteria will enable the Agencies to continue to 45 make inconsistent (and unfair) determinations of jurisdiction, *see supra* pp. 25-26, potentially even causing the jurisdictional status of a single feature to *change* over time.

Agency Response: See essay above.

In addition, the agencies have retained only in specified circumstances the current practice of case specific significant nexus determinations. Therefore, agencies disagree that the rule comes at a great expense and is contrary to the stated goals. For further information see the Economic Analysis, preamble and TSD. The agencies have also provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity.

Additionally, changing hydrological and other characteristics is always a possibility and not a reason to forgo regulation based on connectivity. The CWA 404 program recognizes that site characteristics can change; this is nothing new. Corps Regulatory Guidance Letter (RGL) 05-02 reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District

Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

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

- 3.164 The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval. The proposal also fails to provide the limits of "shallow subsurface hydrological connections" that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agencies. Through use of the broad definition of "tributary" the agencies will extend jurisdiction to any channelized feature, wetland, lake or pond that directly or indirectly contributes flow to navigable waters, without any consideration of the duration or frequency of flow or proximity to navigable waters. (p. 5)

Agency Response: See above essay.

The agencies have also revised the definition of “tributary” in response to comments seeking greater clarity, consistency, and certainty. For example, the terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of the rule), to a water identified in paragraphs (a)(1) through (3) of the rule that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. Additional discussion is provided in the preamble to today’s rule and the TSD.

NiSource Inc. (Doc. #15112)

- 3.165 Additional uncertainty is created by:
- extending the concept of “adjacency” to non-wetlands without providing a limit to “waters” that can be considered adjacent,
 - relying on vague and undefined concepts such as “floodplain,” “riparian area,” and “shallow subsurface hydrologic connection” to identify “adjacent waters,” (p. 4)

Agency Response: See essay above.

Northern Colorado Water Conservancy District (Northern Water), Berthoud, Colorado (Doc. #15114)

- 3.166 The rule's categorical approach to neighboring/adjacent waters is overly broad. The regulated public should be provided the opportunity to demonstrate that there is not a hydrologic connection or nexus sufficient to establish CWA jurisdiction on a case specific basis for these types of waters. Should the agencies proceed to make these waters jurisdictional-by-rule, the rule should be revised to incorporate specific criteria for physical proximity to establish all area as "adjacent" or "neighboring," and to provide clearer definitions for "riparian area" and "floodplain zone." (p. 8)

Agency Response: See essay above.

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

- 3.167 [T]he proposed rule should also clarify that the 1/10 acre and 1/3 acre loss of wetlands limits continue to apply only to wetlands and is not an expansion that would include currently non-jurisdictional uplands that are located within a floodplain. (p. 6)

Agency Response: This rule is a definitional rule and thereby does not alter existing federal agency CWA regulatory permit programs. This rule will have no effect on the 1/10 acre and 1/3 acre limits. Consequently, if a feature is determined not to be a “water of the United States” that feature is not jurisdictional and not subject to permit requirements under the CWA.

Illinois Fertilizer & Chemical Association (Doc. #15129)

- 3.168 “Other waters” and “adjacent waters” should be subject to a case specific analysis of whether they qualify as a “water of the U.S.” The U.S. Supreme Court has only said “adjacent wetlands” are automatically jurisdictional under the Clean Water Act. (p. 2)

Agency Response: See essay above. In addition, the agencies disagree that all waters meeting the definition of “adjacent” in the proposed rule should be subject to a “case-by-case” significant nexus analysis, but instead added distance limits to the definition of adjacency. Thus, some waters which would have been “adjacent” under the proposed rule are subject to case-specific significant nexus analysis under the final rule. Also see the Significant Nexus and Other Waters Compendiums, as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a case-specific significant nexus determination must be made.

Association of Metropolitan Water Agencies et al. (Doc. #15157)

- 3.169 [T]he final rule language should provide a clear basis for: Defining when water is sufficiently physically remote as to be no longer “adjacent.” (p. 3)

Agency Response: For the reasons discussed in the above essay and preamble, the definition of “adjacent” sets such distance limitations.

Eastern Municipal Water District (Doc. #15409)

- 3.170 Clear identification of “floodplain” and “riparian area” in which all “water,” not merely wetlands, are considered “adjacent” or “neighboring” to jurisdictional water. These important terms establish criteria for redefining water features that historically have not been considered waters of the U.S. yet they are subjective and vague under the rule and require more precise definition. If not able to better define, EMWD suggests not using these terms to define waters of the U.S. (p. 6)

Agency Response: See essay above.

Grand Valley Water Users Association et al. (Doc. #15467)

- 3.171 All “adjacent waters” would be categorized as jurisdictional, rather than the prior reference to “adjacent wetlands”. “Adjacent waters” is an apparent expansion over “adjacent wetlands” and the proposed rule also introduces a new and unclear term of “neighboring” into the definition of “adjacent”. This expansion may regulate

infrastructure that was previously not jurisdictional, regardless of whether there is a water quality impact. (p. 3)

Agency Response: See essay above.

Washington County Water Conservancy District (Doc. #15536)

- 3.172 Under the Proposed Rule, “neighboring” waters include waters located within the riparian area or floodplain of a traditional navigable water, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. No reasonable interpretation of Supreme Court precedent as a whole supports such a broad, categorical approach to water bodies other than adjacent wetlands.

This broad definition purports to categorically regulate areas of water that are clearly not contemplated by the CWA, Supreme Court precedent, or the Agencies’ historic practice, and that should not be regulated as a matter of policy. For example, most manmade ditches have riparian areas and floodplains near them and have hydrologic connections to nearby wetlands and ponds. As a result, the Agencies’ definition for “neighboring” will bring many manmade ditches, even ditches with no direct or indirect connection to traditional navigable waters, under the Agencies’ jurisdiction.

Such a result is not supported by the language or the policies of the CWA. The Agencies should revise the Proposed Rule to limit “adjacent” waters to wetlands, and to limit “adjacent” wetlands to wetlands that are “bordering” or “contiguous” to a traditional navigable water. The CWA does not support the Agencies’ proposal to include all “neighboring” wetlands located within the riparian area or floodplain of a traditional navigable water as per se jurisdictional.

While the WWG disagrees with the Agencies approach to finding all adjacent waters are jurisdictional, if the Agencies retain their use of the terms “riparian areas” and “floodplain,” they should at a minimum clarify how the boundaries of a riparian area and a floodplain would be determined. The Agencies’ definitions, which leave these boundaries uncertain, should be clarified. For example, the Agencies could reference a specific map that will be used to determine whether a waterbody is in a floodplain, such as a map showing the 100-year floodplain (i.e., areas with a 1% risk of flooding in any given year). The most obvious choice for such a map would be the Flood Insurance Rate Map (FIRM) produced by the Federal Emergency Management Agency (FEMA).⁵⁶ (p. 18-19)

Agency Response: See essay above.

Lower Colorado River Authority (Doc. #16332)

- 3.173 LCRA respectfully requests that the Agencies withdraw the portion of the Proposed Rule that would make all adjacent waters jurisdictional waters. (p. 6)

Agency Response: See essay above.

⁵⁶ See FEMA, Flood Insurance Rate Map, <http://www.fema.gov/floodplain-management/flood-insurance-rate-mapfirm> (last visited Nov. 3, 2014).

- 3.174 Although the Proposed Rule states that "[a]bsolutely no uplands located in 'riparian areas' and 'floodplains' can ever be 'waters of the United States' subject to jurisdiction of the CWA," LCRA believes that the proposed definitions of neighboring, riparian, and floodplain will inappropriately expand the scope of what is a jurisdictional water contrary to the Agencies' stated intent and authority. 79 Fed. Reg. at 22,207. (p. 6)

Agency Response: See essay above.

- 3.175 If the Agencies decide to adopt a definition of waters of the United States that includes adjacent waters as jurisdictional waters, LCRA supports the approach of limiting adjacent waters to those with a surface connection to jurisdictional waters. LCRA believes this alternative approach provides the most clarity and allows for the most consistent and predictable application. LCRA also believes that this approach is the only approach out of those proposed by the Agencies that allows for the demonstration of compliance in a reasonable manner.

LCRA encourages the Agencies to adopt this option and to revise the proposed definition of "neighboring" in 33 CFR 328.3(c)(2) as follows: "Neighboring. The term neighboring, for purposes of the term "adjacent" in this section, includes waters with a confined surface hydrologic connection to located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, ~~or waters within a shallow subsurface hydrologic connection or such a jurisdictional water.~~" 79 Fed. Reg. at 22,263. Adopting this approach removes any need for the proposed problematic definitions of riparian and floodplain and LCRA proposes the Agencies remove these proposed definitions entirely. See 33 CFR 328.3(c)(3) and (4), 79 Fed. Reg. at 22,263. (p. 6-7)

Agency Response: See above essay.

- 3.176 The Agencies' proposed definition of "riparian area" is problematic. "Riparian area" is defined in the Proposed Rule as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems." 79 Fed. Reg. at 22,263. The inclusion of the term riparian area adds no additional clarity, creates opportunities for inconsistencies, and is unnecessary. LCRA requests that the Agencies remove the term "riparian area" both from the proposed definition of "neighboring" and the Proposed Rule. (p. 7)

Agency Response: See essay above.

Association of Electronic Companies of Texas, Inc. (Doc. #16433)

- 3.177 [T]he term "plant and animal community structure" is undefined, and the Proposed Rule fails to shed any light on what "present climactic conditions" means (e.g., in the past year, 5 years, past few decades, century, or longer). When read together, the newly defined terms in the Proposed Rule would mean that a WOTUS extends upstream until a high water mark on a bed and banks can no longer be found, and also outward from a bed and banks as far as there is an ecosystem of plant and animal life that is directly influenced by the hydrology of the bed and banks feature. Moreover, WOTUS would also include any area where sediment was once deposited "under present climactic conditions" by moderate water flows. Thus, the new definitions of "neighboring,"

"riparian," and "floodplain" in the Proposed Rules when read together would expand the definition of WOTUS an even further cry from interstate waters, territorial seas, and the traditional definition of navigable waters as described in *Riverside Bayview*, *SWANCC* and *Rapanos* than would the new definition of "tributaries."⁵⁷ (p. 8)

Agency Response: See essay above.

South Metro Water Supply Authority, Colorado (Doc. #16481)

- 3.178 Is it accurate to state that waters adjacent to tributaries, including non-navigable tributaries, regardless of how remote or insubstantial the connection, are now jurisdictional; (p. 4)

Agency Response: No. “Adjacent” waters are jurisdictional by rule because the agencies have determined, based on the record for today’s rule that they a significant nexus to traditionally navigable waters, interstate waters and the territorial seas.

Northern California Association (Doc. #17444)

- 3.179 We believe that the term “adjacent” should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the “significant nexus” test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 6-7)

Agency Response: See essay above.

Xcel Energy (Doc. #18023)

- 3.180 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. For instance, the Proposed Rule creates confusion with facilities that have engineered stormwater management ponds that have either a direct connection during unusual rain events or are situated such that they are in the floodplain of the jurisdictional water and likely have a shallow subsurface hydrologic connection to a jurisdictional water. The proposed definition would cause these engineered ponds to be treated as Waters of the U.S. and therefore subject to CWA regulatory requirements. (p. 7)

Agency Response: See essay above.

⁵⁷ *Solid Waste Agency v. Northern Cook County*, 531 U.S. 159; *Rapanos*, 547 U.S. 715.

North Dakota Water Users Association (Doc. #19454)

3.181 [T]he agencies expressly state that the reason “adjacent wetlands” is now termed “adjacent waters” is because the term, “adjacent wetlands” limited agency authority and expansion of jurisdiction was needed. Under the “adjacent waters,” the term “neighboring” is introduced which expands jurisdiction further to “riparian areas” and “floodplains” with no definition of the same. The Water Users are concerned that the definition of these areas is proposed to be left to the “best professional experience and judgment” of the agencies who have historically interpreted these terms broadly, and urge the deletion of these terms from the proposed rule. (p. 1)

Agency Response: See essay above. In addition, the comment mischaracterizes the agencies’ reasons for revising the definition of “adjacent.” See the proposed and final preambles and the TSD for further discussion.

Tucson Electric Power Company, UNS Energy Corporation (Doc. #19561)

3.182 We suggest the following with regards to defining the term adjacent:

- The term "adjacent" should not apply to ephemeral drainages in a floodplain, but apply only to jurisdictional waters, such as wetlands, with confined; scientifically verifiable and substantial surface water connections.
- Groundwater connectivity, no matter how shallow, should not be considered in determining adjacency.
- The rule should define a specific limit, such as exact distance in feet or miles, as to which surface water features qualify as "adjacent" or "neighboring."
- These changes would reduce federal expansion over waters outside riparian zones or floodplain as either excluded from federal jurisdiction or subject to the "significant nexus" test, and would remove the subjectivity of assessing shallow groundwater connections between adjacent water bodies. (p. 6)

Agency Response: See essay above.

Ducks Unlimited (Doc. #11014)

3.183 Definition of “adjacent” should incorporate the concept of “functional adjacency”: However, we cannot agree with every aspect of the proposed rule as it treats “adjacent waters” because some appear to be inconsistent with existing science. The primary underlying concern we have, and which affects a number of individual aspects of the draft rule, is that it seems to consider adjacency almost wholly within the framework of physical proximity to the nearest jurisdictional water. This narrow view of adjacency may be administratively attractive in light of its simplicity, however it diverges too significantly from the underlying science to be acceptable in a rule that purports to be guided by the science. (p. 15)

Agency Response: See essay above.

3.184 We strongly encourage that, in light of the abundant related science, adjacency be viewed from the context of “functional adjacency.” We were glad to see that the SAB in their September 30 letter to the Administrator articulated the same concern. (p. 16)

The available science clearly shows then that, in many cases, the subsurface connections emphasized in the proposed rule’s rationale for protecting physically proximate adjacent wetlands extends far beyond the short distance that the current definitions of “adjacent” and “neighboring” seem to imply, and that significant nexuses also exist via deeper groundwater connections in many cases. This not only underscores the need to look beyond distance in assessing adjacency from the scientifically more meaningful perspective of functional adjacency, but it also raises a temporal component to the question of adjacency, significant nexus, and the purpose of the Act. There is no question that physical proximity is an important component of adjacency, but distance should not override reasonable evidence of the functional connections that provide for a significant nexus. The fact that it may take longer for water to move through subsurface avenues from wetlands within a region to jurisdictional waters should not in itself disqualify these wetlands from being jurisdictional by rule as being adjacent. It should not matter whether or not an impairment to the physical, chemical or biological integrity of jurisdictional water would occur in a month, year, or even 10 or 100 years. If the significant nexus is known or can be reasonably inferred to exist based on available science, the integrity of the future downstream waters, not to mention the health and welfare of future citizens, should be protected now.

Thus, we believe that demonstrated linkages between wetlands, groundwater and navigable waters within a broad variety of wetland categories and across a diversity of landscapes and regions, indicate that adjacency and significant nexus should be interpreted from a functional perspective if the purposes of the Act and the welfare of our citizens are to be benefited. From that perspective, we strongly support the SAB’s recommendation that the definitions associated with adjacent waters be revised to recognize the scientifically demonstrated functional relationships that provide for a significant nexus.

In that light, we are concerned about the agencies’ statement that, “a determination of adjacency based on shallow subsurface or confined surface hydrologic connection outside the riparian area or floodplain requires clear documentation.” For some areas, science exists to support the contention that these connections exist across broad areas including many wetlands. But, depending upon the scale of a jurisdictional decision, the information might not be considered by some regulators to rise to the level of “clear documentation.” Furthermore, and again depending upon the application of such a direction for “clear documentation,” this requirement may go beyond Justice Kennedy’s expectation that the regulation “rests upon a reasonable inference [emphasis ours] of ecologic interconnection.” (p. 17-18)

At the same time, we recognize that there are some ecoregions or landscapes in which the soils, geology, and other characteristics would lead to the reasonable inference that even functional adjacency would not extend very far from the jurisdictional water. This variability in the relationship between distance and the reasonable inference of a significant nexus provides another indication of the benefits of doing a priori significant nexus assessments of at least some of the Nation’s key ecoregions. These a priori analyses would allow identification, by rule, of those ecoregions for which a presumption of significant nexus between its wetlands, in the aggregate, and other jurisdictional waters would be reasonable, and thereby in turn provide a greater degree of clarity, certainty,

and predictability regarding CWA jurisdiction within those landscapes. We will address this suggestion in more detail in our treatment of “other waters” to follow. (p. 18-19)

[A] prior ecoregional assessments could greatly increase clarity and certainty, as well as greatly streamlining administration of the Act because wetlands in some landscapes (including but not limited to the above-cited Gulf Coast, Platte River and tributaries region, and similar circumstances) that are situated far beyond the floodplain or riparian area could be determined to be “neighboring” by virtue of functional adjacency and the significant nexus via subsurface connectivity. They could thus be designated as jurisdictional by rule, therefore obviating the need for many time-consuming and costly case specific analyses. The available and emerging science in many systems strongly supports such an approach. (p. 19-20)

- 3.185 We agree with the agencies’ finding, based on the weight of the scientific evidence presented in the Report and the proposed rule’s Appendix, that adjacent waters such as riparian and floodplain waters “significantly affect the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters” due to the existence of a significant nexus.

Based on the available science related to connectivity, however, we disagree with the almost exclusive emphasis placed on physical proximity to navigable waters within the definition of “adjacent.” We strongly encourage that, in light of the abundant related science and the view of the SAB regarding the narrow view of adjacency applied within the proposed rule, adjacency should be viewed from the more scientifically appropriate context of “functional adjacency.” For example, while it might take years or even decades for water to travel through subsurface pathways from wetlands to navigable waters, the impact and importance of those connections are very often nevertheless significant and can affect not only the integrity of the receiving waters, but also the health and welfare of future generations of citizens. Thus, interpretation of “adjacency” must not be narrowly restricted based on physical proximity.

The science strongly indicates that riparian waters almost universally have a significant hydrologic connection and nexus with the jurisdictional waters that are usually adjacent, in the sense of both physical and functional proximity. Thus, the general goal of categorically incorporating riparian and floodplain waters as jurisdictional “adjacent waters” within the definition of “neighboring” is appropriate. However, the relationships between and definitions of “neighboring” and adjacent require additional clarification given some apparent inconsistencies among their definitions and conflicts with some important aspects of the science that supports the existence of a significant nexus in many cases. (p. 75-76)

Agency Response: See essay above. In addition, the science available today does not establish that waters beyond those identified in (a)(1) - (a)(6) are jurisdictional by rule under the CWA, but the agencies’ experience and expertise indicate that there are waters within the categories described in (a)(7) and (a)(8) where the science demonstrates that they often have a significant effect on downstream navigable waters, interstate waters, or territorial seas, either alone or in combination with similarly situated waters. See also the Other Waters, Science and Significant Nexus compendiums.

The Wildlife Society (Doc. #14899)

- 3.186 Language in the proposed rule indicates that adjacency is based in large part on a water body's physical location on the landscape, while available science clearly finds that the strength of connectivity between water bodies is based on ecological relationships. Therefore, the EPA should consider emphasizing the importance of functional adjacency, instead of relying almost solely on geographical proximity.

We also suggest adding the word “levee” in this definition as levees in floodplains of rivers are common structures which separate adjacent waters and navigable waters. (p. 2)

Agency Response: See essay above. Additionally, the agencies did not add “levee” to the rule language because it is unnecessary. The preamble to the rule and the TSD make clear that levees are features “like” dikes and berms and thus are already referenced in the definition of “adjacent.”

Earthjustice (Doc. #14564)

- 3.187 Earthjustice generally supports the inclusion of “adjacent waters” (and neighboring waters) as waters of the U.S. as consistent with the science and the mandate of the Clean Water Act. See, e.g., Connectivity Report at 1-9 to 1-10; Member Comments, Brooks at 17. However, the proposed rule primarily limits “adjacent” waters to those that are close in terms of distance. As the SAB members point out, this is too limiting and not supported by the science. In keeping with the scientific assessment, it is more scientifically accurate to provide that adjacency is the outer extent of the floodplain and includes all riparian areas. Members Comments, Kolm at 34 (“Distance to water body frequently is not the story”); Rains at 71; Rosi-Marshall at 82 (“River ecologists have known for a long time that it is more appropriate to think of rivers as part of a larger landscape or ‘riverscape’ comprised of a river’s mainstem and adjacent floodplain or wetland habitats”) (emphasis added); Sullivan at 86 (“...the scientific literature unequivocally supports the finding that floodplains and waters and wetlands in floodplain and riparian settings support the physical, chemical and biological integrity of downstream waters” and “[a]lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered”). Adopting a more scientifically grounded interpretation of adjacency is required by the Act, and is also a permissible and reasonable interpretation. Conversely, excluding these waters would not be a reasonable interpretation—nor would it be reasoned decisionmaking supported by the record. (p. 7)

Agency Response: See essay above.

National Wildlife Federation (Doc. #15020)

- 3.188 We support the agencies’ continued reliance on the existing definition of “adjacent,” meaning “bordering, contiguous or neighboring.” Under the Corps’ existing rules (and related case law and agency precedent), “[w]etlands separated from other “waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”³³ 328.3(c). We concur with the agencies’ emphasis that the presence of man-made barriers as well as natural river berms and beach dunes do not sever the hydrological and ecological interconnections between wetlands and

adjacent jurisdictional waters. 79 Fed. Reg. 22207, 22210, 22243-46.⁵⁸ While this key factor in determining adjacency is explicit in the agencies' long-standing regulatory definition of "adjacent," it has at times been overlooked in the field, leading to inconsistent jurisdictional determinations and compromised protections for important wetland systems.⁵⁹ Clarification and documentation of the legal and scientific basis for this important principle of adjacency provide increased certainty and better protection for important wetland systems. Extending the existing adjacent wetlands term to non-wetland adjacent waters is fully consistent with the science and law as noted above. (p. 46)

Agency Response: See essay above. The agencies agree with the commenter regarding the benefits of increased clarity regarding separations and the change from adjacent "wetlands" to "adjacent waters" and this comment provides additional support for these approaches.

American Rivers (Doc. #15372)

- 3.189 We support the determination of categorical jurisdiction over adjacent waters as opposed to just adjacent wetlands. In order to best delineate the adjacent waters' we propose that the Agencies not further specify a floodplain as identified by a mandatory flood recurrence interval (e.g. 100- year floodplain), but instead use the best information and technology available to determine individual floodplains. We also believe that subsurface hydrologic connections should be more clearly defined and that confined surface connections should receive a significant nexus determination instead of being categorically excluded. (p. 2)

Agency Response: See essay above. In addition, the agencies have retained the change from "adjacent wetlands" to "adjacent waters." In clarifying the definition of neighboring, the Agency did mandate use of the 100-year floodplain for the reasons explained in the preamble and TSD.

Natural Resources Defense Council et al. (Doc. #15437)

- 3.190 In general, we support the overarching approach the agencies have proposed for defining adjacency – considering waters to be "adjacent" if they are within the floodplain of a covered water, are in the covered water's riparian area, or are connected to the covered water by confined surface or shallow subsurface flow. The agencies have no reasonable basis for requiring a certain degree of proximity in order for a water body to qualify as "adjacent," or for disregarding shallow subsurface connections. Indeed, the Science Advisory Board expressly explained why doing so would be unreasonable:

Importantly, the available science supports defining adjacency or determination of

⁵⁸ Courts have confirmed that severances of surface hydrological connectivity do not defeat jurisdiction or adjacency. In *Healdsburg*, the overtopping of a levee separating the pond and wetland from the nearby river were rare events and most hydrologic connection was subsurface. See *Healdsburg*, 496 F.3d at 1000. Additionally, the Federal Appeals Court for the Eleventh Circuit found that, "[M]an-made dikes and barriers separating wetlands from other waters of the United States do not defeat adjacency." *Banks*, 115 F.3d. at 921 (emphasis added) (citations omitted). In *United States v. Tilton*, the Eleventh Circuit also found jurisdictional existed over wetlands that were separated from an adjacent river by an earthen berm at least thirty feet wide. 705 F.2d 429.

⁵⁹ See, e.g., *Courting Disaster* at 13 and 20.

adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water. The Board also notes that local shallow subsurface water sources and regional groundwater sources can strongly affect connectivity. Thus, the Board advises the EPA that adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.⁶⁰

With respect to defining floodplain by reference to a specified interval, we support incorporating a more standardized process into the rule and relying less on the judgment of field staff. Because the SAB points out that important aspects of physical connectivity -- such as storage, peak flow attenuation, and sediment and wood transport and/or deposition -- occur due to low-frequency flooding and occur “on a decadal or centennial return interval,”⁶¹ we suggest that the 100-year floodplain be seriously considered as a component of defining adjacency. We understand, however, that existing Federal Emergency Management Agency maps are both incomplete and in many places inaccurate, such that they should not be the conclusive basis for identifying waters’ floodplains; instead, the agencies’ definition should encourage the use of all available and reliable evidence to identify the extent of the 100-year floodplain. (p. 62-63)

Agency Response: See above essay. This comment provides additional support for the agencies’ decision to specify use of the 100-year floodplain in the definition of “adjacent.” The comment also provides further support for the agencies’ approach to consideration of shallow subsurface connections. See Subsurface Connections essay.

Defenders of Wildlife and Patagonia Area Resource Alliance (Doc. #16394)

- 3.191 The definition of wetlands should be strengthened to the extent that the current proposed definition defines adjacency solely based on distance, rather than hydrologic relationships. Adjacency should be defined by actual hydrological connections and effects to downstream waters, which would include the outer extent of riparian and floodplain areas and groundwater connections. See SAB letter at 2-3; Member Comments, Dr. Kenneth Kolm, at 34 (“Distance to water body frequently is not the story.”); Member Comments, Dr. Mazeika Sullivan, at 86 (“Although distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered.”). (p. 9)

Agency Response: See essay above.

- 3.192 In addition, in addressing non-floodplain wetlands, adjacency should not be limited to those that have a “shallow subsurface hydrologic connection or confined surface hydrologic connection.” See proposed subsection (u)(2) (defining “neighboring”); Member Comments, Dr. Allison Aldous, at 2; Dr. Kenneth Kolm, at 33, 39 (noting that limiting the definition to “shallow subsurface hydrologic connection is not consistent with the science”). The SAB recommended that EPA consider the “four pathways by which non-floodplain wetlands can be connected to downstream waters: via surface water and subsurface (shallow or deep groundwater) flowpaths, or through the movement of biota.” SAB Review at 58. These connections may heavily influence

⁶⁰ SAB Rule Review at 2-3

⁶¹ SAB Connectivity Review at 41

downstream waters. “Many watersheds have a large number of non-floodplain wetlands that are collectively responsible for: the maintenance of base flows; the attenuation of floods; the production of organic material that fuels downstream food webs; and the trapping or removal of sediments, nutrients and contaminants that would otherwise contribute to the degradation of the physical, chemical, or biological integrity of downgradient waters.” SAB Review at 56; id. at 6 (“[T]he SAB finds that the scientific literature provides ample information to support a more definitive statement (i.e., numerous functions of non-floodplain waters and wetlands have been shown to benefit the physical, chemical, and biological integrity of downgradient waters)”); id. at 55-56 (discussing gradient of connectivity for non-floodplain wetlands and downstream waters). (p. 9)

Agency Response: See essay above and the Significant Nexus and Other Waters Compendia, as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a site-specific significant nexus determination must be made and responses to comments regarding what types of connections are appropriate to consider in making such determinations.

Waterkeeper Alliance et al. (Doc. #16413)

3.193 We support the inclusion of “adjacent waters” into the definition of “waters of the United States.” The inclusion of adjacent waters is generally consistent with the science and law,⁶² but needs to be modified in accordance with the scientific analysis to ensure that adjacency includes the outer extent of the floodplain and all riparian areas.⁶³ Similarly, the agencies should amend and clarify their approach to groundwater as it relates to adjacent waters and how it is considered in the Proposed Rule to conform to the extensive comments of the individual SAB members. Further, the agencies need to remove the categorical groundwater exemption from the Proposed Definition. The agencies should incorporate a more robust definition of adjacent that fully considers the four dimensional hydrologic connectivity and effects on downstream waters as discussed extensively in the Connectivity Report. (p. 40-41)

Agency Response: See essay above and responses to comment in the Exclusions compendium above.

The Association of State Wetland Managers (Doc. #14131)

3.194 Definition of all adjacent waters and wetlands as jurisdictional will increase regulatory predictability, and eliminate the need for more cumbersome case-by-case decisions regarding jurisdiction. The proposed rule and associated documentation cite key ecological services provided by adjacent waters, and provide a clear nexus with

⁶² See, e.g., Connectivity Report, supra note 3, at 1-9 to 1-10; Member Comments, supra note 72, Brooks at 17

⁶³ Members comments, supra note 72, Kolm at 34 (“Distance to water body frequently is not the story”); Rains at 71; Rosi-Marshall at 82 (“River ecologists have known for a long time that it is more appropriate to think of rivers as part of a larger landscape or “riverscape” comprised of a river’s mainstem and adjacent floodplain or wetland habitats) (emphasis added); Sullivan at 86 (“...the scientific literature unequivocally supports the finding that floodplains and waters and wetlands in floodplain and riparian setting support the physical, chemical and biological integrity of downstream waters” and “(a)lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered”).

navigable waters of the United States. In an era of more extreme and unpredictable climate conditions, these critical resources that buffer against flood and drought, and maintenance of habitat connectivity, are more critical than ever.

We would note that while we support the definition of adjacent waters and wetlands on the basis of shallow subsurface connections, it is our understanding that the proposed rule does not regulate groundwater per se, and our support is predicated on this understanding. (p. 2)

Agency Response: See essay above. The commenter is correct that groundwater is not jurisdictional under today's rule.

Center for Rural Affairs (Doc. #15029)

- 3.195 Consider limiting adjacent waters to include only waters located in floodplains and riparian areas of jurisdictional waters if specific parameters for confined surface and shallow subsurface connections cannot be codified in the final rule. (p. 6)

Agency Response: See essay above.

Rock the Earth (Doc. #12261)

- 3.196 While RtE supports the ecoregion approach laid out in the Proposed Rule, we do not agree that with the contrary position that waters located outside an ecoregion is necessarily nonjurisdictional.⁶⁴ The Proposed Rule states that "the agencies recognize that in specific circumstance, the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination."⁶⁵ This limits the application of adjacency to some quantified distance. The Rule also places geographic limits on adjacency via its very definition. Adjacent is defined as "bordering, contiguous or neighboring."⁶⁶ Again, this definition focuses on a physical, and quantified limit to the scope of adjacency. The EPA proposes to further define "neighboring" as "waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."⁶⁷ (p. 8)

Agency Response: See essay above.

Clean Water Action et al. (Doc. #14884)

- 3.197 We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act. Millions of small streams and wetlands provide most of the flow to our most treasured rivers, including the Farmington, Thames, Connecticut, and Housatonic Rivers. If we do not protect these streams and wetlands, we cannot protect and restore the lakes, rivers and bays on which communities and local economies

⁶⁴ Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22208, 22215.

⁶⁵ Id. at 22208.

⁶⁶ Id. at 22207.

⁶⁷ Id. at 22263 (citing §328.3 (c)(2)).

depend. 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: See essay above and Other Waters compendium. In addition, the science available today does not establish that waters beyond those identified in (a)(1) - (a)(6) are jurisdictional by rule under the CWA, but the agencies' experience and expertise indicate that there are waters within the categories described in (a)(7) and (a)(8) where the science demonstrates that they often have a significant effect on downstream navigable waters, interstate waters, or territorial seas, either alone or in combination with similarly situated waters

Conservancy of Southwest Florida (Doc. #14980)

- 3.198 Wetlands are a vital component of our nation's waters. They filter pollutants, recharge aquifers, and provide flood protection and wildfire habitat for numerous aquatic, terrestrial and avian species. The Conservancy supports that adjacency does not require a permanent, unbroken hydrological connection to traditional navigable waters (TNW), that wetlands physically separated from jurisdictional waters can still be adjacent, and that wetlands located within the riparian area of floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent.

Furthermore, we support the proposed language which revises the existing jurisdictional category of adjacent wetlands to include adjacent waters. The proposed definition of neighboring which includes waters within floodplains and riparian areas, will provide further clarity in making jurisdictional determinations for waters such as ponds and small lakes, and including wetlands.

The Conservancy also strongly supports the recognition that some adjacent waters may be located outside of a floodplain or riparian area, but that shallow subsurface connections or confined surface hydrological connections would provide sufficient evidence for a jurisdictional determination under the definition of neighboring. (p. 3-4)

Agency Response: This comment provides further support for the general importance of protecting wetlands. See essay above.

Idaho Conservation League (Doc. #15053)

- 3.199 ICL generally supports the inclusion of "adjacent waters" (and neighboring waters) as waters of the U.S. as consistent with the science and the mandate of the Clean Water Act. See, e.g., Connectivity Report at 1-9 to 1-10; Member Comments, Brooks at 17. However, the proposed rule primarily limits "adjacent" waters to those that are close in terms of distance. As the SAB members point out, this is too limiting and not supported by the science. In keeping with the scientific assessment, it is more scientifically accurate to provide that adjacency is the outer extent of the floodplain and includes all riparian areas. Members Comments, Kolm at 34 ("Distance to water body frequently is not the story"); Rains at 71; Rosi-Marshall at 82 ("River ecologists have known for a long time that it is more appropriate to think of rivers as part of a larger landscape or 'riverscape' comprised of a river's mainstem and adjacent floodplain or wetland habitats") (emphasis added); Sullivan at 86 ("...the scientific literature unequivocally

supports the finding that floodplains and waters and wetlands in floodplain and riparian settings support the physical, chemical and biological integrity of downstream waters” and “[a]lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered”). Adopting a more scientifically grounded interpretation of adjacency is required by the Act, and is also a permissible and reasonable interpretation. Conversely, excluding these waters would not be a reasonable interpretation—nor would it be reasoned decisionmaking supported by the record.

ICL disagrees with EPA’s treatment of groundwater and urges EPA to better clarify the situation with respect to groundwater—both generally and as it applies to adjacent waters—in keeping with the science regarding the functioning and connectivity of groundwater and surface water. In particular, ICL refers EPA to the many comments of individual members of the SAB on this point. See also section II.A. below. EPA’s discussion of when or why groundwater is included in the definition of adjacent waters is confusing and somewhat in conflict with its later attempt to categorically exclude groundwater from the definition of waters of the U.S. Both of these attempts to strictly circumscribe the protections afforded by the Clean Water Act will leave important groundwater resources that affect surface waters unprotected. ICL urges EPA to incorporate a more full definition of adjacency that is defined by the outer extent of riparian and floodplain areas and to include surface and subsurface connections and hydrology in a manner discussed by members of the SAB that focuses on actual connections and effects to downstream waters as opposed to the less specific descriptions offered. (p. 8-9)

Agency Response: See essay above. For the agencies’ responses to comments regarding groundwater, see the Subsurface Connections essay and the Exclusions compendium.

Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al (Doc. #15095)

- 3.200 The definition should cover adjacent waters in a manner that is consistent with the science, and should not limit coverage solely based on vague notions of close proximity. (p. 2)

Agency Response: See essay above.

Western Pennsylvania Conservancy (Doc. #15202)

- 3.201 [R]elying on clear and/or scientifically-founded definitions for neighboring, floodplain and riparian area as supporting concepts for determining adjacency is essential. Without this clarity, terms related to categorically jurisdictional waters would be left undefined and open to interpretation, undermining the intent of this proposed rule. The draft science report's findings support all of the proposed definitions of these terms. (p. 2)

Agency Response: See essay above.

Columbia Riverkeeper (Doc. #15210)

- 3.202 Impounding an otherwise-jurisdictional “adjacent water” does not somehow make that water non-jurisdictional. Such a result does not even comport with the “significant

nexus” test. Additionally, the proposed rule creates a perverse incentive to impound and pollute adjacent waters. (p. 2)

Agency Response: See essay above. The agencies have further clarified the definition of “adjacent waters” in particular by including impoundments as an example of “all waters” based on science and in response to comments seeking greater clarity, consistency, and certainty. For further detail, see responses to similar comments as well as the preamble and TSD.

Anacostia Riverkeeper et al. (Doc. #15375)

- 3.203 Waterkeepers Chesapeake urges EPA to incorporate a more full definition of adjacency that is defined by the outer extent of riparian and floodplain areas and to include surface connections and hydrology in a manner discussed by members of the SAB that focuses on actual connections and effects to downstream waters as opposed to the less specific descriptions offered. (p. 7)

Agency Response: See essay above and responses to similar comments regarding riparian and floodplain areas. Also see the Significant Nexus Compendium, as well as the preamble and TSD, for the agencies’ guidance on how such connections should be evaluated.

Eastern Municipal Water District (Doc. #15544)

- 3.204 Clear identification of “floodplain” and “riparian area” in which all “water,” not merely wetlands, are considered “adjacent” or “neighboring” to jurisdictional water. These important terms establish criteria for redefining water features that historically have not been considered waters of the U.S. yet they are subjective and vague under the rule and require more precise definition. If not able to better define, EMWD suggests not using these terms to define waters of the U.S. (p. 6)

Agency Response: See essay above.

Wisconsin Wetlands Association (Doc. #15629)

- 3.205 The proposed definition of adjacent is appropriate if intended to capture only waters in close physical proximity to, or subject to bi-directional exchange with, waters identified in (s)(1) through (5). It does not account for the many circumstances where evidence of hydrologic connections (i.e., shallow subsurface or groundwater flow) at greater distances is present.

The definition of the term “neighboring” does appear to cover waters with more distant hydrologic connections, but this may be confusing since it is inconsistent with the colloquial usage of the term.

The EPA Science Advisory Board suggests modifying the definition of adjacent to include “functional adjacency” as a way to ensure coverage for the types of hydrologic connections described above. We support the intent of their request and suggest that a more straightforward approach would be to insert the term “or hydrologically connected” after the word “adjacent” in section (s)(6).

The definitions for adjacent and neighboring did not account for situations where

wetlands or other waters have been physically disconnected from a waterway or floodplain due to incision, mass wasting, or other types of impairments. In many cases, these perched areas still contribute water to incised channels through unidirectional sub-surface flow. Acknowledging these areas as Waters of the U.S. is consistent with the intent of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the nation's waters. We encourage you to clarify that these waters also meet the definitions of adjacent or neighboring. (p. 2)

Agency Response: See essay above. The agencies' determined that adjacent waters as defined in the rule have a "significant nexus" consistent with language in *Riverside Bayview*, *SWANCC* and *Rapanos*, and with the goals, objectives, and policies of the CWA. The definition reflects that not all waters have a requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional. The agencies did not make the change recommended by the commenter because, among other things, as discussed in the Science Report, connectivity is on a gradient, but such hydrologic connections are relevant when making a case-specific significant nexus determination under (a)(8) of the rule.

Regulatory Environmental Group for Missouri (Doc. #16337.1)

- 3.206 Contrary to EPA's statement that the proposed rule makes no changes to the existing definition of the term "adjacent," the Proposed Rule in our view vastly expands this category by asserting jurisdiction over "all waters" rather than "all wetlands" that are adjacent to navigable waters or a tributary thereof.⁶⁸ There is a huge difference between "all waters" and "all wetlands." In addition, the Proposed Rule expands the concept of adjacency by adding new and very broad definitions of "floodplain," and "riparian area." The two new terms are breathtakingly vague and broad, supporting an impermissible expansion of WOTUS. Missouri, with hundreds of miles of land bordering the two longest rivers in North America, will see a massive expansion of jurisdictional waters with no concomitant protection of the environment.

These new definitions do not reflect current practice. Currently, not all waters in a floodplain are considered jurisdictional. The proposed expansion of jurisdiction from "adjacent wetlands" to "adjacent waters" will cause uncertainty regarding the status of wetlands, ponds, water storage systems, and water conveyance that lie in a floodplain or riparian area or that have groundwater connection, however distant, or where waters can move over land to a navigable water. (p. 6)

Agency Response: See essay above.

The River Alliance of Wisconsin (Doc. #16344)

- 3.207 RECOMMENDATION: River Alliance recommends the EPA adopt a definition of adjacent in subsection (u)(1) that incorporates the SAB's descriptions of connectivity and incorporates the flowpath framework.

River Alliance supports efforts to revise the definition of adjacent to no longer limit

⁶⁸ 79 FR Page 22189 and 22199 (April 21, 2014)

consideration to just wetlands. We do recommend, however, that EPA look to the findings of both its “Connectivity Report” and the SAB Review to establish a science-based definition of adjacency. The proposed definition of adjacent is based mainly on physical proximity. The intent of subsection (s)(6) is to acknowledge that waters separated by land may be intricately connected and adjacent waters need to be protected in order to protect the physical, chemical and biological integrity of downstream waters.

Connectivity is not a simple question of proximity; there is a “gradient of connectivity that is a function of the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections. The SAB recommends that the conclusions and findings concerning ephemeral, intermittent, and perennial streams be quantified when possible, related to the four dimensions of connectivity (longitudinal, lateral, vertical and temporal), and discussed with additional detail on biogeochemical transformations and biological connections. (SAB Review, Executive Summary, p.3)

Our practical concern with the proposed definition is that it does not take into consideration scale at which one looks at the landscape. Bodies of water that are not in close proximity may be connected hydrologically through subsurface flow, connected only part of the year or during periodic occurrences. While this may not seem important, the aggregate impact of degradation of these waters impacts the physical, chemical and biological integrity of downstream waters as defined in (s)(1)-(s)(3). (p. 3)

Agency Response: See essay above. As discussed, the agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to the many commenters seeking greater clarity, consistency, and certainty. Waters that do not fall within any of the categories identified in (a)(1) through (a)(6) are jurisdictional if they meet the criteria set out in (a)(7) or (a)(8) and are not specifically excluded. The rule does address the commenter's concern; for example, “the term ‘significant nexus’ means that a water, including wetlands, *either alone or in combination with other similarly situated waters in the region*, significantly affects the chemical, physical, or biological integrity of” an (a)(1) - (3) water. See also the Significant Nexus and Other Waters compendiums.

Missouri Coalition for the Environment (Doc. #16372)

- 3.208 MCE fully supports the proposed Rule’s clarification that wetlands are important jurisdictional waters, although it would like to see additional guidance in the final rule regarding some of the terms in the proposed Rule. For example, the definition of “adjacent” is somewhat circular, leaving it widely open to interpretation and hard to delineate.⁶⁹ Adjacency should be determined from a functional approach, based on interconnectivity and the nexus between the waters in question and not based on physical distance.⁷⁰ Similarly, the term “similarly situated” in the context of determining significant nexus requires better explanation.⁷¹ Terms like “sufficiently close together” and “sufficiently close” that are used to define “similarly situated” may cause confusion

⁶⁹ at 22,263 (defining “adjacent” as “bordering, contiguous or neighboring”).

⁷⁰ This could be clarified in either the definition of “adjacent” or the sub-definition of “neighboring.”

⁷¹ 79 Fed. Reg. at 22,263 (defining “significant nexus” and explaining that waters are “similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States”).

if the final rule does not explain that, here too, physical distance is not the determinative factor.⁷² Instead, the focus should be on the “similar functions” that these waters perform and their ability to collectively affect the chemical, physical, or biological integrity of traditional navigable waters. The future status of wetlands depends upon the protections of the CWA, and the final rule should clarify as unambiguously as possible that wetlands are jurisdictional waters of the United States. (p. 5-6)

Agency Response: See essay above. Also, the agencies address comments calling for greater clarity for “similarly situated,” “sufficiently close together,” and “sufficiently close” in the Significant Nexus and Other Waters compendiums, the preamble and the TSD.

Charles River Conservancy et al. (Doc. #16453)

- 3.209 Our organizations and businesses 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. We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act. (p. 1)

Agency Response: The final rule provides that some waters that may be beyond the floodplain are categorically protected; for example, waters within 100 feet of an (a)(1) through (a)(5) water are “neighboring” regardless of the size of the floodplain. In addition, some waters beyond the floodplain may be protected under the rule on a case-specific basis under (a)(7) and (a)(8) of the rule. See essay above and Other Waters compendium, preamble and TSD.

Wyoming Outdoor Council (Doc. #16528.1)

- 3.210 A second category of waters that the EPA and the Corps propose to define as waters of the United States by rule are “all waters, including wetlands, adjacent to” an (a)(1)-(5) (or(i)-(v)) water. Adjacent would be a defined term and would mean “bordering, contiguous, or neighboring.” Separation from other waters of the United States by structure such as dikes and berms would not remove the adjacency of these waters. The term “neighboring” would also be defined and would include waters located in riparian areas and/or floodplains of (a)(1)-(5) waters, or “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection” to such waters. “Riparian area” and “floodplain” would also be defined terms. (p. 3)

We encourage the EPA and the Corps to maintain these provisions in the final rule. We believe they are well justified (p. 3)

Agency Response: See essay above. The agencies have maintained the “dikes and berms” language, as suggested by commenter.

Florida Stormwater Association (Doc. #14613)

- 3.211 Adjacent – We recommend that the definition of “adjacent” be revised to delete the

⁷² Id.

word “neighboring” so that the definition includes only waters that border or are contiguous to a jurisdictional water. (p. 7)

Agency Response: See essay above. The Agencies did not adopt the commenters’ approach as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas.

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

- 3.212 In aggregate, these intertwined definitions will lead to strict field interpretations and result in expansive WOTUS determination beyond the agencies’ intent. Please refine the definitions to clearly set needed limits. The term Adjacency is particularly troublesome in the proposed rule as it is no longer the traditional definition of bordering or contiguous. Adjacency is now defined as a region (neighboring, floodplain, riparian area). The concept of adjacency is used throughout the proposed rule and we recommend that Adjacency be reverted back to its traditional definition of bordering and Neighboring be defined separately so that the two concepts can be used independently in the proposal. (p. 4)

Agency Response: See essay above.

Environmental Technology Consultants (Doc. #2597)

- 3.213 The term “adjacent” should be defined. Although I detest global definitions that use a fixed distance, (say 100’), I cannot suggest an alternative way of defining “adjacent” that would provide a field actionable definition. (p. 2)

Agency Response: See essay above.

Congress of the United States, Senate Committee on Environment and Public Works et al. (Doc. #16564)

- 3.214 The proposed waters of the United States" rule also deems "[all waters, including wetlands, adjacent to" TNW's, interstate waters, territorial seas, impoundments, and tributaries as jurisdictional per se ⁷³ Similar to "tributary," "adjacent waters" is defined broadly so as to provide EPA and the Corps with significant jurisdictional authority:

"Adjacent" is defined to mean "bordering, contiguous or neighboring," but the subsequent definition of "neighboring" reveals the agencies' intention to encompass much more than adjoining waters.

"Neighboring" waters include "waters located within the riparian area or floodplain" of TNW's, interstate waters, territorial seas, impoundments, and tributaries, as well as "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to another jurisdictional per se water.

"Riparian area" means an area "bordering a water where surface and subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area," EP A and the Corps state further that "riparian areas" are

⁷³ Proposed Rule, 79 Fed. Reg. at 22262-22263

transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."

'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 water flows."

Undoubtedly, the terms "riparian area" and "floodplain" will be a source of confusion as well as geographic mischief. For example, it is difficult to imagine land where surface or subsurface hydrology do not "directly influence the ecological processes and plant and animal community structure," as the term "riparian area" requires. Likewise, many local communities lie in "floodplains" as currently defined in the proposed rule, and therefore could be considered "waters of the United States" in their entirety.

EPA and the Corps have also claimed that "groundwater" is not to be considered "waters of the United States" under the proposed rule.⁷⁴ Yet many groundwater-related activities may require Clean Water Act permits because "adjacent waters" includes those "waters with a shallow subsurface hydrologic connection" to other jurisdictional waters. Furthermore, the proposed rule's categorical jurisdiction for waters "adjacent" to (broadly-defined) 'tributaries' confirms that EPA and the Corps are seeking immense jurisdictional reach over private land located near wetlands, streams, lakes, rivers, and ponds.⁷⁵ (p. 4-5)

Agency Response: See essay above.

Missouri Department of Transportation (Doc. #3313)

- 3.215 Comment: It is our belief that the application of flood interval zone (i.e., mapping linked to flood frequencies) as a tool to define the jurisdictional reach of the term "neighboring" lacks any real scientific validity to support jurisdictional determinations of wetlands or other waters connected by shallow subsurface hydrologic or confined surface hydrologic connections. Discussion: The spatial variability that exists between the scale of floodplains associated with a headwater stream, versus those that serve major rivers, make it extremely difficult to apply any standardized flood frequency interval to more concisely define "floodplain" from a regulatory perspective. Because of this variability, it seems more reasonable to use the geomorphic footprint of the floodplain that has developed for each drainage, regardless of the stream order. This would allow for a better "fit" from the perspective of defining the extent of jurisdiction across a broad spatial scale. Recommendation: A better more scientifically-based solution might be to simply screen for the absence/presence of fluvial soils as the basis for asserting jurisdiction over waters within the floodplain that meet the "neighboring" definition. This is a simple, relatively straightforward method that is consistent, repeatable, and it relates directly to the geomorphic interaction between soils, the

⁷⁴ Proposed Rule, 79 Fed. at 22263.

⁷⁵ The proposed rule also eliminates the current "waters of the United States" exception for wetlands adjacent to wetlands. See 40 C.F.R §230.3(~)(7)(the term "waters of the United States" means "[w]etlands adjacent to wetlands (other than waters that are themselves wetlands)"). See also *Great Northeast, Inc v. United States Army Corps of Engineers*, 2010 U.S. Dist. LEXIS 89132, 96 (D. Alaska 2010) "[T]he Corps' regulations themselves place wetlands adjacent to jurisdictional wetlands outside the reach of the [Clean Water Act]."

waterway, and the floodplain. This approach would involve capturing all waters located in the floodplain, whereby the soils are classified as Fluv(ic) (i.e., Fluvents are floodplain soils) at the suborder or great group level in soil taxonomy, or those having a flooding phase of at least (occasional) in the soil map unit name. This soils data is readily available in a digital format, and would provide a logical scientific component for defining the spatial extent for asserting jurisdiction in floodplains. By using this approach one would capture all waters in both the riparian zone and the floodplain, which are intimately linked (both biologically & ecologically) to tributaries, downstream traditional navigable waters, and interstate waters. Consequently, we would support limiting the geographic extent of jurisdiction to only encompass both of these features (i.e., the riparian zone & floodplain of a jurisdictional water). It is our assertion that waters outside the floodplain (as defined above) that possess either a shallow subsurface or confined surface hydrologic connection, should be exempt from jurisdiction, as they lack a significant nexus and do not significantly affect the chemical, physical, or biological integrity of downstream waters. (p. 3-4)

Agency Response: See essay above. In addition, in promulgating today's rule, the agencies decided that it is important to promulgate a rule that not only protects the most vital of our Nation's waters, but one that is practical and structured so that the public can reasonably understand and implement it. As discussed more fully in the preamble, in promulgating the rule, the agencies relied, 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, and were guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate. In drawing lines, the agencies chose the 100-year floodplain in part because FEMA and NRCS together have generally covered large portions of the United States, and, as noted by many commenters, these maps are publicly available, well-known, and well-understood. For more detail, see the preamble and TSD.

Navajo Nation Environmental Protection Agency (Doc. #10117)

- 3.216 The Navajo Nation EPA Water Quality Program supports the definition of "neighboring" because it includes "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to "jurisdictional waters. This definition describes a common situation on the Navajo Nation. (p. 2)

Agency Response: See essay above.

Florida Association of Counties (Doc. #10193)

- 3.217 The definitions of "riparian area" and "flood plain" are intended to clarify which waters are considered adjacent. According to the proposed rule, waters are jurisdictional if, respectively, they "influence the ecological processes and plant and animal community structure in the area" or are located in areas "formed by sediment deposition under present climactic conditions, and inundated during moderate to high water flows". What ecological processes? Which plants and animals? Is moderate to high water flow simply the equivalent of rain? Each of the definitions discussed above not only expand federal oversight, but do so in contravention of the CWA and of the Supreme Court in

interpreting its provisions. (p. 5)

Agency Response: See essay above.

Virginia Department of Transportation (Doc. #12756)

- 3.218 The definitions of "riparian area" and "floodplain" as presented under paragraphs (c)(3) and (c)(4) on p.22263 are not clear and need to be revised to provide guidance as to how far away a surface water feature can be from a stream in order to be considered adjacent. Surface water features that are within the immediate vicinity of a stream should be considered "adjacent" and thus jurisdictional, as opposed to a surface water feature that is located several hundred feet or more from the stream but is considered by agency staff as being located within a floodplain or riparian area. Please note that very broad floodplains occur throughout the U.S. A potential solution for minimizing confusion in this case would be to eliminate the definition of riparian area and focusing on the floodplain. In order to avoid further subjective interpretations and inconsistencies, geographic limits should be placed on floodplains used in determining "adjacency" and "neighboring." (p. 8)

Agency Response: See essay above.

- 3.219 To further avoid subjective interpretations and inconsistencies, only waters within floodplains with defined surface hydrologic connections should be considered neighboring. The rule should not allow regulators to speculate as to which waters do or do not have discrete confined or shallow subsurface connections. The current language in the proposed rule does not adequately define what is meant by shallow subsurface hydrologic connection, nor does the rule provide a means or methodology for determining if such a subsurface connection exists in the field. This lack of clarity will result in a wide and inconsistent range of agency staff interpretations, which could result in many additional areas becoming jurisdictional. In the absence of an adequate and consistent methodology to provide to federal staff, it is VDOT's position that the rule should only focus on defined surface hydrologic connections and eliminate the evaluation for shallow subsurface hydrologic connection for determining jurisdiction. (p. 8)

Agency Response: See essay. In addition, the Agency did not adopt the commenters' suggested approach of defining "neighboring" to mean only waters within floodplains with "defined surface hydrologic connections." The commenters' approach would, as demonstrated in the preamble and TSD, exclude many waters that the record for today's rule shows have a "significant nexus" to traditionally navigable waters, interstate waters and the territorial seas and thus are appropriately jurisdictional by rule.

New Mexico Department of Agriculture (Doc. #13024)

- 3.220 EPA explicitly notes their lack of jurisdiction over groundwater in paragraph (t) (5) (vi), stating that among other features "[g]roundwater, including groundwater drained through subsurface drainage systems... " is not jurisdictional. However, the term neighboring is dependent on language that directly contradicts this exclusion.

The proposed definition for the term neighboring includes, "waters with a shallow

subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." EPA has no jurisdiction over groundwater thus no jurisdiction over "shallow subsurface" water. We request striking the second half of the sentence, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Further, the term shallow in this definition is subjective and undefined by the Agencies. (p. 11)

Agency Response: See essay above.

- 3.221 Allowing waters located "within the riparian area or floodplain" creates confusion. If the floodplain is larger than a water's riparian area, will the floodplain be used as the guiding jurisdiction criteria? If so, it is not necessary to include riparian area as a jurisdictional criteria. (p. 11)

Agency Response: See essay above.

- 3.222 If the floodplain is larger than a water's riparian area, will the floodplain be used as the guiding jurisdiction criteria? (p. 27)

Agency Response: See essay above.

North Carolina Forestry Advisory Council (Doc. #14123)

- 3.223 The proposed new terms "riparian area" and "floodplain" are not clearly defined. This is going to cause much confusion and uncertainty in the proposed rule. If these terms must be defined, then their definitions must be absolutely clear and easy to understand. (p. 1)

Agency Response: See essay above.

Texas Commission on Environmental Quality (Doc. #14279.1)

- 3.224 TCEQ is concerned with allowing a hydrologic connection to be a demonstration of the term "neighboring" 133 CFR §328.3(c)(2)]. A hydrologic connection (particularly a subsurface connection) has no geographic limit on how far away a connected water body might be, and the basic tenet of adjacency for determining federal jurisdiction becomes so attenuated as to be without meaning.

The definitions for "riparian area" and "floodplain" lack specific boundaries and do not result in greater clarity or regulatory certainty.

The definition of "riparian area" indicates that these areas are transitional, and, as a result, any determination of which waters will be considered to be within a riparian area will be subjective. A "floodplain" is defined as an area inundated during periods of moderate to high flows, which means the extent of a floodplain will depend on the severity of the inundation. (p. 7)

Agency Response: See essay above.

State of Wyoming (Doc. #14584)

- 3.225 The proposed rule makes return flows, shallow subsurface groundwater or tail waters (that create artificial wetlands and riparian areas at field bottoms) "waters of the United States" based on potential for contribution. Id. While small streams and ditches can join larger "navigable" streams or interstate waters, it is at the point of joinder that they could

be considered jurisdictional, not before. Putting these types of waters under federal jurisdiction could result in limiting or eliminating positive contributions of flow to waters of the United States. The proposed rule creates a disincentive to anything but the full consumptive use of these waters in ditches and small streams. This defeats one of the Act's purposes - to maintain and restore the Nation's waters. (p. 2-3)

Agency Response: See above essay.

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

3.226 Pennsylvania proposes the following specific revisions to definitions in the rule:

Neighboring — Delete "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." (p. 6)

Agency Response: See essay above.

Tennessee Department of Environment and Conservation (Doc. #15135)

3.227 [T]he state agencies recommend that EPA and the Corps revise the definition of neighboring to exclude the concept of waters with discrete surface and shallow subsurface connections and only assert jurisdiction by rule over adjacent waters if they are located in the floodplain or riparian zone of jurisdictional waters. Additionally, if EPA and the Corps do not appropriately tailor the definition of tributary as discussed above, the state agencies recommend the agencies limit jurisdiction by rule to adjacent waters that are located in the floodplain or riparian zone of traditionally jurisdictional waters (i.e., traditional navigable water, interstate water, and the territorial seas). (p. 26)

Agency Response: See essay above.

Wisconsin Department of Natural Resource (Doc. #15141)

3.228 The proposed definition of "neighboring," "riparian area" and "floodplain" are all subject to a wide degree of interpretation. Unfortunately, while many of the details that further define these terms are described in the preamble, there is still a wide degree of uncertainty as to what level of storm event should be utilized to determine if a water is located in the floodplain of a WOTUS, what constitutes a subsurface hydrologic connection and how you would prove it, and then how the agencies will determine whether there is a reasonable proximity to a WOTUS. This uncertainty would seem to suggest that determinations for "adjacent" waters will continue to be case-by-case analysis. The WI DNR suggests that the agencies consider adding some of the details located in the preamble to clarify uncertainty in regulating adjacent waters and further define some of the vague terms utilized in these definitions. (p. 2)

Agency Response: See essay above.

California Department of Water Resources (Doc. #15245)

3.229 The structure of the Proposed Rule relating to jurisdictional determinations involving adjacent waters is unclear in part because it connects four different general definitions (adjacent, neighboring, riparian area, and floodplains) into one regulatory determination.

This will present significant compliance questions for DWR, because it is not clear how these four terms are to be interpreted together, and the precise limits of their jurisdictional reach are not clear on the face of the Proposed Rule and accompanying background information.

This is especially the case for DWR with its flood management responsibilities within the Central Valley. Historically, significant parts of California's Sacramento and San Joaquin Valleys, Delta region, and other regions of the state were subject to periodic damaging floods during California's rainy seasons. In order to protect the public safety and permit economic progress, DWR, USACE, and local agencies have provided flood protection through the construction of extensive flood management systems described above that includes miles of dikes, levees, and berms as prominent features. These improvements have permitted the development of cities and thousands of acres of farmland within the Central Valley in what historically would have been considered riparian areas and floodplains under the Proposed Rule. Development in these areas has been long-standing and has predated the CWA.

Under the Proposed Rule, to the extent that riparian and floodplain areas separated by dikes, levees, and berms from the other jurisdictional waters are considered jurisdictional, DWR will have regulatory uncertainty and be affected by the potential of a significantly expanded definition of waters of the United States to areas that have traditionally not been regulated before Rapanos. Given the breadth of the definition of the terms riparian area and floodplains, it appears that potentially large sections of the Sacramento Valley, San Joaquin Valley, and Sacramento-San Joaquin Delta that previously were not considered jurisdictional under previous definition of waters of the United States may now be subject to jurisdictional determinations. (p. 3-4)

Agency Response: See essay above.

- 3.230 DWR is also concerned how the Proposed Rule defines "adjacent" waters to include "neighboring" and now links that term to the new definitions of "riparian areas" and "floodplains". This new regulatory scheme may expand the scope of jurisdictional areas to lands that do not meet the hydrologic or biological characteristics of wetlands and without necessarily improving the chemical, physical, or biological integrity of California waters. Under the Proposed Rule, some areas within the flood management system, such as uplands, may fall under these new definitions despite being disconnected and lacking the necessary hydrology and ecosystem characteristics. Any activities occurring in these areas could impair jurisdictional waters. DWR further notes the definition of riparian areas attempts to better define the scope of riparian areas by requiring a connection in these areas between hydrology and ecological processes and plant and animal community, but the scope is not sufficient. However, no such connection is attempted for floodplains, making unclear the nexus between floodplains and the chemical, physical, and biological integrity of California waters.

DWR therefore requests that the USACE and EPA consider that activities carried out in riparian and floodplain areas behind levees and berms could be affected by the proposed changes to "neighboring," which includes the new definitions of "riparian area" and "floodplain". DWR further requests that the USACE and EPA consider the regulatory uncertainties created by the scope of these definitions and refine them. DWR also

requests that the USACE and EPA consider excluding areas separated by levees and berms. In addition, DWR recommends that areas that do not meet the hydrologic and biological criteria for classification as wetlands not be included as waters of the United States. (p. 4-5)

Agency Response: See essay above. Although the final recommendation in this comment is unclear, the agencies note that they have concluded based on the record for today's rule that more than wetlands should be included in the definition of waters of the U.S.

Ohio Department of Natural Resources, et al. (Doc. #15421)

- 3.231 MRM: Comment has been requested on whether there are other reasonable options for providing clarity for jurisdiction over waters with confined surface or shallow subsurface hydrologic connections in the “adjacent” waters category (not the “other waters” category). The shallow subsurface connection is difficult to establish in any case. A shallow subsurface connection should at most extend to the limits of the “region”, (using Justice Kennedy’s reasoning), which is the watershed that drains to the nearest water identified in paragraphs (a)(1) through (a)(3), -- the single point of entry watershed, according to the USACOE and USEPA.

A shallow subsurface hydrologic connection can be a common shallow aquifer [“A shallow subsurface connection also exists, for example, when the adjacent water and neighboring (a)(1) through (a)(5) water are in contact with the same shallow aquifer”]. However, merely having a shallow aquifer in common should not be sufficient to establish a subsurface connection for the purposes of jurisdiction, since it is also stated that there must be “a direct connection to the water found on the surface.” Given the relative difficulty in assessing the shallow subsurface situation (as the preamble states) compared to the surface situation, there should be some distance limits placed and jurisdiction should not be automatically asserted over all waters connected through a shallow subsurface hydrologic connection. Note that this is supported by other statements already in the preamble, such as, regarding adjacency, that the term has never been interpreted “to include wetlands that are a great distance from jurisdictional water(s). The agencies intend to similarly interpret the new definition of “neighboring”.

Since the shallow subsurface hydrologic connection cannot be speculative, but may also not be directly visible, examples of suitably determining a shallow subsurface connection should be stated. This differs from stating examples of a shallow subsurface connection. Methods for determining such a connection should be required of the agencies.

The reasoning behind the definitions of “adjacent” “similarly situated.” And “significant nexus” is well founded. However, the definitions and their associated terms use common words that could cause confusion. For example, adjacent waters are addressed (a) (6) above. However, in the definition in paragraph (c) (1), “adjacent” means bordering, contiguous or neighboring. In paragraph (c) (2), neighboring, for purposes of the term “adjacent”, includes water located within the riparian area or floodplain OR waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a jurisdictional water. Paragraph (c) states that riparian area means an area bordering a water where surface or subsurface hydrology directly influence the paragraph (c)(4)

states that floodplain means an area bordering water that was formed by sediment deposition and is inundated during periods of moderate to high water flows. Therefore, adjacent means bordering or neighboring. Neighboring means riparian or floodplain, and both of those terms mean bordering, which circles back to “adjacent.” In addition, in paragraph (c) (7) the term “significantly” is used in the definition of “significant Nexus.” Potentially making the definition somewhat imprecise and “significant” has not been defined as we

Agency Response: See essay above. See Other Waters Compendium (Topic 4) for a discussion of “similarly situated” and the Significant Nexus Compendium (Topic 5) for discussion of the definition of “significant nexus.”

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

- 3.232 Perhaps more confounding is the chain of newly defined terms that brings all waters in "riparian area[s]" or "floodplain[s]" under categorical federal jurisdiction. Waters "adjacent" to core waters and tributaries (which, as discussed above, are expansively defined) are also deemed by fiat to have a "significant nexus" to core waters and, therefore, be regulated under the Clean Water Act. These adjacent waters include "neighboring" waters, which are defined to include waters within a "riparian area" or "floodplain." Michigan Farm Bureau points out that the latter 'two terms are "so vague and all-encompassing" that a variety of small waters in these potentially huge areas could be pulled under federal jurisdiction without any actual basis in fact that they have a significant nexus with core waters. (p. 5)

Agency Response: See essay above.

Tennessee Department of Transportation (Doc. #16470)

- 3.233 The proposed rule has the potential to expand, perhaps substantially, the universe of "adjacent waters" that are deemed jurisdictional by rule. The definition of "adjacent" itself would not change: it would continue to be defined as "bordering, contiguous, or neighboring." But, in effect, the definition of "adjacent" would be changed by including a new and relatively expansive definition of "neighboring." TDOT's concerns focus on this new definition of "neighboring" as well as the related definitions of "riparian area" and "floodplain."

The proposed definition of "neighboring" includes "waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." The preamble explains that this definition "captures those waters that in practice the agencies have identified as having a significant effect on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas." The preamble also notes that "'Adjacent' as defined in the agencies' regulations has always included an element of reasonable proximity." (79 Fed. Reg. 22207).

TDOT agrees that it is useful to include a regulatory definition of "neighboring" given the use of that word in the definition of "adjacent." TDOT's concern is that the proposed definition of "neighboring" is open to such an expansive interpretation that it could - and

likely would - result in a substantial broadening of the definition of "adjacent waters" that are jurisdictional by rule.

TDOT recommends revising the definition of "neighboring" to include an explicit requirement for both reasonable proximity and significant effect. The rule should include specific criteria for determining whether these requirements are met. Under this approach, the existence of a subsurface hydrological connection would not automatically result in a finding that waters are jurisdictional by rule. Similarly, location within a riparian area or floodplain would not be enough, on its own, to cause waters to be deemed jurisdictional by rule. Instead, the waters would be deemed "adjacent" and thus jurisdictional by rule only if they are actually located close to other jurisdictional waters and have a significant effect on the chemical, physical, and biological integrity of those waters. TDOT also supports the following options among those identified in the preamble for limiting the definition of "neighboring":

- asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; and
- establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example , distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent. (p. 5-6)

Agency Response: See essay above.

Office of the Governor, State of Utah (Doc. #16534)

- 3.234 More specifically, the state is concerned the proposed definition of "neighboring" will be interpreted to eliminate the dual requirements of "reasonable proximity" and "significant effect." For example, the proposed rule would allow "waters with a shallow subsurface hydrologic connection" to be deemed "neighboring" irrespective of the degree of that subsurface connection and the distance of that connection. If read literally, this definition would allow a water to be deemed adjacent, and therefore jurisdictional by rule, based on a geographically remote and hydrologically insignificant subsurface connection.

The definition of "neighboring" should include an explicit requirement for both "reasonable proximity" and "significant effect." The rule should include specific criteria for determining whether these requirements are met. Under this approach, the existence of a subsurface hydrological connection would not automatically result in a finding that waters are jurisdictional by rule. Similarly, location within a riparian area or floodplain would not be enough, on its own, to cause waters to be deemed jurisdictional by rule. Instead, the waters would be deemed "adjacent" and thus jurisdictional by rule only if they are actually located close to other jurisdictional waters and have a significant effect on the chemical, physical, and biological integrity of those waters.

The proposed definitions of "riparian area" and "floodplain"⁷⁶ are also a concern because

⁷⁶ "Riparian areas" and "floodplain" terms mentioned in the definition of "neighboring" which is a term used in the

they do not include a requirement for "reasonable proximity" and "significant effect."⁷⁷ In particular, the definition of "floodplain" - which includes areas "inundated during periods of moderate to high water flows" - could encompass areas that are subject to flooding only during rare and extreme flooding events. The effect of these definitions would define as "adjacent" and thus jurisdictional by rule - waters that are not in any reasonable sense adjacent to core waters.

The proposed rule creates a new definition for the term "riparian area" which modifies the definition currently relied upon by EPA and Army. In addition, the proposed definition would require a "best professional judgment" determination by the agencies in order to determine whether the area is considered to be "riparian."⁷⁸ This creates uncertainty among those landowners with lands alongside waterways. The definition should be changed to the definition currently being used by EPA in their Water Quality Standards Academy Glossary, " riparian zone: an area adjacent to and along a watercourse that often is vegetated and that constitutes a buffer zone between the nearby land s and the watercourse."⁷⁹ To add further consistency among commonly used terms, the word " land" should be changed to "terrestrial ecosystem." This new definition is simple, self-supporting and easily understood.

The Proposed Rule defines "floodplain" to include areas" inundated during periods of moderate to high flows.⁸⁰ Moderate flows of water are not considered a flood event and, therefore, would not contribute significant sediment to the floodplain. The Proposed Rule should adhere to commonly understood geographic principles and definitions. As currently proposed, the interpretation of what is considered to be a floodplain would be left up to EPA or Army staff for a "best professional judgment" analysis,⁸¹ leading to uncertainty and inconsistency. (p. 10-11)

Agency Response: See essay above.

Dennis Daugaard, Governor, State of South Dakota (Doc. #16925)

- 3.235 While the current definition of "adjacent waters" does not change in the proposed rule, in our view, the addition of the definition of "neighboring" does expand this portion of jurisdiction, especially in conjunction with "riparian area" and "floodplain." The potential for interpreting "neighboring" broadly enough to eliminate the requirements of "reasonable proximity and significant effect " can have staggering effects on project costs and delivery times for SDDOT. Determining subsurface hydrologic connections from relatively remote locations to a true waterway can be incredibly difficult and based upon hydrologic and soils investigations that, even when shown to be insignificant

definition of "adjacent." In addition to adding confusion, this nesting of definitions has the practical effect of expanding the reach of CWA into floodplains or riparian areas that contain what otherwise may be relatively isolated water bodies.

⁷⁷ The proposed regulations define "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." While the term "directly influence" does help to limit the scope of the definition, it does not require a Significant effect.

⁷⁸ See 79 Fed. Reg. 222 08.

⁷⁹ Environmental Protection Agency, Water Quality Standards Academy Glossary, at 22 (1997) available at <http://water.epa.gov/learn /training/standard sacademy/upload/WQ Sglossary9-20 12.pdf> (accessed (1/10/201 4)).

⁸⁰ See 79 Fed. Reg. 22263

⁸¹ Id. at 22209.

connections, may still be within the purview of this rule. Similarly, the terms riparian and floodplain do not appear to require reasonable proximity to be considered "neighboring." Shallow subsurface connections" should not be a basis for asserting jurisdiction over prairie pothole areas. SDDOT recommends revising the definition of "neighboring" to include reasonable proximity and significant effect, such that waters are deemed "adjacent" and jurisdictional by rule only if they are actually located close to other jurisdictional waters and have a significant effect on the chemical , physical , and biological integrity of those waters. (p. 5)

Agency Response: See essay above.

North Cass Water Resource District (Doc. #5491)

- 3.236 The rule does not clearly define how far the "riparian area" extends, nor does the rule define the floodplain (100 year or 500 year). This very broad definition of "adjacent waters" is seemingly open-ended and could conceivably render all land in the Red River Valley jurisdictional under the CWA. (p. 2)

Agency Response: See essay above.

New Hanover County, North Carolina (Doc. #5609)

- 3.237 [T]he new proposed term "neighboring" will further increase "waters" subject to the proposed rule. Adding the definition of "neighboring" can bring non-jurisdictional ponds, detention basins, swales, ditches, wetlands and stormwater conveyances under the proposed rule even if there is not a defined surface water connection. (p. 3)

Agency Response: See essay above.

Nevada County Board of Supervisors (Doc. #6856)

- 3.238 Other newly defined terms ("Riparian Area," "Floodplain," "Neighboring") establish a connection between various land features that could extend further beyond any waterway and still establish jurisdictional authority of the EPA and Corps. Waters that are located within a riparian area or floodplain would be jurisdictional without any significant nexus analysis and there is, at best, a nebulous limiting of the scope and size of a riparian area. "Neighboring" includes waters with confined surface or shallow subsurface hydrological connection to (any) jurisdictional water. Waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate-this could include standing water from an irrigation cycle. (p. 1-2)

Agency Response: See essay above.

City of San Diego, Transportation & Storm Water Department (Doc. #7950.1)

- 3.239 Floodplain and riparian zones are insufficiently defined and could in their entirety become jurisdictional and result in potential citizen lawsuits related to City-owned or maintained water bodies in floodplains or riparian zones. (p. 2)

Agency Response: See essay above.

Aurora Water (Doc. #8409)

- 3.240 [T]he proposed rule states that determination of jurisdiction using the terms "riparian area," "flood plain," and "hydrologic connection" will be based on best professional judgment and experience applied to the definitions proposed in this rule. There is no limiting scope to the size of a riparian area or a definition of the types of animal, plant and aquatic life that may trigger this definition. (p. 2)

Agency Response: See essay above.

- 3.241 [T]he rule does not clearly define how water must be geographically proximate to the adjacent water, nor how waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate. This lack of clarity creates uncertainty about whether these waters would be considered a WOTUS because it leaves it up to the local ACOE office to determine jurisdiction in these instances. (p.2)

Agency Response: See essay above.

Olivenhain Municipal Water District (Doc. #8596)

- 3.242 Under the proposed rule, "adjacent" would refer to "waters located within a riparian area or waters with a shallow subsurface connection of confined surface hydrologic connection." This broad definition of adjacent water could mean that recharge ponds that are a part of water reclamation facilities would be classified as a Water of the United States. Water and water reuse facilities could also become subject to the rule based on either their adjacency to jurisdictional waters, whether they are located in a floodplain, or their potential for subsurface hydrologic connection. For example, facilities that are adjacent to or dependent on the California Aqueduct could be susceptible to a new, expensive, and time consuming permitting process. (p. 2)

Agency Response: See essay above.

Pasco County, Florida (Doc. #9697)

- 3.243 Revise the definition of "neighboring" to include an explicit requirement for both reasonable proximity and significant effect. The rule should include specific criteria for determining whether these requirements are met. (p. 2)

Agency Response: See essay above.

Board of Supervisors, Imperial County (Doc. #10259)

- 3.244 The term neighboring (for purposes of adjacent) includes waters within the riparian area or waters with a shallow subsurface hydrologic connection to a jurisdictional water. The current definition containing the language "shallow subsurface hydrologic connection" is concerning for two reasons. First, hydrologic connection in the context of the broad conclusions of the CR raises concerns that even the slightest of connections will be used to define features as neighboring. Second, subsurface hydrologic connection appears to encroach upon groundwater regulation and runs contrary to the Agencies' stated intention of the proposed rule. We recommend that the definition require an "appreciable or substantial" hydrologic connection that does not take into account the broad CR findings under this analysis. (p. 2-3)

Agency Response: See essay above.

Hancock County Surveyor's Office and the Hancock County Drainage Board, Indiana, (Doc. #11979)

- 3.245 The [second] term is adjacent waters and our interpretation is that you have defined them as bordering, contiguous or neighboring. This could impact wetlands, ponds, oxbows and open waters in floodplains. The neighboring should have a distance in feet from watercourse. This is more area that would require federal permits and approvals. (p. 1)

Agency Response: See essay above.

Colfax Soil & Water Conservation District, New Mexico, et. al. (Doc. #13886)

- 3.246 Neighboring should also remove those last clause caveats regarding waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. This type of investigation will require significant resources to make what are really case-by-case determinations of connection but not the significance of the connection. To leave the clause in place serves only to further confuse EPA's and USACE's efforts toward clarity. Further, it is abrasive to all that the agencies would go to great lengths to find a shallow subsurface connection, but not make a similar determination of its significance. (p. 1)

Agency Response: See essay above.

The Board of County Commissioners of Otero County New Mexico (Doc. #14321)

- 3.247 The agencies' definition of "neighboring" to include those waters located in the "riparian area" or "floodplain" of an (a)(1) through (a)(5) water will undoubtedly include waters with absolutely no "significant nexus," as that term is defined, to the larger water. For example, this could include an isolated pond located in the 100 year floodplain of a major tributary and containing: no surface connection, no subsurface connection, and no nexus. Yet, because it is "neighboring" it is included. This logic of inclusiveness—to the complete disregard of navigable—was challenged and struck down by the Supreme Court in SWANCC. See SWANCC, 531 U.S. at 172. If such language is to stay, then the confines or sideboards of "floodplain" must be appropriately defined and not left to "the best professional judgment." (p. 16)

Agency Response: See essay above.

National Association of Counties (Doc. #15081)

- 3.248 "Neighboring" is a term used to identify those adjacent waters with a significant nexus. The term "neighboring" is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring. 36 Using the term "neighboring," without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region. (p. 10)

Agency Response: See essay above.

Painesville Township, Ohio (Doc. #15183)

- 3.249 Adjacency determinations will now depend on the newly proposed definition of "neighboring", defined in the rule for the first time as "waters located within the riparian area or floodplain of a water identified in (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection (i.e., groundwater) to such a jurisdictional water." We believe that the term "adjacent" should only apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. (p. 2)

Agency Response: See essay above.

New York City Law Department (Doc. #15065)

- 3.250 Neighboring Waters: To provide further clarity on what may constitute a "neighboring water," EPA and the Corps should include a definition for "confined surface connections" and "shallow subsurface connections" in the Proposed Rule itself, rather than only in the accompanying narrative. (p. 3)

Agency Response: See essay above.

Alameda County Flood Control and Water Conservation (Doc. #15074)

- 3.251 On page 22188-22189 the rule state that "other waters" that are not: Traditional navigable waters; interstate waters and interstate wetlands; territorial seas; impoundments of traditional navigable waters, interstate waters, interstate wetlands, territorial seas and tributaries, could be determined on case by case basis. Case by case determination would lead to more confusion and regulatory overreach (and arbitrariness) causing Section 404 permitting delays and unreasonable mitigation demands.

Neighboring is defined as including waters located in the riparian area or flood plain of water identified in paragraph (a) (1) through (5) or waters with confined surface or subsurface hydrologic connections or confined surface hydrologic connections to a jurisdictional water. The proposed rule states all of the above waters would be jurisdictional. It is important to clarify the metrics by which a riparian and or flood plain is determined under the proposed rule. (p. 2)

Agency Response: See essay above. For the agencies' responses to comments addressing "other waters," see the preamble, TSD and Other Waters compendium.

City of Stockton, California (Doc. #15125)

- 3.252 "Riparian area" and "floodplain" must be defined to better inform land use decisions and describe the jurisdictional boundaries of regulation. (p. 3)

Agency Response: See essay above.

Lea Soil and Conservation District Board of Supervisors (Doc. #15144.1)

3.253 The agencies' definition of "neighboring" to include those waters located in the "riparian area" or "floodplain" of an (a)(1) through (a)(5) water will undoubtedly include waters with absolutely no "significant nexus," as that term is defined, to the larger water. For example, this could include an isolated pond located in the 100 year floodplain of a major tributary and containing: no surface connection, no subsurface connection, and no nexus. Yet, because it is "neighboring" it is included. This logic of inclusiveness—to the complete disregard of navigable—was challenged and struck down by the Supreme Court in SWANCC. See SWANCC, 531 U.S. at 172. If such language is to stay, then the confines or sideboards of "floodplain" must be appropriately defined and not left to "the best professional judgment."

•"Neighboring" should also remove those last clause caveats regarding "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." This type of investigation will require significant resources to make what are really case-by-case determinations of connection but not the significance of the connection. To leave the clause in place serves only to further confuse EPA's and USACE's efforts toward clarity. Further, it is abrasive to all that the agencies would go to great lengths to find a shallow subsurface connection, but not make a similar determination of its significance. (p. 4-5)

Agency Response: See essay above.

Pamela Jo Bondi, Attorney General, State of Florida (Doc. #15429)

3.254 To make matters worse, the Proposed Rule expands upon this already overly expansive definition to include waters within broad, geographically amorphous floodplains and riparian areas that are next to these "tributaries." There is no requirement that there even be a shared border, an actual touching, or close proximity between the floodplain or riparian area, on the one hand, and a traditional, navigable water, on the other. The Proposed Rule's inclusion of waters within any floodplain or riparian area next to a tributary will bring under regulation secondary and tertiary intrastate and private waters remote from any core water. It also will cover whole swaths of territory that may be primarily dry or have tenuous, speculative effects on the integrity of core waters. (p. 3)

Agency Response: See essay above.

City of Beaverton's, Oregon (Doc. #16466)

3.255 Any proposal to regulate waters within a floodplain, riparian, or any other general area must include a specific definition, including the specific boundaries, of the floodplain, riparian, or other area subject to the rule (p. 3)

Agency Response: See essay above.

City of Oceanside, California (Doc. #16509)

3.256 Floodplain and riparian zones are insufficiently defined and could in their entirety become jurisdictional and result in potential citizen lawsuits related to City-owned or maintained water bodies in floodplains or riparian zones. "Neighboring" waters would

include "waters located within the riparian area or floodplain" of WOTUS, or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to WOTUS. The new definition does not require any nexus analysis and thus arguably expands the reach of the CWA to include entire floodplains or riparian areas that may not have been previously regulated under the CWA. With respect to storm water related facilities, this expanded definition of "adjacent" could result in structural BMPs, flood control basins, green infrastructure projects, and other multi-purpose benefit projects being classified as a WOTUS if such projects are installed in a floodplain or riparian zone, or are otherwise determined to be "adjacent" to a traditional navigable water. As indicated previously, such facilities are installed so that storm water agencies can reduce pollutants to the maximum extent practical, and many such facilities provide for multiple benefits to the environment. (p. 4)

Agency Response: See essay above.

Snowmass Water and Sanitation District (Doc. #16529)

- 3.257 The proposed rule does not adequately define "floodplain" or "riparian." Floodplains are typically defined by the frequency of a flood predicted to inundate up to a specific elevation (e.g., a 10-year or 100-year flood event). The proposed rule does not reference any specific criteria or mapping, and this would make it challenging to define jurisdictional limits. Similarly, the proposed rule does not provide an adequate definition of "riparian" that incorporates soil, biotic and hydrologic criteria that would allow practitioners to determine the boundaries in a consistent and predictable manner.

Moreover, including the concepts of "riparian" and "floodplain" in the rule will likely not add to clarity, as the public is likely to confuse these areas as themselves being jurisdictional. Regardless of whether a water feature occurs within or outside of a riparian area or floodplain zone, it should not be jurisdictional unless it has the requisite hydrologic connection and nexus to the chemical, physical and biological integrity of traditional navigable waters. (p. 7)

Agency Response: See essay above.

- 3.258 The proposed rule would also define neighboring to include water features with a shallow subsurface hydrologic connection to a jurisdictional water. The assertion of jurisdiction over isolated water features with only a subsurface hydrologic connection does not comport with the Rapanos plurality's "continuous surface connection" test⁸² It is also difficult to reconcile with the rule's exclusion of "groundwater" from its definition of waters of the United States. The proposed assertion of jurisdiction based on shallow subsurface hydrologic connections would potentially extend jurisdiction to minor activities that occur miles away from areas that are within any reasonable definition of agency jurisdiction under the Clean Water Act. The rule's categorical approach to neighboring/adjacent waters is overly broad. The regulated public should be provided the opportunity to demonstrate that there is not a hydrologic connection or nexus sufficient to establish CWA jurisdiction on a case specific basis for these types of waters. Should the agencies proceed to make these waters jurisdictional-by-rule, the rule should be revised to incorporate specific criteria for physical proximity to establish an

⁸² 12 547 U.S. at 742.

area as "adjacent" or "neighboring," and to provide clearer definitions for "riparian area" and "floodplain zone." The rule should not assert jurisdiction over features based solely on the presence of a subsurface hydrologic connection to a jurisdictional water. (p. 7)

Agency Response: See essay above.

City of Portland, Bureau of Environmental Services (Doc. #16662)

- 3.259 More clarity is needed on the definitions of "neighboring;" and "floodplain." While "neighboring" provides more scientific clarity than "adjacent" it is still too vague to apply easily in a regulatory context. Embedded in the definition for "neighboring" is the term "floodplain the technical definition of floodplain does not provide adequate clarity, certainty or consistency. The soil type and current climactic conditions (the basis for the definition of floodplain in the proposed d e) might not have changed, but the river management may have been altered through dams, levees, berms, floodwalls, and fill. Without a more explicit definition of floodplain, we will see inconsistency in how the agencies will use their discretion in defining the floodplain for the purposes of determining jurisdiction. A single, uniform flood frequency should be used to establish 'the floodplain boundaries. In addition, there is no mention of the potential for flood boundaries to shift with climate change, and how this will be incorporated into determinations of adjacency. (p. 2)

Agency Response: See essay above. Also, the CWA 404 program recognizes that site characteristics can change; Corps Regulatory Guidance Letter (RGL) 05-02 reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

City of Palo Alto, Office of the Mayor and City Council (Doc. #16799)

- 3.260 "Riparian area" and "floodplain" must be defined to better inform land use decisions and describe the jurisdictional boundaries of regulation. (p. 5)

Agency Response: See essay above.

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

- 3.261 Neighboring and Riparian Area: The term neighboring includes language that would allow EPA to claim jurisdiction over waters connected via "a shallow subsurface hydrologic connection." A riparian area is "an area bordering a water where surface or subsurface hydrology directly influence... plant and animal community structure in the area." The Hidalgo SWCD requests removal of the subsurface or groundwater criteria. (p. 2)

Agency Response: See essay above.

Maui County (Doc. #19543)

- 3.262 Neighboring is defined to mean waters located within the riparian area or floodplain of a

jurisdictional water or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional waters. The proposed rule fails to identify what constitutes "shallow subsurface hydrological connection," and this term should be defined and demarcated. (p. 4)

Agency Response: See essay above.

California State Association of Counties (Doc. #9692)

- 3.263 The term neighboring (for the purposes of adjacent) includes waters within the riparian area or waters with a shallow subsurface hydrologic connection to a jurisdictional water. The current definition containing the language "shallow subsurface hydrologic connection" is concerning for two reasons. First, hydrologic connection in the context of the broad conclusions of the CR raises concerns that even the slightest of connections will be used to define features as neighboring. Second, subsurface hydrologic connection appears to encroach upon groundwater regulation and runs contrary to the agencies stated intention of this proposed rule. CSAC proposes the definition require a "substantial" surface hydrologic connection. (p. 3)

Agency Response: See essay above.

Nebraska Association of Resources Districts (Doc. #11855)

- 3.264 [T]he Proposed Rule's expansive definitions of "neighboring," "riparian," and "tributary," expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is not insignificant. (p. 5)

Agency Response: See essay above.

- 3.265 The Proposed Rule alters a current category of jurisdictional waters to include "all waters (not just wetlands) adjacent" to waters susceptible to use in interstate or foreign commerce, waters subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas ("Proposed 1-5 Waters").⁸³ For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term "adjacency" is the term "neighboring" which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a "shallow subsurface hydrologic connection" to Proposed 1-5 Waters. Also included within the term "neighboring" is the term "riparian area," which includes any area "bordering where surface or subsurface hydrology directly influence the animal community."

No definition is provided for the scope of "shallow subsurface hydrologic connection" or "subsurface hydrology." The State of Nebraska has a relatively high groundwater table throughout most of the State,⁸⁴ and the interconnection between groundwater sources and local river systems makes it unlikely that NARD's member NRDs, or landowners within

⁸³ 40 C.F.R. 230.3(s)(6)

⁸⁴ See Exhibit A, image depicting depth to groundwater in Nebraska

their respective jurisdictions, could engage in development activities or implement and manage flood control, drainage, and irrigation projects without creating some form of open water that would fall within the category of “adjacent waters.”

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require the absence of a surface hydrologic connection. Remarkably, the Proposed Rule explicitly states that hydrologic connections are not necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.⁸⁵ Regardless of the number of species of plants or animals cited by the Agencies, this approach is no different than the previously-rejected Migratory Bird Rule,⁸⁶ which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water. (p. 5-6)

Agency Response: See essay above. See also Significant Nexus compendium, preamble and TSD.

Region 10 Tribal Caucus (Doc. #14927)

3.266 Third, the Tribal Caucus supports the inclusion of “adjacent waters” into the definition of WOTUS. However, the definition of adjacent waters needs to be modified to include the outer extent of the floodplain and all riparian areas. As noted by EPA’s Scientific Advisory Board member Dr. Sullivan, “[T]he scientific literature unequivocally supports the finding that floodplains and waters and wetlands in floodplain and riparian setting support the physical, chemical and biological integrity of downstream waters” and “[a]lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered.” (p. 3)

Agency Response: See essay above.

Western Urban Water Coalition (Doc. #15178.1)

3.267 The proposed rule allows for neighboring waters and wetlands to occur outside of floodplains and riparian areas. Waters and wetlands determined to have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water would also be a WUS by rule as an adjacent water falling within the definition of “neighboring.” So it is the hydrologic connection of a water or wetland to an (a)(1) through (a)(5) water that is important to determining that the wetland or water is jurisdictional and not if the water or wetland is located in a floodplain or riparian area.

Including the terms “riparian” and “floodplain” in the proposed rule will add unnecessary confusion to the rule. Regardless of whether a water or wetland occurs within or outside a riparian area or floodplain, it should not be jurisdictional unless it has a hydrologic connection to an (a)(1) through (a)(5) water. The terms do not add clarity to the proposed rule and are not needed. Additionally, the regulated public should be provided the

⁸⁵ 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

⁸⁶ SWANCC. v. U.S. Army Corps of Engineers, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA “to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the ‘Migratory Bird Rule’ is not fairly supported by the CWA.”

opportunity to demonstrate that there is not a hydrologic connection to an (a)(1) through (a)(5) water.

The references to riparian areas and floodplains in the criteria for “neighboring” will likely have the additional unintended consequence of requiring fact-specific determinations to discern whether a given water feature is within one of those areas and thus jurisdictional by rule. The proposed rule is intended to reduce case-specific determinations and use of the terms riparian and floodplain, as defined, will likely needlessly increase case-specific determinations.

Preferred Solution

The term neighboring, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water identified in paragraphs (s)(1) through (5). The term riparian area means an area defined as 1) the portion of the valley bottom influenced by fluvial processes under the current climatic regime, 2) riparian vegetation characteristic of the region, and 3) the area of the valley bottom flooded at the stage (water surface elevation) of the 100-year recurrence interval flow. bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

If the agencies are uncomfortable with the above-recommended modification, then the following modification is proposed:

Adjacent waters and wetlands are those that have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water. Adjacent waters and wetlands frequently occur in riparian areas, and such areas may warrant close scrutiny in the identification of such connection. “Riparian areas” are defined as 1) the portion of the valley bottom influenced by fluvial processes under the current climatic regime, 2) riparian vegetation characteristic of the region, and 3) the area of the valley bottom flooded at the stage (water surface elevation) of the 100-year recurrence interval flow.

The proposed solutions allow the agencies and project proponent to determine adjacency based on site-specific information instead of assuming jurisdiction because of location in a riparian area or poorly defined floodplain. (p. 28-30)

Agency Response: See essay above. In addition, for the reasons discussed in the TSD and preamble, as well as elsewhere in this compendium, the agencies disagree with the commenter that a water cannot be jurisdictional unless it has a hydrological connection with an (a)(1) – (5) water.

Great Lakes Indian Fish and Wildlife Commission (Doc. #15454)

- 3.268 With respect to the proposed rule currently being considered, GLIFWC staff fully support the proposed definition’s inclusion of: 1) all tributaries of waters described in subsections 1-4 of Section (s) of the rule, and 2) wetlands and waters adjacent to those

waters and their tributaries. Staff appreciate the additional definitions provided in the proposed rule to increase its clarity, and in particular are comfortable with the definition of “tributary” as proposed in the rule. However, it is unclear why the hydrologic connection referred to in the definition of “neighboring” should be restricted only to shallow subsurface connections; connections of deeper groundwater may also be important and should not be overlooked. (p. 2)

Agency Response: See essay above.

Oregon Association of Clean Water Agencies (Doc. #16613)

3.269 The fuzziness around what constitutes jurisdictional floodplains and riparian areas is made worse, not better, by introducing the term “neighboring waters” as it relates to waters in a floodplain or riparian area. The size of the floodplain or riparian area obviously has a huge impact on projects, whether public or private. The proposed rule leaves this critical decision to EPA’s discretion without any suggestion as to what would guide EPA’s decision. FEMA invests over \$100 million annually to map floodplains. The final rule should contain information on how it will determine adjacent waters from a scientific perspective. Oregon ACWA suggests starting with existing FEMA maps and use science to determine the connectivity of surrounding water rather than struggle to clarify the amorphous term “neighboring”. (p. 3)

Agency Response: See essay above.

Maine Municipal Association (Doc. #16630)

3.270 [T]he addition of "neighboring" to the existing definition of the term "adjacent" has the potential to connect separate water bodies in a way that makes them jurisdictional without the benefit of any case-specific analysis. "Neighboring" includes waters located within the riparian area or floodplain of the EPA's traditionally identified jurisdictional waters, or waters with a surface or shallow subsurface hydrologic connection to jurisdictional waters. Under the current regulatory system, adjacency is limited to wetlands. By changing the definition from "adjacent wetlands" to "adjacent waters", and then adding this definition of "neighboring", waters that are currently only jurisdictional on a case-by-case basis could now be determined by the EPA to be de facto jurisdictional without a case-specific significant nexus analysis. As Justice Kennedy stated in the 2006 Rapanos case, "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." (p. 1-2)

Agency Response: See essay above.

John Deere & Company (Doc. #14136)

3.271 The agencies propose to define “neighboring”, which is contained in the defined term adjacent, as including waters located within the riparian area of the jurisdictional waters identified in paragraphs (a)(1) through (3) of the proposed rule, or waters with a confined surface or shallow subsurface hydrologic connection to such a jurisdictional

water.⁸⁷ The term -- riparian area is defined broadly by the agencies as “transitional areas between aquatic and terrestrial ecosystems influencing the exchange of energy and materials between these ecosystems”.⁸⁸ By defining the term “neighboring” to include riparian areas of jurisdictional waters the proposed rule offers a far more expansive yet poorly-defined scope to jurisdictional water inquiries. Currently, the term “riparian area” has no well-established meaning and is subject to wide ranging interpretation. Moreover, the proposed neighboring definition will divert and/or expand jurisdictional inquiries from a particular parcel of land to the hydrological systems of all surrounding parcels and areas, even those separated by man-made dikes or barriers. This expanded inquiry may be particularly onerous in light of the proposed definition for tributary, which will significantly increase the penetration of jurisdictional waters into many fields and land areas currently not subject to such inquiries. (p. 9)

Agency Response: See essay above.

Corporate Environmental Enforcement Council, Inc. (Doc. #14608)

3.272 Unlike the common understanding of “adjacent” as abutting, the Agencies’ definition would be far broader, encompassing a new definition of “neighboring” that will pick up water features that are wholly distant and removed from TNW. The Agencies offer no definition of “riparian area” or “floodplain,” and no guideposts or outer limits for what may be deemed to be neighboring or to what extent (if any) intervening breaks will defeat adjacency. Under the Proposal, waters may be deemed to be adjacent, and thus jurisdictional, even if miles apart and wholly separated from one another. They may even be deemed to be adjacent if connected only by way of groundwater, even though the Agencies have absolutely no authority over groundwater under the CWA. (p. 7)

Agency Response: See essay above.

American Foundry Society (Doc. #15148)

3.273 [T]he definitions of “riparian area” and “floodplain” rely on ambiguous and undefined concepts. For example, “riparian area” is defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” While this definition is vague and broad (particularly as it relates to ecological processes, communities and structures), there is no clarification in the proposed rule on how far a riparian area extends away from the water body. (p. 6-7)

Agency Response: See essay above.

American Council of Engineering Companies (Doc. #15534)

3.274 The introduction of "neighboring" in the proposed rule is extremely problematic. Neighboring is defined as "including waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) (waters of the United States), or waters with a confined surface or shallow subsurface hydrologic connection to such a jurisdictional water." What this means is that wetlands and waters of the

⁸⁷ 79 Fed. Reg. 22,207 (April 21, 2104).

⁸⁸ Ibid.

United States with a subsurface hydrologic connection are now jurisdictional. (p. 2)

Agency Response: See essay above.

American Society of Civil Engineers (Doc. #19572)

3.275 Civil engineers are responsible for constructing many features found in riparian areas and floodplains. Many of those larger features, such as dams and levees understandably require a §404 permit. Civil engineers are also responsible for flood plain mapping, levee design, stream restoration and a multitude of other engineering activities found in floodplains. We received feedback from engineers who work in these sectors who questioned the reach of floodplains in the proposed definition. The proposed rule defines floodplains as: “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 water flows.”⁸⁹ We received feedback indicating this definition could extend to far reaches in the Mississippi River Basin and concerns that the term “floodplain” is not tied to generally understood floodplain boundaries, such as those identified by the Federal Emergency Management Agency (FEMA) in the National Flood Insurance Program (NFIP). The rule states that jurisdictional determinations over the extent of floodplains will be decided by the “best professional judgment and experience” of agency staff. Our members urge consistency and transparency in this regard. (p. 8)

Agency Response: See essay above.

Commercial Real Estate Development Association (Doc. #14621)

3.276 Neither one of the following phrases: (i) “riparian area” and the phrase (ii) “or waters with a shallow subsurface hydrologic connection or confirmed surface connection to such a jurisdictional water” can be defined by a precisely located line on the ground (i.e., how many inches deep is “shallow”) – thus the result will be confusion, uncertainty, inconsistency and delay. Therefore, we recommend that you replace this subsection with the following changes:

Neighboring. The term neighboring, for the purposes of the term “adjacent” in this section, includes waters located within 100 feet of a water identified in paragraphs (a)(1) through (5) of this definition, or within the floodplain of a water identified in paragraphs (a)(1) through (5) of this definition. This language, coupled with our suggested change to the floodplain definition, would provide certainty and clarity to all involved in the program. (p. 5)

Agency Response: See essay above.

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

3.277 The definitions associated with the concept of adjacent waters are vague and will be subject to inconsistent interpretation; it is more logical to treat most adjacent waters as “other waters” subject to an individualized analysis: Although the agencies are asserting the appropriateness of categorically regulating all adjacent waters (a point with which

⁸⁹ See Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22, 199.

the joint commenters disagree for the reasons stated above), the various definitions associated with the concept of adjacency are imprecise and likely to lead to differing interpretations. The word “adjacent” is defined to include bordering, contiguous or neighboring. See proposed 33 C.F.R § 328.3(c)(1). The terms “bordering” and “contiguous” are not defined, but the term “neighboring” is defined to include as being located within the riparian area or floodplain of a regulated water, or having a shallow subsurface hydrologic connection with such a water. See proposed 33 C.F.R § 328.3(c)(2).

“Floodplain” and “riparian area” are also defined terms, but the definitions are extremely generic in nature and do not provide useful guidance. For example, “floodplain” is defined as an area bordering a water that has been “formed by sediment deposition from such water under present climatic conditions” that is “inundated during periods of moderate to high water flows.” See proposed 33 C.F.R § 328.3(c)(4). “Riparian area” is defined to be the “area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” See proposed 33 C.F.R § 328.3(c)(3).

The preamble provides no more definitive means of identifying the scope of these terms, or of differentiating between a “shallow” subsurface hydrologic connection and one that is not shallow. For practical purposes, therefore, potentially adjacent waters will still need to be evaluated on essentially a case-by-case basis to determine whether they are regulated, just as they would be if the adjacent waters category were eliminated (or scaled back to adjacent wetlands). The fact that the agencies have been unable to develop clearer definitions is testament to the fact that there are likely to be significant differences between types of adjacent waters (or individual adjacent waters in a watershed), such that regulation of the group as a category is unwarranted. Rather, it is more logical to consider most adjacent waters (other than wetlands and perhaps some types of open waters) as “other waters,” subject to more individualized analysis.

Recommendation: The agencies should move away from categorical regulation of all adjacent waters, and instead should regulate at most adjacent wetlands and certain specified types of open waters. Other adjacent waters should be evaluated in the “other waters” category (p. 34-35)

Agency Response: See essay above. As described more fully in the preamble and TSD, the agencies did not adopt the commenter’s approach as the record for today’s rule supports regulating waters defined as adjacent as jurisdictional by rule.

National Association of Home Builders (Doc. #19540)

- 3.278 Rather than defining parameters to clarify the extent of “adjacency,” the Agencies lean on the regulated community for input: “Commenters should support where possible from scientific literature any suggestions for additional clarification of current explicit limits on adjacency, such as a specific distance or a specific floodplain interval.”⁹⁰ This is problematic for several reasons. First, it reveals that the Agencies have failed to conduct the research necessary to determine when and under what conditions a significant nexus occurs between an “adjacent” water and an (a)(1) through (5) water.

⁹⁰ Id. at 22,209.

This research should have been completed prior to developing the proposed rule. Second, by suggesting commenters refer to the scientific literature to clarify limits on adjacency, the Agencies undermine the import of the draft Connectivity Report to inform the proposed rule. If EPA’s Office of Research and Development, which spent over four years developing the draft Connectivity Report, was unable to clarify critical limits of adjacency, how are commenters expected to do so during a 207 day comment period? Third, it is unlikely many commenters will have the requisite expertise to knowingly review and provide meaningful input, much less have access to prohibitively expensive journal subscriptions needed to review much of the scientific literature. The Agencies have failed to do the new research needed to inform the proposed rule and are now asking commenters to do the heavy lifting. This is inappropriate. The Agencies should withdraw the proposed rule until they have the data necessary to clearly define the limits of “adjacency.” (p. 95)

Agency Response: See essay above. As discussed in the preamble and TSD, the proposal, and the final rule are supported by extensive research and science. Many of the key issues in the rule, however, are not based entirely on science but require an overlay of legal context and rule implementability, among other things. Also, science does not always provide clear answers. So it is not unusual for an agency to request, through the public comment period, scientific input into rules of this kind. In addition, with the cited request for comments, the agencies were not asking the public to conduct original or extensive research. Instead, the statement simply reflects the fact that, although the agencies welcome all comments, for a very science-based rule like today’s, suggestions supported by science are especially useful.

Devon Energy Corporation (Doc. #14916)

- 3.279 For the term “neighboring” in the context of geographically proximate to the “adjacent” water in the Proposed Rule, it is not clear how a “shallow subsurface hydrologic connection” or “confined surface hydrologic connection” are defined.

Under the exclusion discussion, the Proposed Rule reinforces the agencies’ long-held position to exclude groundwater as WOTUS, including drainage through subsurface systems. However, elsewhere in the Proposed Rule, a shallow subsurface connection could establish “adjacency” jurisdiction. Such an assertion of jurisdiction would appear to exceed the Agencies’ statutory authority as interpreted by the most recent Supreme Court decisions. This could affect projects that use groundwater that is far removed from the traditional navigable stream and other WOTUS. (p. 7)

Agency Response: See essay above.

American Petroleum Institute (Doc. #15115)

- 3.280 Under the 2014 Proposed Rule, “neighboring” waters (and therefore adjacent waters) include waters located within the riparian area or floodplain of per se jurisdictional waters (including the agencies’ new and expansive conception of jurisdictional tributaries).⁹¹ This definition of neighboring is unreasonable because it provides

⁹¹ at 22,262.

unbridled discretion to the permitting authorities to determine the scope of the riparian area or floodplain based on the “scientific judgment” of the agency, and includes waters that would fail both jurisdictional tests in the Rapanos majority.⁹² This definition is also arbitrary because it does not consider the proximity of the subject waters to a navigable water, as required by the Rapanos majority.⁹³ The incorporation of all waters within a floodplain or riparian area suggests that the notion of “reasonable proximity” will be effectively abandoned in the 2014 Proposed Rule. To the extent that the agencies assert jurisdiction without regard to distance from a traditional navigable water, interstate water, or territorial sea, they are beyond the bounds of the Clean Water Act.⁹⁴ (p. 28)

Agency Response: See essay above.

National Sustainable Agriculture Coalition (Doc. #15403)

- 3.281 If specific parameters for what constitutes a “shallow subsurface hydrologic connection” cannot be determined and the criterion is removed from the definition of neighboring, it may prove helpful to limit adjacent waters to include only waters located in floodplains and riparian areas of jurisdictional waters. Floodplains and riparian areas provide clear, water body-specific, physical boundaries for jurisdiction, whereas confined surface—and certainly shallow subsurface—hydrologic connections are less clear. This action would tighten the scope of section (a)(6) in determining what constitutes adjacent waters, but, again, would not necessarily sacrifice jurisdiction for waters with a confined surface or shallow subsurface hydrologic connection to other jurisdictional waters, as these waters could be jurisdictional if found to have a significant nexus to waters listed in (a)(1) through (5). Recommendation: Consider limiting adjacent waters to include only waters located in floodplains and riparian areas of jurisdictional waters if specific parameters for confined surface and shallow subsurface connections cannot be codified in the final rule. (p. 6)

Agency Response: See essay above.

American Gas Association (Doc. #16173)

- 3.282 AGA members further report that jurisdictional determinations will vary depending on the time of year when a site is surveyed. As the proposal’s defined term “neighboring” can mean any connection, there may be no evidence of a connection between an impoundment and a U.S. stream at some times of the year, and at other times, the same “neighboring” impoundment may show a surface connection. Jurisdictional

⁹² Although Justice Kennedy’s significant nexus test considered the adjacency of “wetlands, either alone or in combination with similarly situated lands in the region,” Rapanos, 547 U.S. at 780, his opinion did not define “similarly situated” or “in the region” and the agencies have provided no basis that his opinion supports per se jurisdiction for waters under the broad definition of neighboring in the 2014 Proposed Rule.

⁹³ Both the plurality and the concurrence expressed serious concern over the assertion of jurisdiction over wetlands “adjacent to” covered waters when the wetlands were physically remote from those waters, Rapanos, 547 U.S. at 742 (Scalia, J., plurality) (“Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters that we described as a ‘significant nexus’ in SWANCC.”); id. at 781 (Kennedy, J., concurring) (applying the significant nexus test because otherwise the regulation allows for jurisdiction over drains, ditches and streams remote from any navigable-in-fact water and likely to be beyond the Act’s scope like the isolated ponds in SWANCC).

⁹⁴ Rapanos, 547 U.S. at 742, 781.

determinations for such sites will be a repetitive, inconsistent exercise, and both regulatory field officers and project consultants (science experts) are likely to reach inconsistent, subjective decisions. Simply broadening the definition of WOTUS is not a suitable replacement for rigorous scientific analysis and clear metrics. (p. 7)

Agency Response: See essay above.

Vulcan Materials Company (Doc. #16566)

- 3.283 The inclusion of flood plains and associated riparian areas without definition of the flood criteria to use in defining the flood plain creates confusion and uncertainty regarding the extent of jurisdictional coverage. Irrespective of the flood criteria, the inclusion of flood plains applies the CWA jurisdiction broadly without evaluation of whether connectivity or other jurisdictional criteria are present. Flood plains are defined based on the probability of some periodic flood event; not CWA jurisdictional criteria. The purpose and objectives of defining flood plain locations and flood hazard zones have different statutory and regulatory basis from the CWA jurisdictional determination process, and the processes are not interchangeable. (p. 2)

Agency Response: See essay above.

- 3.284 While the FEMA maps may have been developed in another context, they are, as noted by many commenters, familiar, easily accessible and understandable. Categorically, flood plains and associated riparian areas should be exempted from consideration as jurisdictional waters, unless such areas qualify as jurisdictional based on current criteria. (p. 4)

Agency Response: See essay above.

National Milk Producers Federation (Doc. #1599)

- 3.285 The proposed rule asserts CWA jurisdiction over waters or wetlands using terms such as “neighboring,” “riparian area,” “floodplain,” “tributary,” and “significant nexus.” These terms are as clear as muddy water, and, therefore, will create confusion for dairy producers. Additionally, the proposed rule heavily relies on “best professional judgment” in application of these and other terms. This will only exacerbate the lack of certainty for farmers. Because a significant amount of time and technical expertise will be needed to evaluate definitional alternatives, more time will be required to fully evaluate these alternatives to assure greater regulatory certainty to U.S. dairy producers. (p. 2)

Agency Response: See essay above.

Alameda County Cattlewomen (Doc. #8674)

- 3.286 On more than one occasion during the comment period, the agencies have said the “adjacent waters” category does not include every water within a floodplain and riparian area, but simply those that have a connection to another jurisdictional water. Perhaps these officials should read the words that were placed in the Federal Register on April 21, 2014. “The term neighboring, for purposes of the term “adjacent,” includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1)

through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” (Proposed Rule at 22207 (emphasis added)). The plain language of the regulation makes all waters within a floodplain or riparian area jurisdictional and any water left outside those areas that might have some surface or subsurface hydrologic connection can also be included. The agencies are out of bounds. Not every water within a floodplain and riparian area meet Justice Kennedy’s “significant nexus” test and therefore you cannot make them jurisdictional by rule. This change in the definition has a very real possibility to impact every single operation in the United States that is involved in production agriculture, usurping the federal-state partnership that underpins the CWA. (p. 12-13)

Agency Response: See essay above.

- 3.287 The term “adjacent” should have the plain meaning of the word if the true intent of the regulation is to provide clarity to the regulated community. Using the common definition of the word allows the vast majority of people to have a shared understanding of its meaning. The term “neighboring” within the agencies’ definition of “adjacent” is beyond the common understanding of what would be an “adjacent water” to a TNW. A simple google search should enlighten the agencies on the public’s understanding of the term “neighboring.” That search results in a definition for “neighboring” of “next to or very near another place; adjacent.”⁹⁵ If the agencies’ definition of neighboring can include all waters within an undefined floodplain and riparian area they have gone well beyond the common understanding of the term, making the category of “adjacent waters” virtually limitless. (p. 13)

Agency Response: See essay above.

Floyd County Farm Bureau, Inc. (Doc. #9673)

- 3.288 We are also concerned with the provision of the rule which creates a category of "adjacent waters." Adjacency is broadly defined. The reference to "neighboring" waters which may be remotely located from a jurisdictional water raises the question of whether those "waters" will have any impact, let alone a significant affect, upon the jurisdictional water. Additionally, the use of gullies, rills and non-wetland swales to serve as the connection to those features and the jurisdictional water raises the possibility that the gullies, rills and swales could be subject to regulation. (p. 2)

Agency Response: See essay above. The final rule also expressly excludes erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; from regulation as waters of the United States even where they may have connections to jurisdictional waters. Additional exclusions are provided in today’s rule.

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

- 3.289 "Neighboring" is the first term the proposed rule seeks to define as falling within "adjacent" and describing all waters. It is broadly described as including waters within

⁹⁵ Google definition of “neighboring,” available at https://www.google.com/?gws_rd=ssl#q=define+neighboring.

riparian areas or floodplains, or waters with a confined surface or shallow subsurface connection to jurisdictional waters. This then requires the agencies to define "riparian" and "floodplain," which they do as follows:

Riparian area. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

Floodplain. The term 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 water flows.

While the agencies stress that no uplands adjacent to jurisdictional waters will be classified as waters of the United States, the definitions above are so vague and all-encompassing that they could include wetlands, pools, ponds, ephemeral broken waterways, ditches and other features far from jurisdictional waters without regard to the Supreme Court's "reasonable proximity" restriction in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). How far upland can a riparian influence extend before waters located in it cease to fall under CWA authority, especially if plant and animal communities that may migrate or have food sources up and down the landscape are included in that assessment? What do the agencies consider "moderate" or "high" water flows that would cause a water to be jurisdictional? Lacking any practical, field based, legal, or other basis for setting limits on these terms, the rule gives the agencies nearly limitless flexibility for deciding which waters they will regulate and which ones they will not. (p. 6-7)

Agency Response: See essay above.

Louisiana Cotton and Grain Association (Doc. #12752)

- 3.290 Adjacent waters as defined in the proposed rule replaces what the current rule regulates as adjacent wetlands, which is a clear expansion of jurisdiction simply by the substitution of "waters" for "wetlands." An even broader expansion of jurisdiction is apparent upon a reading of the previously undefined term "neighboring," one of the synonyms of "adjacent" in the proposed rule's definition of adjacent. Neighboring includes waters located within the riparian area or floodplain of a TNW, interstate water, territorial sea or tributary, or waters with a surface or shallow subsurface hydrologic connection to such a jurisdictional water (emphasis added). Adding to the broad and vague definition of "neighboring" is the fact that the proposed rule provides no limits on the appropriate area or floodplain interval to apply. The proposed rule instead leaves this determination to the agencies' "best professional judgment" If, for example, a 100-year FEMA floodplain interval were to be arbitrarily selected by an agency representative's "best professional judgment," then any wet feature in the Louisiana Delta that has 1 "hydrologic connection" every 100 years within that floodplain area, even if miles away, could be "adjacent" to the Mississippi River. (p. 3)

Agency Response: See essay above.

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

- 3.291 The lack of a clear definition for the term “floodplain” is also problematic. Common, historical practice and good science dictate that a floodplain be defined by a recurrence interval. The agencies, however, have elected not to so, apparently leaving that decision to individual agency officials and in doing so introducing uncertainty and subjectivity into the process. Similarly, as with floodplains, the proposed rule leaves to the agencies’ “best professional judgment” determinations made regarding a riparian area.⁹⁶ Applying a best professional judgment standard can only lead to confusion and inconsistency across districts. (p. 7)

Agency Response: See essay above.

North Dakota Soybean Growers Association (Doc. #14121)

- 3.292 According to the proposal, “reasonable proximity,” a concept which is also subjective and vague, applies only when adjacency is established through a hydrologic connection for “water” that lies “outside of the floodplain and riparian area of a tributary”.⁹⁷ For “waters” within the riparian area, the proposal does not explain how far from a waterway that the “bordering” area would extend.

“Bordering” area is further explained as a location “where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area,” but it is entirely unclear what the agencies mean by the “area” where such influence exists. Because the agencies are attempting to rely on a functional, not spatial, definition for “riparian area,” the proposed rule is hopelessly vague and is subject to varying, case-by-case interpretations and applications to regulated parties. This varying interpretation is precisely the type of analysis that the agencies claim that the WOTUS rule is designed to avoid!

The definition of “floodplain” relies on the undefined term “waters” and the concept of “bordering.” While the definition employs a measurable concept, an area that actually has been inundated by, and was formed by sediment deposition from, actual waters, the return period for such inundation is not specified. Is it the 10-year, 50-year, 100-year, or 200-year floodplain? The agencies cannot simply say, as they have in the proposal, that they will use their “best professional judgment” to answer this question on a case--by--case basis because this judgment, again, returns us precisely to the type of analysis they claim the WOTUS rule is designed to avoid! (p. 8-9)

Agency Response: See essay above.

Kansas Agriculture Alliance (Doc. #14424)

- 3.293 Under the proposed rule the term “floodplain” is given no temporal limits. Therefore, the agencies are free to pick and choose how far away from a stream it would want to exert jurisdiction, defying the Supreme Court’s limitations on adjacency. If for argument’s sake the agencies intend to use the 100-year floodplain under the definition contained in the rule, vast swaths of dry land would now become WOTUS because it is

⁹⁶ 79 Fed. Reg. at 22,209

⁹⁷ 79 Fed. Reg. 22,207---08

capable of having water once in 100 years. The agencies have tried to assert that the definition only includes areas in the floodplain where water is present. At the same time, however, the agencies claim jurisdiction over every part of an intermittent or ephemeral stream regardless of whether water is present. The agencies cannot have it both ways. If EPA and the Corps stand on its belief that every part of an ephemeral stream is regulated regardless of the presence of water in or on the feature, then the entirety of a feature like a floodplain, categorically designated as WOTUS by the proposed rule, but is devoid of water for a period of time, is subject to regulation at all times. Even if the presence of water in or on the feature is permitted to trigger regulation, because floodplains often have high water tables, farmers and ranchers are left to only speculate which part of the floodplain meets the shallow subsurface hydrologic connection component. (p. 5)

Agency Response: See essay above. The agencies reiterate that the floodplain is not categorically designated as jurisdictional by the rule. Waters located in the 100-year floodplain within 1500 feet of the ordinary high water mark of an (a)(1) through (a)(5) water are "neighboring" and therefore jurisdictional. As stated in the Preamble, the agencies use the term "water" and "waters" in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems, identifiable by the water contained in these aquatic systems or by their chemical, physical, and biological indicators. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. Thus, an ephemeral stream, which has chemical, physical, and biological indicators that it is a stream, remains a water even during those seasons when water is not present. Land in a floodplain, in contrast, will not have the chemical, physical, and biological indicators that it is a water because it is not a water. See also General Compendium. Additionally, the rule does not modify the exemptions at CWA Section 404(f). For example, the CWA exempts from the Section 404 program discharges associated with normal farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices (Section 404(f)(1)(A)).

Iowa Farmers Union (Doc. #15007)

3.294 To further the goal of water not crafting an easily applied bright---line rule, we propose incorporating the following changes in the final rule:

- The final rule should adopt a factor; physical characteristics caused reasonable limitation to the term "floodplain." For example, limiting the scope of "neighboring" waters to those waters located within the established 20---year floodplain would allow farmers to easily map the area in question and identify waters within the defined floodplain that may be jurisdictional. Placing no such limitation on the term "floodplain" makes the rule too broad to be easily interpreted and applied by the regulated community. Waters falling outside the rule's defined floodplain would still be adequately protected by the "significant nexus" test under paragraph (7).
- The final rule should eliminate waters with either a shallow subsurface or confined surface hydrologic connection from the definition of "adjacent." Such connections are not well---defined, not readily identified, and not an appropriate part of an otherwise

straightforward jurisdictional test. Again, these waters would still be adequately protected via the “significant nexus” test under paragraph (7). (p. 5-6)

Agency Response: See essay above. Additionally, the rule does not modify the exemptions at CWA Section 404(f). For example, the CWA exempts from the Section 404 program discharges associated with normal farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices (Section 404(f)(1)(A)).

National Pork Producers Council (Doc. #15023)

- 3.295 In the case of the use of a floodplain to determine adjacency, we suggest that the relationship between the wetland and tributary in question must be relatively persistent, common and significant. The direct hydrological interaction must be more common than not, and as a result we suggest the extent of the floodplain be defined by the reach of flood waters as a result of a 5-year, 24-hour rainfall flooding event. (p. 21-22)

Agency Response: See essay above.

Arizona Farm Bureau Federation (Doc. #15064)

- 3.296 [T]he language associated with “floodplains” or “riparian areas” is vague and the Agencies are allowed to use their “best professional judgment” to determine what flood intervals to use and the applicability of riparian designation. This is a clear example of the uncertainty created by the proposed rule. Instead of clarity farmers and ranchers who operate in such geographical areas are left wondering if they will need to obtain permits to conduct normal farming activities. (p. 2)

Agency Response: See essay above. Additionally, the rule does not modify the exemptions at Section 404(f). For example, the CWA exempts from the Section 404 program discharges associated with normal farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices (Section 404(f)(1)(A)).

Florida Fruit & Vegetable Association (Doc. #15069)

- 3.297 The jurisdictional expansion continues with “riparian” defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” The proposed definition for “riparian” is especially problematic in Florida due to our unique geologic characteristics and interfaces with our surficial aquifer system. Due to hard pan soil type, shallow underlying clay lenses, shallow ground water tables and karst topography, subsurface hydrology has a substantial impact and influence on a very large portion of the state’s land area which, per the proposed definition, could be classified as “riparian” and fall under CWA jurisdiction. Karst terrains develop in areas underlain by carbonate rocks, primarily limestone and dolomite, and Florida is almost entirely underlain by carbonate

rocks.⁹⁸ The rule continues by explaining that “a shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the vertical flow of water, or in karst systems, especially karst pans.” Again, very large portions of Florida’s surface area could categorically be defined by these characteristics. Lastly, although the term “floodplain” is defined in the proposed rule, it is done so vaguely, leaving much open to interpretation. For example, what are the parameters defining the extent of the floodplain? Is it based on a 10 year/24 hour, 25 year/24 hour or 100 year/24 hour storm event? The design storm duration would have significant implications on the actual area of inundation. This aside, the landscape of Florida is characterized by its numerous lakes and rivers, all of which have associated floodplains. As is the case with potential riparian areas, the amount of land area within the state that could categorically fall under the proposed definition of “floodplain” is quite astonishing. (p. 3)

Agency Response: See essay above.

American Forest Foundation (Doc. #15093)

3.298 [S]uch broad and diverse terms as riparian area and floodplain are deemed necessary, then each term must be defined with specific, measurable, repeatable, and science-backed metrics that can be easily understood and quickly derived when assessing all possible landscape features across the United States. (p. 4)

Agency Response: See essay above.

Virginia Poultry Federation (Doc. #16604)

3.299 In addition, the definitions of “riparian area” and “floodplain” rely on ambiguous and undefined concepts. For example, “riparian area” is defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” While this definition is vague and broad (particularly as it relates to ecological processes, communities and structures), there is no clarification in the proposed rule on how far a riparian area extends away from the water body.

Furthermore, “floodplain” is defined as an area that has been inundated by actual waters or was formed by sediment deposition from actual water. The proposed rule does not, however, specify whether it is the 10-year, 50-year, 100-year or 500-year floodplain that is included in the definition. Using “best professional judgment” to answer this on a case-by-case basis (as is suggested in the proposed rule) provides no meaningful guidance as to what areas are to be included as a floodplain for purposes of designating waters of the U.S. subject to CWA jurisdiction.

Accordingly, “adjacent waters” in the proposed rule is a vague and overly broad concept that could include an area as vast as the 500-year floodplain of the Ohio River valley. Landowners in these areas or any area within miles of a navigable water or tributary

⁹⁸ Karst in Florida, Special Publication No. 29. 1986. Florida Geological Survey. Available at: http://publicfiles.dep.state.fl.us/FGS/FGS_Publications/SP/SP29LaneKarstFlorida.pdf

could never be sure if activities on their land would trigger federal water permit requirements covered by the CWA. This is not the clarity and certainty that poultry and egg producers and other landowners need. (p. 6-7)

Agency Response: See essay above.

New Mexico Cattle Growers Association et al. (Doc. #19595)

- 3.300 “Neighboring” should also remove those last clause caveats regarding “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” This type of investigation will require significant resources to make what are really case-by-case determinations of connection but not the significance of the connection. To leave the clause in place serves only to further confuse EPA’s and USACE’s efforts toward clarity. Further, it is abrasive to all that the agencies would go to great lengths to find a shallow subsurface connection, but not make a similar determination of its significance. (p. 13)

Agency Response: See essay above.

Georgia Department of Transportation (Doc. #14282.1)

- 3.301 We agree that it is useful to include a regulatory definition of "neighboring" given the use of that word in the definition of "adjacent." Or concern is that the proposed definition of "neighboring" is open to such an expansive interpretation that it could - and likely would - result in a substantial broadening of the definition of "adjacent waters" that are jurisdictional by rule.

More specifically, our concern with the proposed definition of "neighboring" is that it could be interpreted to eliminate the twin requirements of reasonable proximity and significant effect. For example, the proposed rule would allow "waters with a shallow subsurface hydrologic connection" to be deemed "neighboring" regardless of the degree of that subsurface connection, and regardless of the distance of that connection. If read literally, this definition would allow a water to be deemed adjacent, and therefore jurisdictional by rule, based on a geographically remote and hydrologically insignificant subsurface connection.

The proposed definitions of "riparian area" and "floodplain" heighten this concern, because they also do not include a requirement for reasonable proximity and significant effect.⁹⁹ In particular, the definition of "floodplain" - which includes areas "inundated during periods of moderate to high water flows" - could be construed to encompass areas that are subject to flooding only during rare and extreme flooding events. The effect of these definitions could be to define as "adjacent" - and thus jurisdictional by rule - waters that are not in any reasonable sense adjacent.

The expansive definition of "neighboring" raises particular concerns in States with prairie pothole wetlands. As written, the rule would allow the Corps to assert jurisdiction over prairie pothole wetlands based on a "confined surface hydrologic connection" if the

⁹⁹ The proposed regulations define "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." While the term "directly influence" does help to limit the scope of the definition, it does not require a significant effect

wetlands "fill and spill" into jurisdictional waters during occasional flood events - regardless of the distance between the prairie pothole area and the jurisdictional water. "Shallow subsurface connections" also could be used as a basis for asserting jurisdiction over prairie pothole areas. Our members are concerned that the proposed rule would expand, perhaps dramatically, the area deemed jurisdictional by the Corps in the prairie pothole region.

Recommendation: We recommend revising the definition of "neighboring" to include an explicit requirement for both reasonable proximity and significant effect. The rule should include specific criteria for determining whether these requirements are met. Under this approach, the existence of a subsurface hydrological connection would not automatically result in a finding that waters are jurisdictional by rule. Similarly, location within a riparian area or floodplain would not be enough, on its own, to cause waters to be deemed jurisdictional by rule. Instead, the waters would be deemed "adjacent" and thus jurisdictional by rule only if they are actually located close to other jurisdictional waters and have a significant effect on the chemical, physical, and biological integrity of those waters. We also support the following options among those identified in the preamble for limiting the definition of "neighboring":

- asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water;
- considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; and
- establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent.¹⁰⁰ (p. 7-8)

Agency Response: See essay above. See also Other Water Compendium for a discussion of prairie potholes.

Beaufort County Stormwater Utility (Doc. #7326.1)

3.302 The proposed definition of "neighboring" could be interpreted to eliminate the requirements of reasonable proximity and significant effect. For example, the proposed rule would allow "waters with a shallow subsurface hydrologic connection" to be deemed "neighboring" regardless of the degree of that subsurface connection and regardless of the distance of that connection. If read literally, this definition would allow a water to be deemed adjacent and, therefore, jurisdictional by rule, based on a geographically remote and hydrologically insignificant subsurface connection of an undefined time-scale.

"Floodplain" is 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 water flows. EPA has stated that it will use "best professional judgment" when determining where a floodplain exists. The proposed definitions of "riparian area" and "floodplain" heighten this concern over what neighboring means,

¹⁰⁰ 79 Fed. Reg. 22298.

because they also do not include a requirement for reasonable proximity and significant effect. In particular, the definition of “floodplain” which includes areas “inundated during periods of moderate to high water flows” could be construed to encompass areas that are subject to flooding only during rare and extreme flooding events. The effect of these definitions could be to define as “adjacent” and thus jurisdictional by rule waters that are not in any reasonable sense adjacent.

Recommendation: Revise the definition of “neighboring” to include an explicit requirement for both reasonable proximity and significant effect. The rule should include specific criteria for determining whether these requirements are met. (p. 1-2)

Agency Response: See essay above.

JEA (Doc. #10747)

- 3.303 Like the proposal's approach to ditches, the Agencies' treatment of "other" waters raises significant questions:

The term "riparian area" is defined broadly as including "transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems." What does the phrase "influence the exchange of energy and materials" mean in this context?

The proposed definition does not specify an inundation return period for deeming a waterbody jurisdictional based on floodplain considerations; instead, the proposal states that precise outcomes will be determined based on "best professional judgment." How is a member of the regulated community to know if a seemingly isolated water is jurisdictional based on such a nebulous test?

Again, JEA requests that the Agencies resolve these issues and consider whether the assertion of authority over "adjacent" and "neighboring" waters would create environmental benefits. Further, the Agencies should reevaluate whether these concepts are consistent with the text of the Clean Water Act and applicable U.S. Supreme Court precedent. (p. 4)

Agency Response: See essay above.

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15413)

- 3.304 The proposed rule defines floodplains as "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 water flows." As local sponsor, MSD is concerned that the term "floodplain" is not tied to the generally understood Federal Emergency Management Agency (FEMA) program that oversees the National Flood Insurance Program (NFIP) in floodplain areas. The rule states that jurisdictional determinations over the extent of floodplains will be decided by the "best professional judgment and experience" of agency staff. MSD is concerned that this could lead to inconsistent interpretations and applications and requests that the definition be clarified. (p. 2)

Agency Response: See essay above.

Lake County Stormwater Management Commission (Doc. #16893)

3.305 328(c)(4) - Floodplain: This term is ambiguous and subject to wide interpretation ...“inundated during periods of moderate to high flows.” How would that be consistently quantified, and by whom? Accordingly, we believe this definition should be removed from the proposed rule.

428(c)(2) - Neighboring: We suggest “or floodplain” be removed from this definition (consistent with our comment [#3] above). (p. 3)

Agency Response: See essay above.

Duke Energy (Doc. #13029)

3.306 After this statement, the proposed rule goes into a lengthy discussion about the definition of “neighboring.” Disappointingly, this definition does not offer clarification on this issue, or clarify “great distance,” but instead notes several other parameters (i.e., reasonably proximate) that would make it almost impossible for a regulated entity to contest any final interpretation. This is yet another example of how the proposed rule is ambiguous, creates uncertainty and goes far beyond what is currently jurisdictional. The agencies should clarify the definitions in any final rule. (p. 31)

Agency Response: See essay above.

3.307 Upper Niobrara White Natural Resources District, Chadron, NE (Doc. #13562) Neighboring for the purpose of determining adjacent waters includes waters with a "shallow subsurface hydro logic connection". Subsurface water is groundwater and if the two waterbodies in question are jurisdictional, EPA could usurp authority of the subsurface water, ignoring the statutory authority of the NRDs. It is recommended that EPA revert back to the term navigable waters and apply jurisdiction where there is a direct surface connection. (p. 2)

Agency Response: See essay above. In addition, for the reasons discussed in the TSD and preamble, as well as elsewhere in this compendium, the agencies disagree with the commenter that a water cannot be jurisdictional unless it has a hydrological connection with an (a)(1) – (5) water.

Santa Clara Valley Water District (Doc. #14776)

3.308 Definitions should be based on and specify easily recognizable field characteristics for what are waters of the United States and what are not. For example, the proposed definition of riparian area is broad and general, suggesting a need for regional delineation manuals similar to what currently exist for wetlands. This increases jurisdictional area of the CWA, as well as permitting and other costs of projects, programs, and activities. The proposed definition of a floodplain should not be subjective (i.e., moderate to high flows), but relate to specific hydrologic frequency of flooding. For example, a bankfull event (1 to 2 year recurrence frequency) shapes stream geomorphology, often relates to ordinary high water, and often can be identified in the field. Floodplains shown on the Federal Emergency Management Agency (FEMA) Flood Insurance (p. 2)

Agency Response: See essay above.

ERO Resources Corporation (Doc. #14914)

- 3.309 Under the proposed rule, waters and wetlands occurring in a floodplain or riparian area of (a)(1) through (5) waters are assumed to have a confined surface or shallow subsurface connection to the jurisdictional water. This presumption may not always be true and should be a rebuttable presumption. (p. 23)

Agency Response: See essay above.

- 3.310 Eliminate the terms "riparian" and "floodplain" from the proposed rule and simply state that adjacent waters and wetlands are those that have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water. If the agencies are uncomfortable with the above-recommended modification, then the following modification is proposed: Adjacent waters and wetlands are those that have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water. Adjacent waters and wetlands frequently occur in riparian areas. "Riparian areas" are defined as 1) the portion of the valley bottom influenced by fluvial processes under the current climatic regime, 2) riparian vegetation characteristic of the region, and 3) the area of the valley bottom flooded at the stage (water surface elevation) of the 100-year recurrence interval flow. (p. 24)

Agency Response: See essay above.

South Metro Water Supply Authority, Colorado (Doc. #16481)

- 3.311 Are isolated waters without any direct surface or shallow subsurface connection to TNWs, but which periodically capture sheet flows containing pollutants, jurisdictional; (p. 4)

Agency Response: See essay above. If the water is not excluded and does not meet the definition of "adjacent" in the final rule, it would only be jurisdictional based on a case-specific evaluation under (a)(7) or (a)(8).

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

- 3.312 The Great Waters Coalition supports the many important clarifications provided by in the proposed rule: (1) defining the term "tributary," (2) affirming that waters of the U.S. categorically include all tributaries to traditionally navigable Waters and interstate waters, and (3) defining "neighboring" as it relates to "adjacency" for wetlands and other waterbodies, such as lakes or ponds. Furthermore, application of "adjacency" to both wetlands and other waterbodies will work in concert with the clarification on tributaries to restore protections for headwaters and downstream waters into which tributaries flow. The Great Waters Coalition strongly support the rule's recognition that adjacency does not require a permanent, unbroken hydrological connection to a traditionally navigable water, that wetlands physically separated from jurisdictional waters can still be adjacent, and that the wetlands and other waterbodies located within the riparian area or floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent. (p. 2)

Agency Response: See essay above.

Chesapeake Bay Foundation (Doc. #14620)

- 3.313 CBF supports the definition of the term “Neighboring” for purposes of Waters of the U.S. but recognizes operational challenges with one part of that definition. Under the first part of the definition: when located in the floodplain or riparian zone of a jurisdictional water is a reasonable way for agencies to consider adjacency within the Chesapeake Bay watershed as it is directly consistent with the way the Chesapeake Bay Watershed Model works as described above. The other option provided in the rule, “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection” may or may not be consistent with the framework of the Chesapeake Bay Watershed Model on which loads and load reductions are calculated within the Chesapeake Bay TMDL unless considered at fairly coarse resolution such as a major basin. The Chesapeake region continues to gain understanding of the role of groundwater sinks of dissolved nutrients, their lag times for delivery to adjacent waters and their ultimate fate as a pollutant load. However, shallow subsurface hydrologic connections and confined surface hydrologic connections could only be determined through costly and time-consuming groundwater pathway and ditch network analyses at relatively fine resolution. (p. 6)

Agency Response: See essay above.

National Wildlife Federation (Doc. #15020)

- 3.314 We support the agencies’ proposal to clarify the term “adjacent” by defining “neighboring” as “waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (a)(5) of this section” See 33 CFR 328.3(c)(2); 22207. We agree that one sufficient condition of adjacency should be location within a riparian area or floodplain. And we generally support the agencies’ proposal to define the lateral reach of the term neighboring by proposing science-based definitions of “riparian area” and “floodplain” for purposes of defining neighboring and adjacency. 79 Fed. Reg. at 22207. (p. 46)

Agency Response: See essay above.

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

- 3.315 The conservation groups agree with your inclusion of adjacent waters within WOTUS, but disagree with your restrictive definition of “neighboring.” (p. 5)

Agency Response: See essay above.

- 3.316 The conservation groups concur with your assessment that waters that are adjacent to so-called (a)(1) to (a)(5)3 waters provide “vital functions for downstream traditional navigable waters, interstate waters or the territorial seas,” and that their substantial impact is a function not only of flow, but also of the movement of energy and materials (including biological interaction). 79 Fed. Reg. 22261. You have noted that adjacent water bodies that retain such vital functions include wetlands, oxbow lakes, and ponds. Id. In the conservation groups’ view, these points are amply demonstrated in the scientific literature, (p. 6)

Your proposal also includes, as jurisdictional adjacent waters, those water bodies deemed to be “neighboring waters,” including waters outside the riparian area or floodplain that are nonetheless hydrologically connected to an (a)(1) to (a)(5) water body. 79 Fed. Reg. 22210-11, 22268. This too is scientifically supportable.

However, the conservation groups disagree with your specification of the type of connection that qualifies, namely either a confined surface hydrologic connection or “a shallow subsurface hydrologic connection.” 79 Fed. Reg. 22207. This formulation leaves unprotected by the “adjacent waters” designation of those neighboring waters, including wetlands, which are outside the riparian area or floodplain and retain only a subsurface hydrologic connection that is not shallow. Your exclusion of such a water body from the “neighboring-adjacent” protection lacks any scientific basis, is contrary to the purpose of the Clean Water Act, and is not compelled by Rapanos, SWANCC or Riverside Bayview. Similarly, see, Rapanos, 126 S.Ct. 2244-45 (Kennedy occurrence explaining that the Rapanos plurality’s postulated requirement of a surface-water connection draws no support from the structure of the Clean Water Act or Supreme Court precedent in SWANCC or Riverside Bayview). Furthermore, your definition leaves vulnerable nearby wetlands, potholes, playas, lakes, and other similar non-adjacent, but hydrologically connected water bodies that would require substantial time and costs to prove to a trier of fact, even though the hydrologic principle of connection is virtually inevitable, that such water bodies are connected to, and therefore per se have a significant nexus to, the navigable water. (p. 6-7)

Agency Response: See response above.

- 3.317 [T]he conservation groups urge you to modify your proposed definition of “neighboring” as follows:

Neighboring. The term neighboring, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a ~~shallow-subsurface hydrologic connection or confined-surface~~ hydrologic connection to such a jurisdictional water. (p. 8)

Agency Response: See response above.

Environmental Defense Fund (Doc. #15352)

- 3.318 The proposed rule also clarifies the meaning of adjacency and tributaries by providing definitions of “neighboring,” “floodplain,” and “tributary.” It is quite clear that waters, not land within floodplains, are protected. The agencies have reasonably declined to adopt an arbitrary definition of floodplain (such as a 100-year floodplain). Conditions vary too much throughout this country to adopt the same flood interval for the entire nation. It is much more accurate and faithful to the best scientific understanding of connectivity to leave the determination of which flood interval to use to best professional judgment. We support the agencies’ broad definition of tributaries consistent with the science that tributaries contribute flow, directly or indirectly through another water, to a navigable water or impoundment of navigable water, that tributaries can be natural, man-made, or artificial, and can include ditches, canals, ponds, wetlands and impoundments. (p. 4-5)

Agency Response: See essay above, as well as the **Tributaries compendium**.

Defenders of Wildlife and Patagonia Area Resource Alliance (Doc. #16394)

- 3.319 Finally, the rule’s treatment of a “shallow subsurface hydrologic connection” in the definition of “neighboring” in proposed subsection (u)(2) is confusing and inconsistent with the science for another reason. Although the definition of “adjacent waters” includes waters with a “shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water,” the rule later excludes all groundwater from Clean Water Act jurisdiction. See proposed subsections (u)(2), (t)(5)(vi). There is no scientific or legal basis to protect a wetland connected to a jurisdictional water by groundwater, but not the groundwater itself. As described in more detail below, Defenders strongly disagrees with the exclusion of groundwater. (p. 10)

Agency Response: See essay above.

Western Resource Advocates (Doc. #16460)

- 3.320 WRA supports the proposed rule’s borrowing from the existing regulation that defines adjacency and adding the additional definitions for “neighboring,” “flood plain” (as WRA suggested in its comments on the guidance¹⁰¹) and “riparian area.”¹⁰² For example, given the extensive physical alteration of watersheds in the Rocky Mountain region, it would create a perverse incentive to fill wetlands were the mere existence of a constructed dike to block jurisdiction over a previously adjacent wetland. Again, thinking about the federally endangered razorback suckers of the Colorado River Basin, even adult fish migrate between the Green and Yampa rivers and neighboring wetlands that are flooded by high spring peak flows.¹⁰³ To the extent that Clean Water Act protection plays a critical role in recovering and thereafter sustaining these native fish, it will be imperative to maintain jurisdiction over these wetlands. (p. 19-20)

Agency Response: See essay above. This comment adds further support to the agencies’ approach regarding constructed dikes and the like.

The Wildlife Society (Doc. #14899)

- 3.321 We find that there is potential for conflicting direction between the language in the definition for “neighboring” and the exclusions listed for waters of the United States. Language in the definition for “neighboring” indicates that waters with a “shallow subsurface hydrologic connection” to jurisdictional waters are themselves considered jurisdictional waters. Water that moves subsurface is in fact groundwater, and therefore groundwater should not be categorically excluded in paragraph (s)(5)(iii). Scientific evidence presented in the SAB report and Tiner (2003) on unidirectional wetlands cites numerous examples of the types and degrees of connectivity that exists between these wetlands and downstream waters (in cases including so-called geographically isolated wetlands, which are clearly identified as very often not being hydrologically isolated) at

¹⁰¹ These comments are attached.

¹⁰² 40 C.F.R. § 122(c), 79 Fed. Reg. at 22263.

¹⁰³ See Yampa PBO at 33, supra note 83.

the regional level. Clarifying this language will be particularly useful for landscapes such as the Prairie Pothole Region, the Nebraska Sandhills, and playa wetlands in which unidirectional wetlands play a dominant role in landscape form and function.

We are especially concerned that even though a "shallow subsurface hydrologic connection" can create a significant nexus between jurisdictional waters, the "shallow surface hydrologic connection" itself is not protected under CWA. If such a connection is disturbed, this action may alter the nature of the water made jurisdictional because of this connection, even to the point of changing its jurisdictional status. We believe that this situation could form a loophole in the rule, allowing the destruction of a "shallow subsurface hydrologic connection" in order to remove a water body from jurisdictional status. Therefore we suggest that language be added to protect such connecting waters.

Also, because there will inevitably be ambiguity about what qualifies as "shallow" that will lead to the inability for consistent practical application, we suggest removing this word from the definition. (p. 2)

Agency Response: See essay above. In addition, the agencies reiterate that only waters of the United States are regulated by the CWA. For additional information, see the Exclusions compendium.

Southeastern Legal Foundation (Doc. #16592)

- 3.322 The definition of "neighboring" itself contains several problems. First, the definition allows for jurisdiction established by "subsurface hydrologic connections." The Agencies cannot use groundwater, a water that falls outside of the purview of the CWA, as a link in the chain of establishing jurisdiction under the CWA. Second, further nesting of definitions, the definition of neighboring contains two newly defined terms: "riparian area" and "floodplain." As defined, neither riparian areas nor floodplains are themselves WOTUS or even water. Despite this, the Proposed Rule establishes jurisdiction over even the most isolated waters in both areas based solely on their "reasonable proximity" with no requirement for a "significant nexus" to be established. This vastly expands on the Agencies' current jurisdiction under the CWA. (p. 20)

Agency Response: See essay above.

Endangered Habitats League (Doc. #3384.2)

- 3.323 EHL supports the many important clarifications provided by the Clean Water Protection Rulemaking, including defining "tributary" for the first time and affirming once again that Waters of the U.S. categorically include all tributaries to Traditional Navigable Waters (TNW) and interstate waters. Additionally, the included definition for "neighboring" as it relates to "adjacency" for wetlands and other water bodies, such as lakes or ponds, is also a further help in clarifying CWA jurisdiction. Furthermore, application of "adjacency" to both wetlands and other water bodies, will work in concert with the clarification on tributaries to restore protections for headwaters and downstream waters into which tributaries flow. We especially support the recognition by the agencies that adjacency does not require a permanent, unbroken hydrological connection to the TNW, that wetlands physically separated from jurisdictional waters can still be adjacent, and that the wetlands and other water bodies located within the riparian area or

floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent. (p. 2)

Agency Response: See essay above.

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

- 3.324 “Neighboring” should also remove those last clause caveats regarding “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” This type of investigation will require significant resources to make what are really case-by-case determinations of connection but not the significance of the connection. To leave the clause in place serves only to muddy EPA’s and USACE’s efforts toward clarity. Further, it is abrasive to all that the agencies would go to great links to find a shallow subsurface connection, but not make a similar determination of its significance. (p. 15-16)

Agency Response: See essay above.

Wyoming Outdoor Council (Doc. #16528.1)

- 3.325 Adjacency will apparently require some level of reasonable proximity, even if there are hydrologic connections. See 79 Fed. Reg. 22207-08 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)). That said, confined surface or shallow subsurface hydrologic connections can create adjacency. *Id.* at 22208. The agencies should ensure careful adherence to the definitions of “neighboring,” “riparian areas,” and “floodplain” before excluding a water as an adjacent water just because it lies at some distance from an (a)(1)-(5) water. If there is one thing that is apparent from the discussions in Appendix A, it is that waters that are not immediately adjacent to a navigable water can nevertheless strongly impact those waters. Moreover, the concept of “chemical, physical, and biological integrity” as an objective of the CWA could probably be restated as seeking to restore the ecological integrity of the Nation’s waters. And, as the science of ecology illustrates, as its fundamental underlying hallmark, everything is connected and interconnected. Therefore, excluding adjacent waters just because they are not immediately adjacent to a navigable water should be done only rarely, when the science clearly shows there is a little downstream impact on chemical, physical, and biological integrity.

The EPA and the Corps invite comment on whether language such a geographically proximate” or “reasonably proximate” should be added to the definition of “neighboring.” 79 Fed. Reg. at 22209. We believe there is no need for this addition to what is meant by “waters with a shallow subsurface hydrological connection or confined surface hydrologic connection.” The EPA and the Corps have already made it clear uplands can never be adjacent waters. *Id.* at 22207. The detailed definitions of “riparian area” and “floodplain” also make this an unnecessary redundancy. The agencies have recognized that floodplains and riparian areas significantly affect chemical, physical, and biological integrity so there is no need to limit that core finding. See *id.* at 22210-11 (pointing out that adjacent waters can be separated “but those intervening uplands do not eliminate or impede the functional interactions...” and any determination of adjacency based on shallow subsurface or confined surface hydrologic connection outside the riparian area or floodplain requires clear documentation). (p. 4)

Agency Response: See essay above.

Audubon Society of Greater Denver (Doc. #16934)

- 3.326 Streams, tributaries and wetlands that will be protected through this rule supply drinking water to more than one-third of all Americans, filter pollutants, absorb floodwaters and provide habitat for a wide diversity of wildlife. Because they perform these vital functions it is imperative that they receive adequate long-term protection. We think the Rule's criteria for connectivity will help ensure this as well. (p. 1)

Agency Response: See essay above.

Florida Stormwater Association (Doc. #14613)

- 3.327 The proposed definition of "floodplain" is the broadest possible definition of the word. The definition is so broad that it would limit EPA's and the Corp's ability to use best professional judgment when determining where a floodplain (and therefore jurisdictional water) is or is not. It would create a state of confusion where many would litigate the terms "adjacent" and "floodplain" for years to come – the antithesis of the stated reasons for one of the primary reasons for proposing the regulations: To provide clarity in terms of the application of the CWA. (p. 3)

Agency Response: See essay above.

Congress of The United States (Doc. #1434)

- 3.328 [T]he rule heavily relies on undefined or vague concepts such as "riparian areas," "landscape unit," "floodplain," "ordinary high water mark" as determined by the agencies' "best professional judgment" and "aggregation." Even more egregious, the rule throws into confusion extensive state regulation of point sources under various CWA programs. (p. 1)

Agency Response: See essay above. The commenter does not specify how the rule will throw point source regulation into confusion; the TSD explains how waters of the US can also be point sources.

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

- 3.329 The definitions of neighboring, riparian area and floodplain are inappropriate [...] that has been implemented for decades. Does neighboring encompass the entire floodplain, which is for the first time defined in the regulations and defined in unquantified terms (moderate to high water flows). Why is there a sectional limit placed on the term?¹⁰⁴ How high is high: 50-year event; 100-year event; 500-year event? What are present climatic conditions? Recognizing that climate changes (whether as the result of human activity or not), has the climate changed in the last 50, 100 or 500 years? Will it continue to change? Similarly, "riparian area" is too nebulous. These definitions as proposed would establish new areas for dispute and allow regulators to add their own interpretation, which is a major problem in the implementation of the regulatory

¹⁰⁴ This is the existing problem with terms such as ephemeral, which specifically are limited to one section of the regulation.

program today. Flexibility when it comes to what is under federal jurisdiction is not appropriate and should not be subject to local, arbitrary determination. (p. 8)

Agency Response: See essay above.

O'NEIL LLP (Doc. #16559)

- 3.330 The proposed definition for the term "neighboring" is too expansive and capable of misuse by agency personnel to enable regulatory staff to claim that essentially any area of water in the floodplain or in a riparian area of the initial waters and their tributaries can be classified as "neighboring" and subject to jurisdiction under the CWA. (p. 8)

Agency Response: See essay above.

California Association of Sanitation Agencies (Doc. #12832)

- 3.331 Many wastewater treatment processes, including man-made spreading basins, are located near or even "adjacent" to rivers and tributaries that have been (or under the proposed rule, would be) designated as waters of the U.S. and may be located in the riparian or floodplain areas of these rivers. Because the proposed rule defines "adjacency" and includes the incorporation of waters within the flood plain or riparian area of a designated water of the U.S. as also being a jurisdictional water (see section 328.3(c)(2)-(4), FR 22263), this could lead to an interpretation that such spreading basins and artificial storage ponds are jurisdictional.

Specifically, the proposed rule would revise the current category of an "adjacent wetland" to include all "adjacent waters." (FR 22206) As a result, numerous treatment ponds, recycled water reservoirs, and spreading grounds/basins across California could become jurisdictional, creating a significant problem and interference with existing wastewater treatment processes. For example, under the proposed rule, the Montebello Forebay spreading grounds in Southern California would appear to become jurisdictional. (p. 3-4)

Agency Response: See essay above.

Committee on Small Business, U.S. House of Representatives (Doc. #14751)

- 3.332 First, under the Proposed Rule, *all waters and wetlands* that are adjacent to TNWs, interstate waters and wetlands, the territorial seas, impoundments, and tributaries are "waters of the United States."¹⁰⁵ In comparison, under the extant rule and 2008 Guidance, *only certain adjacent wetlands* were categorically deemed "waters of the United States."¹⁰⁶ Second, the definition of the term "adjacent" is different in the Proposed Rule than the existing regulation. The proposed definition of "adjacent" departs from the existing one by substituting "[w]aters, including wetlands" for "wetlands."¹⁰⁷ Third, the terms "neighboring," "riparian area," "floodplain," "tributary,"

¹⁰⁵ Proposed 33 C.F.R. §328.3 (a)(1)(6), 79 Fed. Reg. at 22, 263.

¹⁰⁶ 2008 Guidance, *supra* note 26, at 5-7 interpreting 33 C.F.R. §328.3 (a)(7), (c). The guidance states that the agencies only will assert categorical jurisdiction over wetlands adjacent to TNWs or adjacent wetlands that have a continuous surface connection with a relatively permanent non-navigable tributary. *Id.* at 5-7.

¹⁰⁷ Compare Proposed § 328.3 (c)(1) ("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 are 'adjacent waters.'") with 33 C.F.R. §

and "significant nexus" are defined for the first time under the Proposed Rule.¹⁰⁸ These terms are not defined in the existing rule or guidance documents. Finally, the Proposed Rule changes the list of geographic features that are expressly excluded from the definition of "waters of the United States."¹⁰⁹ Unfortunately, the proposed alterations to the existing regulation do not resolve the question of which water bodies are subject to the jurisdiction of the CWA. (p. 6-7)

Agency Response: See essay above.

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

3.333 The agency's categorical approach is especially problematic when considering their expansion of the criteria for adjacency by vaguely defining the terms "neighboring," "riparian," and "floodplain," and allowing adjacency jurisdiction to be established through a "shallow subsurface" connection. The agencies state that these terms were added to provide greater "consistency and clarity and certainty" but admit that application of these terms would be based "in part on best professional judgment" Id at 22208-09. However, because these terms are so imprecise, there is greater likelihood of arbitrary and inconsistent application. For example, the definition of floodplain ("an area bordering inland or coastal areas that is inundated during periods of moderate to high flows") has no clear limit and the determination of the appropriate flood interval may vary depending on the size of the tributary involved. In some cases, an agency reviewer could use the 10-to-20 year flood interval zone (the example in the rule's preamble) Id. at 22209, while another reviewer looking at essentially the same kind of tributary could use the 100-year interval. Such inconsistency becomes especially problematic when considering the agencies' new definition of neighboring ("waters located within the riparian area of floodplain of a water identified in paragraphs 1(i) through (v) or waters with a shallow subsurface hydrologic connection") to establish adjacency. Id. at 22263. A reviewer who uses a 100-year flood interval zone could find that wetlands and waters within that large floodplain, a considerable distance from a TNW, would become jurisdictional by rule as "neighboring" without any site-specific analysis. Another reviewer might apply only the 10-to-20 year frequency flood and could find that wetlands or waters the same distance from a similar stream are not jurisdictional by rule. Indeed, 100-year flood zone areas could encompass literally hundreds of square miles as reflected in the attached map. Thus, the floodplain concept in the rule is simply too imprecise and prone to abuse to provide clear guidance for the regulated community on what waters are subject to CWA regulation.

The "shallow subsurface" test to establish adjacency based on "best professional judgment" is similarly imprecise and prone to abuse in the field.¹¹⁰ While the agencies attempt to distinguish groundwater (which is not a WOTUS but can establish adjacency),

328.3 (c) ("Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'").

¹⁰⁸ Proposed 33 C.F.R. §328.3 (a)(1)(6), 79 Fed. Reg. at 22, 263.

¹⁰⁹ Id. at §328.3 (a)(1)(6), 79 Fed. Reg. at 22, 263.

¹¹⁰ There is no scientific standard to separate what is "shallow subsurface" and what is "groundwater." The USGS definition of groundwater includes shallow subsurface flow "groundwater occurs almost everywhere beneath the land surface" (USGS Groundwater Facts, http://pub.usgs.gov/circ/circ1186/html/gen_facts.html)

Id at 22208, that distinction is very vague and difficult to implement on the ground.¹¹¹ For example, one agency reviewer could find that groundwater from a tributary has a shallow subsurface connection because it occasionally reaches the 12-inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system of a similar stream could find that the subsurface water was deep groundwater although it occasionally inundates that root zone. The reviewer in the former case could then establish adjacency over a large area of the landscape whereas the latter reviewer would not. The rule itself is extremely confusing and misleading on the groundwater/shallow subsurface alleged distinction by its definition of groundwater. In many areas of the United States, digging a shallow depression in the ground leads to groundwater. Will the potential connection of shallow subsurface flow to regulated water lead to monitoring and mitigation? The practical consequences of the variations of "best professional judgment" over a rule that conflicts within itself are staggering. Moreover, this nebulous distinction creates an almost impossible burden on a landowner trying to determine if subsurface flow is unregulated groundwater. The proposed rule does say, "A determination of adjacency based on shallow subsurface connection outside the riparian or floodplain area required clear documentation" Id at 22211. However, the reality is that a landowner would essentially have to prove lack of jurisdiction, not the reverse. A landowner would have to install wells and monitor the groundwater seasonally to attempt to prove that underground flow does not establish an "adjacency" connection.¹¹² In light of these concerns, NSSGA strongly urges the agencies to delete any reference to floodplain and shallow subsurface connection to determine "neighboring" under the adjacency criteria. (p. 23-25)

Agency Response: See essay above.

Walker River Irrigation District (Doc. #14562)

- 3.334 Under the proposed rule, a water "adjacent" to an interstate water, to a tributary, or to a ditch which is not excluded as a "tributary" would also be a water of the United States. The definition of "adjacent" in the proposed rule includes "bordering," "contiguous" or "neighboring." The definition also explains that separation by man-made ditches or barriers will not disqualify a water from being "adjacent." The definition of "neighboring" is less than clear. It seems to include a water which may be connected by groundwater to the water of the United States. Thus, on the one hand, groundwater "drained through subsurface drainage systems" is excluded from jurisdiction, but a water

¹¹¹ The proposed rule describes a shallow subsurface hydrologic connection as "a lateral flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes vertical flow of water or in karst systems, especially in karst pairs." 79 Fed. Reg. 22208. It then describes tests that may be used to determine "shallow subsurface connection." Id. Proving that it could be very time-consuming and expensive for aggregate operators to prove that no such connection exists. Yet, any such effort could be arbitrarily rejected by an agency reviewer's best professional judgment.

¹¹² The recent case of *Hawaii Wildlife Federation v. County of Maui*, 2014 WL 2451565 (D. Hi. May 30, 2014) found the County liable under the CWA for pollutants discharged from injection wells at the County's reclamation facility that migrated to the ocean based on strong evidence that effluent significantly affected the ocean's ecology. However, the court acknowledged that while it makes sense to regulate groundwater under the conduit theory "it cannot point to controlling appellate law or statutory text allowing this theory in the present context." Id. at 13. The "shallow subsurface connection" criteria in the proposed rule is so vague as to allow extension of jurisdiction based on much weaker evidence than found in the County of Maui case.

which has a "shallow subsurface hydrologic connection" to an interstate water or a tributary of an interstate water is considered "adjacent" to it and thus is jurisdictional. The proposed rule is so broad, that water sitting in a field next to a ditch or drain may be a "water of the United States." (p. 5-6)

Agency Response: See essay above. See discussion of ditches in the Ditches Compendium (Topic 6).

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

- 3.335 QQ agrees with defining all waters that are adjacent to a jurisdictional water as categorically jurisdictional as long as the rule continues to include within the definition the characteristics of these adjacent waters. The list of characteristics ensures that the adjacent waters are part of “an aquatic system incorporating navigable waters” as required by the Supreme Court in *Rapanos*. As Justice Kennedy observed, wetlands should be covered if they "possess a significant nexus with navigable waters." See *Rapanos* at 787. (p. 5)

Agency Response: See essay above.

Murray Energy Corporation (Doc. #13954)

- 3.336 These new definitions raise the possibility that two waters can be separated by great distance and dry land and still be considered “adjacent.” This is supported by language in the preamble, which states that “in showing chemical, physical or biological connection between adjacent waters and other jurisdictional waters, adjacent waters, including wetlands, may be separated by land or other features not regulated under the CWA” Proposed Rule at 22210 (emphasis added). This is precisely the result that both the plurality and Justice Kennedy sought to avoid in *Rapanos* by refusing to extend jurisdiction where significant distances separated allegedly adjacent water features. There is simply no discernible limit to the concept of adjacency under the Proposed Rule, which affirms Justice Scalia’s worst fears of “turtles all the way down.”¹¹³ See *Rapanos* 547 U.S. 754. (p. 15)

Agency Response: See essay above.

- 3.337 Specifically, the Proposed Rule would potentially capture as jurisdictional on-site ponds/impoundments and closed-loop water systems that are open (i.e., not piped) wherever these features are located within a “riparian area” or “floodplain” (terms that, as noted above, are overbroad and left to inconsistent interpretation by agency personnel), or share surface or shallow subsurface connections with other waters. (p. 15-16)

Agency Response: See response above.

- 3.338 The attempted jurisdictional stretch here becomes even more problematic, and even less reasonable in light of established law, when factored in combination with the Agencies’

¹¹³ Justice Scalia was using this metaphorical reference to criticize aspects of Justice Kennedy’s interpretation that sought to revive the notion that physically unconnected ponds could be included based on their ecological connection to covered waters which the Court explicitly rejected in *SWANCC*.

conclusion that a significant nexus can be determined based purely on a biological connection. See e.g., Proposed Rule at 22241. In support of this position, the Agencies cite to the habitat and life cycle dependency of aquatic birds. Once again, the reasoning here leads to a result that is inconsistent with binding Supreme Court precedent, as it would bring isolated wetlands back into jurisdiction based on a new “Migratory Aquatic Bird Rule” or “Migrating Duck Rule,” a reincarnation of the “Migratory Bird Rule” which the majority opinion in SWANCC rejected. See 531 U.S. at 174. (p. 16)

Agency Response: See essay above.

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

3.339 [T]he proposed rule states: "Application of the terms 'riparian area,' 'floodplain,' and 'hydrologic connection' would be based in part on best professional judgment and experience applied to the definitions contained in this rule" (page 22208, bottom of the third column of the Federal Register notice). For all the reasons listed above, and because Metropolitan is concerned about potential inconsistencies among individual regulators in making these determinations, Metropolitan requests that these categories and definitions be based on science that has been finalized and be substantially revised to clarify the details and provide greater specificity regarding their application. (p. 12)

Agency Response: See essay above.

National Federation of Independent Business (Doc. #8319)

3.340 Under the Rapanos plurality opinion, the Agencies may be able to assert jurisdiction over wetlands that are adjacent to traditional navigable waters.¹¹⁴ But in order to do so they must demonstrate that there is a continuous surface connection between such “traditional navigable waters” and the wetland, such that it is difficult to discern where the water ends and the wetland begins. Rapanos, 547 U.S. at 742. Yet the Proposed Regulation asserts jurisdiction over wetlands without regard to whether there is a continuous surface connection.

The Proposed Regulation invokes Justice Kennedy’s significant nexus test in justifying an assertion of jurisdiction over waters adjacent to relatively permanent, non-navigable tributaries that are connected downstream to “traditional navigable water.” The Agencies therein operate on the assumption that adjacent waters are always sufficiently integrated with the ecological system of the entire watershed. This much is true in so far as the Proposed Rule defines “adjacent waters” as having a significant nexus to traditional navigable waters. But that circular definition tells us nothing as to when adjacent waters will in actuality be jurisdictional. (p. 6-7)

Agency Response: See essay above.

New Mexico Environmental Law Center (Doc. #8538)

3.341 NMELC urges you to further strengthen the final rule to fully protect wetlands and other

¹¹⁴ The Rapanos plurality defined a “traditional navigable water” as a “relatively permanent, standing or continuously flowing bod[y] of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’” Rapanos, 547 U.S. 739.

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. (p. 1)

Agency Response: See essay above.

Alabama Rivers Alliance (Doc. #14280)

3.342 We would also highlight the need for strong protections for our wetlands and groundwater connections. As SELC points out, “[t]he scientific literature is now clear that most non-proximate wetlands are connected either biologically, chemically, or hydrologically to jurisdictional waters”¹¹⁵ Likewise, there is now a common understanding of the inseparable connection between our surface and near surface groundwater resources which often establishes the nexus between various non-adjacent surface waters. The proposed rule should reflect this reality. (p. 3)

Agency Response: See essay above.

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

3.343 Caltrans requests that specific information be added regarding what would be considered 'reasonable proximity' with regard to determining an adjacent water. (p. 3)

Agency Response: See essay above.

Florida Crystals Corporation (Doc. #16652)

3.344 We recommend that the agencies modify the definition of "neighboring" to include a distance limitation on waters which are captured by that term. The Proposed Rule would define the term "adjacent" to mean "bordering, contiguous, or neighboring." The term "neighboring" is proposed to be defined to include "waters located within the riparian area or floodplain [of an otherwise jurisdictional water], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." As discussed above, in places such as Florida which have a flat landscape, surficial aquifer, and floodplain maps which cover virtually the entire state, it appears that almost any otherwise isolated water would be "neighboring" no matter how far away it may be located from a water which otherwise is jurisdictional.

The proposed definition of "neighboring" would stretch the term far beyond its natural meaning. Most dictionaries define "neighboring" to mean "next to or very near another place; adjacent." See, e.g., Oxford Dictionaries (online edition). This definition incorporates the concept that for something to be "neighboring," it must be located only a short distance away. Yet, the Proposed Rule's definition of "neighboring" contains no such constraint. In Florida, floodplains and shallow subsurface connections can extend for miles. Like the term "navigable waters" in the CWA itself, the Proposed Rule would stretch the term "neighboring" into a meaning which is completely at odds with its plain meaning. We recommend that the agencies incorporate a distance constraint on the term "neighboring" to reflect the concept that a water is neighboring only if it is next to or very

¹¹⁵ Id. at 52 (citing U.S. v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974), Headwaters, Inc. v. Talent Irrigation Dist., 243 F. 3d 526 (9th Cir. 2001).).

near a jurisdictional water, in addition to the requirement that there be some sort of hydrological connection. The Army Corps Jacksonville District has applied a 200-foot limit in determining adjacency in Florida for many years, and that would be a reasonable distance limit to choose. (p. 11)

Agency Response: See essay above.

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

- 3.345 Furthermore, the Rule states that an "adjacent" connection exists through a *shallow aquifer*, and shallow subsurface connections may be found below the *ordinary root zone* (below 12 inches). The terms "shallow aquifer" and "ordinary root zone" are not defined within the Rule and are speculative. This language is ambiguous and relies heavily on best professional judgement to determine what constitutes a *shallow aquifer* connection which can extend to greater than 4-6 feet deep within the dry season. By their very nature, many of the City's stormwater management facilities are located within riparian areas or the floodplains adjacent to WOUS and likely have shallow groundwater connections or are connected to a WOUS by a stormwater ditch; therefore, most of the City's currently nonregulated stormwater management facilities and ditches may become regulated WOUS, under this proposed Rule. There is no reasonable option for providing clarity for this type of jurisdiction because of its inherent ambiguity. There are no scenarios where it would be appropriate for EPA to extend CWA jurisdiction over resources "adjacent" to existing WOUS, no matter the distance or landscape position, unless more than *speculative or insubstantial* scientific evidence is produced through a case-specific analysis that a significant nexus exists between an "adjacent" resource and a WOUS. The City of Chesapeake will not support the expansion of CWA jurisdiction through *adjacent* waters because it may result in less clarity, certainty and predictability for the regulated community, as well as increasing infrastructure maintenance/retrofitting and development costs. (p. 4-5)

Agency Response: See essay above.

National Wildlife Federation (Doc. #15020)

- 3.346 While we generally support the proposed adjacency definition, we challenge the agencies' emphasis on physical proximity in determining adjacency. The ecological interconnections that demonstrate adjacency are based on wetland functions that are, at most, indirectly related to physical proximity. Physical adjacency, like isolation, is largely a legal construct and an artificial distinction not grounded in hydrology or aquatic ecology.

We respect the agencies' effort to provide additional precision in order to reduce uncertainty "as to whether a particular water connected through confined surface or shallow subsurface hydrology is an 'adjacent' water." However, the agencies must not place undue emphasis on geographic proximity at the expense of waters that clearly function as part of the aquatic system. See, e.g., 79 Fed. Reg. at 22208 citing 42 FR 37128, July 19, 1977. We urge the agencies to carefully consider the scientific literature, including the SAB Connectivity Peer Review Report, the draft Connectivity Report, and the agencies' Appendix A Science Summary, as well as the additional scientific literature and analysis submitted during the public comment period, as it considers its options for

increased clarity.

More specifically, we believe the scientific literature supports the conclusion that “all waters connected through a shallow subsurface hydrologic connection or confirmed surface hydrologic connection” have at least the potential to have more than an insubstantial influence on the physical, chemical, and biological integrity of tributaries “regardless of distance” and therefore should be found jurisdictional as adjacent waters. See 79 Fed. Reg. at 22207-08, 22241-43; Connectivity Report at 1-7 to 1-14 (The scientific evidence also demonstrates that shallow groundwater connections serve as hydrologic connections between surface waters and should be considered in assessing connectivity and effects on downstream waters.). Therefore, we strongly oppose the following proposed options to the proposed rule described at 22208-09 as clearly inconsistent with the scientific literature and the goals of the CWA:

- We oppose “asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water.”
- We oppose “considering only confined surface connections but not shallow surface connections for purposes of determining adjacency.”
- We oppose establishing by rule “specific geographic limits for using shallow subsurface or confined surface hydrologic connections as a basis for determining adjacency....”
- We oppose adding specific language to the “neighboring” definition that waters connected by shallow subsurface or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water. (p. 50-51)

Agency Response: See essay above, as well as the preamble and TSD.

3.347 [D]efining and determining adjacency based on geographic proximity alone is not consistent with the scientific literature or the goals of the CWA. Instead, the adjacency definition and preamble should focus on adjacency based on functional relationships. (p. 51)

Agency Response: See response above.

National Association of State Foresters (Doc. #14636)

3.348 [I]t is our contention that attempting to codify and define such broad and diverse terms as riparian area and floodplain will not bring clarity or consistency to the implementation of the proposed WOTUS rule. If such terms are deemed necessary, then each term must be defined with specific, measurable, repeatable, and science-backed metrics that can be easily understood and quickly derived when assessing all possible landscape features across the United States. This is the only way that use of these terms can lead to the consistency in application of the CWA, which is the goal of this rule. In practical application, neither of these terms is appropriate for inclusion in a regulatory framework that is intended for national implementation, and ultimately, we suggest that these two terms be excluded from the proposed rule. (p. 2)

Agency Response: See essay above.

City of Chesapeake (Doc. #9615)

- 3.349 By their very nature, many of the City's stormwater management facilities are located within riparian areas or the floodplains adjacent to WOUS and likely have shallow groundwater connections or are connected to a WOUS by a stormwater ditch; therefore, most of the City's currently nonregulated stormwater management facilities and ditches may become regulated WOUS under this proposed Rule. There is no reasonable option for providing clarity for this type of jurisdiction because of its inherent ambiguity. There are no scenarios where it would be appropriate for EPA to extend CWA jurisdiction over resources "adjacent" to existing WOUS, no matter the distance or landscape position, unless more than speculative or insubstantial scientific evidence is produced through a case-specific analysis that a significant nexus exists between an "adjacent" resource and a WOUS. The City of Chesapeake will not support the expansion of CWA jurisdiction through adjacent waters because it may result in less clarity, certainty and predictability for the regulated community, as well as increasing infrastructure maintenance/retrofitting and development costs. (p. 5)

Agency Response: See essay above.

Illinois Coal Association (Doc. #15517)

- 3.350 The new definition of "adjacent waters" would capture waters never before defined as jurisdictional, based on the still largely undefined concepts of chemical, physical or biological connection to traditional navigable water. This significantly modified definition also introduces newly defined terms such as "neighboring," "riparian area," and "flood plain," which are plagued by ambiguity and, taken together, threaten to extend the reach of the Act to non-navigable waters far from any traditional navigable water. See Proposed Rule at 22266. These new definitions raise the possibility that two waters can be separated by great distance and dry land and still be considered "adjacent." This is supported by language in the preamble, which states that "in showing chemical, physical or biological connection between adjacent waters and other jurisdictional waters, adjacent waters, including wetlands, may be separated by land or other features not regulated under the CWA" Proposed Rule at 22210 (emphasis added) . This is precisely the result that both the plurality and Justice Kennedy sought to avoid in *Rapanos* by refusing to extend jurisdiction where significant distances separated allegedly adjacent water features. There is simply no discernible limit to the concept of adjacency under the Proposed Rule, which affirms Justice Scalia's worst fears of "turtles all the way down." See *Rapanos* 547 U.S. 754. ¹¹⁶ (p. 12-13)

Agency Response: See essay above.

- 3.351 Proposed Rule at 22213. The Agencies fail to note that Kennedy's comment here was made in response to the plurality's argument as to why wetlands adjacent to TNWs, but separated by a man-made berm, may still have a significant nexus to TNWs and thus be subject to the Corps' regulations . See 547 U.S. at 775. Justice Kennedy was highly skeptical of and rejected the plurality's "any hydrological connection" test, opining that a

¹¹⁶ Justice Scalia was using this metaphorical reference to criticize aspects of Justice Kennedy's interpretation that sought to revive the notion that physically unconnected ponds could be included based on their ecological connection to covered waters which the Court explicitly rejected in *SWANCC*.

hydrological connection alone would be inadequate in some cases to assert jurisdiction. *Id.* at 784-785. ("... mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."). Justice Kennedy never concluded that jurisdiction as a general matter could be broadly asserted in the absence of hydrologic connection. Rather, Justice Kennedy specifically called into question the Corps' overly broad proposed definition of jurisdictional tributaries, i.e., those that "feed into a traditional navigable water (or tributary thereof) and possess an ordinary high-water mark," arguing that such an expansive definition could in fact reach tributaries that lacked significant nexus. *Id.* at 781 ("Yet the breadth of this standard - which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it - precludes its adoption as the determinative measure ..."). In sum, the Agencies' misreading of Supreme Court precedent leads us to conclude that this particular approach to defining jurisdiction over "other waters" is fatally flawed. (p. 14-15)

Agency Response: See above response.

National Farmers Union (Doc. #6249)

- 3.352 One of the proposed alternatives put forth by the agencies is "asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian area of a jurisdictional¹¹⁷. This is the proper way to address these waters. It creates certainty for the regulated community since waters located a substantial distance from a jurisdictional water would not be subject to jurisdiction due to an insubstantial connection to the jurisdictional water. Even in the current regulatory framework, the agencies consider distance from a jurisdictional water when determining whether a water that is located outside the floodplain or riparian area of the jurisdictional water, but that is connected to the jurisdictional water by a shallow subsurface or confined surface hydrologic connection, is adjacent to that jurisdictional water."¹¹⁸

This alternative also reserves to the agencies the ability to address waters that could actually have a consequential impact on the quality of a water of the United States, since the water located outside the floodplain and riparian area of the jurisdictional water, unless otherwise excluded, would be subject to the "significant nexus" test. Holding the definition of "adjacent water" to waters within a jurisdictional water's floodplain or riparian area allows the regulated community maximum certainty without encumbering the agencies' ability to protect water resources. (p. 5)

Agency Response: See essay above.

Alameda County Cattlemen (Doc. #8674)

- 3.353 The proposed rule states, "The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."

¹¹⁷ *Id.* at 22208.

¹¹⁸ *Id.* at 22208.

(Id., emphasis added). The agencies use of the term “or” in this definition means that even geographically isolated waters outside of a floodplain and riparian area, but that have such shallow subsurface hydrologic connection, are automatically jurisdictional. It seems this definition is in direct conflict with the Supreme Court’s decision striking down the “any hydrologic connection” rule of jurisdiction because this definition allows automatic jurisdiction over waters that have only a hydrologic subsurface connection.

When “waters with a shallow subsurface hydrologic connection” to (a)(1) through (5) waters are jurisdictional simply by virtue of that connection, without any consideration of the significance of that connection. Because EPA and the Corps have not excluded any types of water from the term “waters” it could have the meaning of puddles, wetlands, ditches, or possibly damp depressions in a pasture. If that damp depression does have a shallow subsurface hydrologic connection it appears by the language of the proposed rule to be a jurisdictional water.

Based on the intent of Congress to only regulate surface water via the CWA, it follows that the agencies should not use shallow subsurface flow, shallow subsurface hydrologic connections or the like to serve as the basis for determining jurisdiction. Regulating the surface water that has this “groundwater” flow is the same as regulating the groundwater connection. Is it the agencies’ position that a citizen could inject pollutants into this “shallow subsurface hydrologic connection” without running afoul of the CWA? If the answer is no then the agencies are regulating groundwater, running afoul of their stated exclusion of groundwater.

There are also additional questions regarding this phrase. How deep must a landowner dig to discover whether his pond is connected to another water via “shallow subsurface flow”? At what depth must he dig to know whether it is groundwater instead of “shallow subsurface flow”? The agencies stated intent in providing this proposed rule was to provide clarity to everyone, including landowners. ACCW assert that the agencies’ decision to find adjacent waters with “shallow subsurface hydrologic connections” jurisdictional by rule puts an enormous burden on landowners to have surveys and analysis done on each and every “water” on their property to determine whether they have this type of connection and whether they can utilize their waters or must ask permission from the government to conduct numerous activities near these waters.

ACCW strongly encourage the agencies to consider not looking at groundwater as the source of any connection, as there is too much confusion regarding whether it is part of the regulated water. Additionally, there is no logical way for landowners to know whether these connections exist, unfairly placing them squarely in the sites of a regulatory enforcement action without any knowledge. (p. 17-18)

Agency Response: See essay above.

Caloosahatchee River Citizen’s Association (Doc. #4711.2)

- 3.354 [W]e believe that the adjacent wetlands and headwaters of the numerous tributary creeks meet the standard of a significant nexus with and are thus jurisdictional using the proposed Rule. (p. 2)

Agency Response: See essay above. Further, where headwaters meet the definition of a tributary, they are jurisdictional under today’s rule. Additional

information is provided in the preamble to today's rule and the TSD.

Rock the Earth (Doc. #12261)

- 3.355 Rock the Earth therefore urges the EPA against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdiction and instead focus not only on connectivity but on functionality. (p. 11)

Agency Response: See essay above.

Quapaw Tribe of Oklahoma (Doc. #7980)

- 3.356 Definition of Adjacent Wetlands. Under existing regulations these are described as wetlands that are bordering, contiguous, or neighboring. Wetlands separate from other Waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." Under the proposed rule, these would still be described as any waters that are bordering, contiguous, or neighboring; however, "neighboring" would now be defined as including waters which are within the riparian area or floodplain of a Water of the U.S. The proposed rule would increase the types and number of features that can be determined to be jurisdictional through adjacency to Waters of the U.S. and adds additional specificity regarding which features may be considered neighboring, including waters which are within the riparian area or floodplain of a Water of the U.S. (p. 2)

Agency Response: See essay above.

North Dakota Office of the Governor, et al. (Doc. #15365)

- 3.357 Wetlands on flood plains should not be in themselves regulated as WOTUS unless a clear, substantial, and ongoing effect on the flowing waterbody can be demonstrated. EPA refers to the appropriateness of its federal jurisdiction in relation to wetland effects on flooding.¹¹⁹ (p. 8)

Agency Response: See essay above.

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

- 3.358 LADWP believes that adjacent waters should be limited to wetlands that are part of a continuum that establishes the point at which the water ends and land begins. If separated by land, then the adjacent water or other water are not jurisdictional. (p. 4)

Agency Response: See essay above.

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

- 3.359 The net result is that the costs and delays for aggregate operators by categorically including all tributaries and then sweeping in "adjacent waters and wetlands," based on a vague and broad floodplain definition, will undoubtedly make it much more difficult to meet criteria infrastructure supply needs without providing any clear ecological benefit to the closest TNW. (p. 27)

¹¹⁹ 79 Fed. Reg. 22188, 22191, and 22193.

Agency Response: See essay above. Further, only tributaries that meet the definition of a tributary as defined in today’s rule are jurisdictional under the Act. Additional information is provided in the preamble to today’s rule and the TSD.

Kitchen Cabinet Manufacturers Association et al. (Doc. #15418)

- 3.360 Under the existing WOTUS rule, wetlands adjacent to “waters of the United States” are explicitly listed as “waters of the United States.” In the Proposal, however, “all waters, including wetlands, adjacent to” the waters covered by the first five categories of the proposed definition, i.e. traditional navigable waters through tributaries, are defined as WOTUS. In addition to changing “wetlands” to “all waters,” the Proposal expands the concept of adjacency considerably. Current regulations define “adjacent” as “bordering, contiguous, or neighboring,” and state that “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” See, e.g., 33 C.F.R. § 328.3(c). The Proposal, however, (1) states that “[w]aters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent waters,’” and (2) adds a definition of “neighboring” that may expand CWA jurisdiction over “adjacent” waters beyond what a court might have otherwise interpreted to be “bordering, contiguous, or neighboring.”

Specifically, the Proposal defines “neighboring” to include waters located within the riparian area or floodplain of a traditional navigable water or its tributary, “or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” Agency staff have asserted in outreach meetings that there is a geographic limitation on the subsurface connection, but it is not in the proposed rule text itself. A “floodplain” is an area that, among other things, “is inundated during periods of moderate to high water flows,” although the definition does not reference a particular year flood interval but leaves it to the agencies’ “best professional judgment” to determine the appropriate area or flood interval. “Riparian area” is defined as “an area bordering a water where surface or subsurface hydrology directly influence [sic] the ecological processes and plant and animal community structure in the area.” Because interpretation and application of these vague and expansive concepts is left in the hands of individual regulators and ultimately the federal courts, the rule provides us with no clarity or certainty. (p. 1-2)

Agency Response: See essay above.

Chicken & Egg Association of Minnesota (Doc. #19584)

- 3.361 In agricultural settings, we recommend that the agencies treat wetlands and all ditches and all subsurface drainage systems as part of a treatment system, designed to meet the broad goals of the CWA. (p. 2)

Agency Response: See essay above. The final rule also expressly excludes certain ditches from regulation as waters of the United States. Additional exclusions are provided in today’s rule. Additionally, the rule does not modify the exemptions at Section 404(f). For example, the CWA exempts from the Section 404 program discharges associated with normal farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food,

fiber, and forest products, or upland soil and water conservation practices (Section 404(f)(1)(A)).

Southern Company (Doc. #14134)

- 3.362 The connection of non-navigable waters, such as wetlands, via an unconfined aquifer could extend well beyond the boundaries of a floodplain and be located miles away from the nearest stream.¹²⁰ That is, under the agencies’ proposed approach, wetlands (or “waters”) upland from riparian areas or floodplains may still be categorically jurisdictional as “neighboring” if they are connected in any way by a “shallow subsurface hydrologic connection or confined surface hydrologic connection” to a down gradient tributary or impoundment. This creates unnecessary confusion between where adjacent waters end and “other waters” begin—that point on the landscape must be better defined. Moreover, such a result would be in direct contravention to the jurisdictional limits imposed by both Rapanos and SWANCC. In effect, a previously unregulated discharge to a previously non-jurisdictional, isolated wetland could become regulated solely by virtue of the fact that the wetland is connected to some distant downstream water via a subsurface hydrologic connection. (p. 40)

Agency Response: See essay above.

Delaware Riverkeeper Network (Doc. #15383)

- 3.363 All adjacent waters and wetlands should be jurisdictional; however, these waters should not be defined solely on the basis of geographical proximity or distance to a jurisdictional water. When determining whether a water body is “adjacent”, the EPA should examine both the functional relationships and geographical proximity. (p. 3)

Agency Response: See essay above.

Alameda County Cattlemen (Doc. #8674)

- 3.364 ACCW assert that the agencies expansive definition for “neighboring” in their per se jurisdictional category of “adjacent waters” is beyond the scope of the CWA. It is so expansive that it obliterates the federal-state partnership under the CWA, and pushes the outer limits of the Commerce Clause of the Constitution. Based on the Supreme Court’s decisions in Rapanos and SWANCC, the agencies cannot finalize a regulation that makes any open water within a floodplain or riparian area per se jurisdictional. ACCW strongly encourage the agencies not to change the “adjacent wetlands” category to “adjacent waters” and not to finalize their definition of “neighboring.” (p. 13)

Agency Response: See essay above.

Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al (Doc. #15123)

- 3.365 We also support the proposed Rule’s clarification that waters, including wetlands, adjacent to any tributary--not just a traditionally navigable tributary--are categorically

¹²⁰ See 1998 USGS Circular 1139, Groundwater and Surface Water a Single Resource, available at <http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf>.

waters of the United States.¹²¹ Adjacent is defined as “bordering, contiguous or neighboring,” including waters that are separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like. Adjacent waters must be categorically protected under the Clean Water Act. These waters are physically, chemically, and biologically connected with rivers through, for example, the export of channel-forming sediment and woody debris, and the temporary storage of local groundwater that supports base-flow in rivers.¹²² More specifically, adjacent wetlands:

- Remove and transform excess nutrients such as nitrogen and phosphorus¹²³ serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.¹²⁴ Numerous studies have demonstrated that surface water discharged from wetlands exhibits higher water quality than the water entering the wetland, although exceptions exist.¹²⁵
- Have reduced flood flows in the Midwest by 80 percent in basins with wetlands compared to basins without wetlands.¹²⁶
- Provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects.¹²⁷ (p. 7)

Agency Response: See essay above.

Portland Cement Association (Doc. #13271)

3.366 3.140 In short, the adjacent waters test is no more clear or less procedurally complex than the existing significant nexus test (and to some degree is even more procedurally complex). This is in large part because, for the most part, the “adjacent waters” test is simply a repackaging of the significant nexus test. As described above, the most recent iteration of the significant nexus test, as recited in the Agencies’ December 2, 2008 guidance document requires an [a]ssess[ment of] the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they [alone or in combination with other similarly situated wetlands adjacent to the tributary] significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

Setting aside the assessment of other similarly situated waters in the region, this test boils down to whether the tributary and adjacent wetlands “significantly affect the chemical,

¹²¹ 79 Fed. Reg. at 22,269 (defining “waters of the United States” to include “[a]ll waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of [the proposed Rule],” and explaining that “[w]aters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent waters.’”).

¹²² Connectivity Report at 1-3.

¹²³ Id.

¹²⁴ Connectivity Report at 1-3.

¹²⁵ Mitsch, W.J.; Gosselink, J.G. 2000. The value of wetlands: importance of scale and landscape setting. *Ecological Economics* 35 (2000) 25–33.

¹²⁶ Wisconsin 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-3 (Apr. 8, 2003).

¹²⁷ Connectivity Report at 1-3.

physical and biological integrity of the traditionally navigable waters.”

The new test, combining the definitions of floodplain and riparian area, is whether an adjacent wetland or water is inundated during periods of moderate to high water flows¹²⁸ or is in an area where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area or affect the exchange of materials between terrestrial and aquatic ecosystems. The former (floodplain) test and the final sentence of the riparian area test largely equate to the chemical and physical integrity of downstream waters, as they relate to flow rates and materials that could be carried downstream by such flows.¹²⁹ The first sentence of the riparian area test (regarding ecological processes and plant and animal community) largely relates to the biological integrity of the downstream waters.¹³⁰ Thus, the Agencies have simply restated the significant nexus test by identifying by name the factors that may affect downstream chemical, physical and biological integrity.

There are several problems with this approach. First, as stated above, it is no more clear than the significant nexus test. Second, it is no more procedurally efficacious than the significant nexus test. And finally, it changes a case-by-case test into a de jure test without identifying any new factors which show that significant chemical, physical or biological connectivity is met in each and every situation. (p. 20-21)

Agency Response: See essay above.

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

- 3.367 Because the agencies decided to expand the protection of adjacent waters to include more than just wetlands, they provided additional definitions for “adjacent” and “neighboring.”¹³¹ The proposed definition for “neighboring” includes “waters located within the riparian area or floodplain of a water. (p. 44)

Agency Response: See essay above.

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

- 3.368 If adjacent waters other than wetlands are to be regulated, the type of additional waters being regulated should be limited to open waters, and should not include non-tributary ephemeral washes (including those whose tributary connection has been severed): In the preamble discussion of the need to regulate all adjacent waters, the agencies refer specifically only to wetlands, ponds, lakes (including oxbow lakes) and “similar” waters. See 79 Fed. Reg. at 22207, 22209 & 22210. These features are distinguished by the essentially permanent presence of water. To the extent the agencies can lawfully regulate adjacent waters other than wetlands, this might be a basis for identifying the additional types of other waters that are intended to be within the scope of the regulation.

If the final rule does include regulation of adjacent waters other than wetlands, then

¹²⁸ And formed by sediment deposition under present climactic conditions.

¹²⁹ To some degree, this factor also relates to the downstream waters’ biological integrity to the extent flows or materials affect that integrity either positively or negatively.

¹³⁰ To some degree, this factor also relates to chemical and physical integrity, since the plant and animal community might affect these aspects of the downstream water.

¹³¹ at 22263.

limiting the types of waters so regulated to open waters (lakes, ponds and other features where water is commonly present) would be a reasonable approach. This class of waters appears to encompass those that the agencies believe have a significant nexus to TNWs, as well as those that were more likely to have been regulated previously. Other types of adjacent waters, such as non-tributary ephemeral washes, are unlikely (individually or as a class) to have a significant nexus to an adjacent TNW, or to have been previously regulated.

The notion of an adjacent ephemeral wash may warrant explanation. Obviously, ephemeral washes that would potentially be considered in the adjacent water category include only those that do not have a direct surface water connection (as a first order tributary or via other tributaries) to a TNW. In Arizona, this situation can exist where a wash's tributary connection was severed through the construction of features that prevent upstream flow from continuing downstream. (The features may have been constructed prior to the adoption of the CWA, or pursuant to permits issued under the Section 404 program after adoption of the CWA.) If the ephemeral channel were simply re-routed around the feature, it might still qualify as a tributary. In many cases, however, no such re-routing occurred, and flow in the ephemeral channel upstream of the feature no longer travels beyond the feature. This is true most often for small washes that were not capable of carrying significant flow.

Based on our analysis of the proposal, the upstream portion of a channel in the situation described above would not qualify as a tributary because it never contributes flow, directly or through another water, to a TNW. The extremely broad definition of adjacent waters included in the proposal, however, theoretically could result in regulation of some of these cut-off washes, depending on their location, even though they have not traditionally been regulated. For example, if a feature (e.g., a mine rock dump) had been constructed where a sixth order tributary previously joined a fifth order tributary, and the feature had been constructed in the 1960's (pre-CWA), the experience of the joint commenters is that the remaining portions of the sixth-order tributary (i.e., those upstream of the dump) would not have been regulated under the existing rules. Under the proposal, however, it appears possible that the upstream portion of the wash could be regulated, on the theory that it is located within the (poorly defined) floodplain or riparian area of the fifth-order tributary, or that there is some sort of shallow subsurface connection between the two (in those infrequent cases when water is present in the washes).

Recommendation: If the final rule addresses adjacent waters other than wetlands, only lakes, ponds or other features where water is commonly present should be included within the concept of adjacency. The agencies also should specifically clarify that ephemeral washes would not be regulated as adjacent waters. This includes removing or scaling back the language in the definition of “adjacent” (proposed 33 C.F.R § 328.3(c)(1)) stating that all waters separated from other waters by man-made barriers are still considered adjacent waters, and thus automatically regulated in all cases. (p. 33-34)

Agency Response: See essay above. Additionally, ephemerals are regulated only where they meet the definition of tributary. Otherwise, they are excluded under paragraph (b) and thus would not be considered adjacent. (Additional information on tributary is provided in the preamble to today's rule and the TSD.)

Kansas Independent Oil & Gas Association (Doc. #12249)

- 3.369 The term "wetlands" is defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The phrase "under normal circumstances" should be expanded upon consistent with the Bayview decision as meaning "supports a prevalence of vegetation typically adapted for life in saturated soils conditions." Wetlands generally include swamps, marshes, bogs and similar areas." The qualifying phrase "under normal circumstances" presents regulatory guidance that directs the regulator to make the judgment as to what is a "normal circumstance". The definition of floodplain, discussed above, ignores the "normal circumstance" of sediment deposition and instead invites assessment of "present climatic conditions." The intentional design of invited regulatory analyses to deliver the most expansive "waters of the United States" is noteworthy. This choice of language positions the regulator to apply "waters of the United States" to default to the most inclusive footprint as possible. (p. 16)

Agency Response: See essay above.

In addition, the definition of “wetlands” is outside the scope of today’s rulemaking.

Duke Energy (Doc. #13029)

- 3.370 [T]he Army Corps of Engineers 1987 Wetland Delineation Manual, which they rely on for determining when a wetland is subject to regulation, does not consider unvegetated aquatic sites, such as mudflats and coral reefs, or vegetated shallow water to be wetland areas, whereas the Cowardin classification does since it only requires one or more of the attributes to be present to be considered a wetland. It was even noted by the SAB Panel in their draft recommendation report that “many public commenters have expressed concern about the potential expansion of the scope of jurisdiction of the underlying Clean Water Act – from “three-parameter” to “one-parameter” waters and wetlands.”¹³² In addition, the Corps have recently announced that they are in the process of considering changes to the 1987 Wetland Delineation Manual.¹³³

It is also important to clearly understand the agencies’ intent with regards to floodplain and riparian areas. It is unclear if these areas will be considered jurisdictional based on location even if they exhibit only one or two of the wetland parameters instead of all three. If so, then this is clearly an expansion in jurisdictional reach. The agencies must clarify consistently that only wet areas within the floodplain or riparian areas that demonstrate all three wetland parameters would be considered jurisdictional. If revisions are made to the Wetland Delineation Manual to only require the presence of one or two of these factors for an area to be considered a wetland, this would be a substantial change and would result in an expanded jurisdictional reach. Moreover, the Corps continues to add new plant species to the list of wetlands vegetation which can also lead to additional areas classified as wetlands. Duke Energy contends that any changes to this manual that could significantly alter the method or extent of delineations should be an integral part of

¹³² Draft SAB Panel Recommendations on EPA’s Connectivity Report (8-11-14 version), Page 16, Section 3.2.4

¹³³ Bridget DiCosmo, InsideEPA.com, Agencies’ Workgroup Eyes Changes to Key Delineation Guides (Apr. 30, 2014)

this rulemaking and not undertaken separately. (p. 34)

Agency Response: See response above. Issues pertaining to the definition of “wetlands” are outside the scope of today’s rulemaking. Like the current practice, the other waters, including ponds, lakes, oxbows, impoundments, and similar features will be delineated based on the feature’s OWHM.

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

- 3.371 The proposed rule does not take into consideration the constantly changing coastal conditions of rising seas, rising ground water, artesian wells, surge, flooding from upstream causes, FEMA and FIRM mapping, and the like.

The proposed rule expands jurisdiction to the flood way to the 1% base flood elevation of any stream. This will make any proposed development that is permitted under FEMA guidelines very costly to implement due to the time and data required to comply with this proposed Waters of the US rule, effectively making these areas 'unbuildable'. (p. 1)

Agency Response: See essay above. As discussed there, the final rule is narrower in scope than the existing rule. For a discussion of costs associated with the rule, see economic report and Economic Compendium (Topic 11)].Also, the CWA 404 program recognizes that site characteristics can change; Corps Regulatory Guidance Letter (RGL) 05-02 reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis

New Mexico Mining Association (Doc. #8644)

- 3.372 The proposed rule contains numerous ambiguous and undefined terms which hinder the agencies' stated goal of promulgating a clear and understandable definition of Waters of the United States. One example is the rule's definition of "floodplain." The current floodplain definition includes areas "inundated during periods of moderate to high water flows," but provides no clarification as to what constitutes a moderate to high water flow. As written, even waters whose only connection with a jurisdictional water occurs following a 100 or 500-year flood could fall within the rule's purview. This open-ended definition could cover nearly all waters, especially in regions of the country, such as the arid Southwest, that are subject to infrequent but far-reaching flooding events. To provide land managers and owners with some degree of certainty, the final rule should define regionally specific flood intervals that take into account climactic, geographic, and geologic variations. These regionally specific intervals should be supported by scientific evidence to indicate why waters within that interval have a significant nexus to a Traditional Water of the United States. The adoption of regionally specific intervals would provide greater clarity to landowners and would support the proposed rule's goal of creating a clear and understandable definition of Waters of the United States. (p. 1)

Agency Response: See essay above.

Environment Council of Rhode Island (Doc. #3532.2)

3.373 Our organizations 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. We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act. Millions of small streams and wetlands provide most of the flow to Rhode Island's most treasured rivers, including the Blackstone River, the Pawtuxet River, the Wood River and the Sakonnet River, to name a few. If we do not protect these streams and wetlands, we cannot protect and restore the lakes, rivers and bays on which communities and local economies depend. (p. 2)

Agency Response: See essay above.

3.2. ADJACENT WATERS VERSUS ADJACENT WETLANDS

Following are the specific comments received on the proposed rule and responses on “adjacent waters versus adjacent wetlands:”

Navajo Nation Environmental Protection Agency (Doc. #10117)

3.374 The Navajo Nation EPA Water Quality Program agrees with the proposal to include all adjacent waters (not just wetlands) as categorical “waters of the United States.” (p. 2)

Agency Response: The rule continues to provide that all adjacent waters are jurisdictional by rule.

Sean Parnell, Governor, State of Alaska (Doc. #19465)

3.375 Under the existing rule (33 CFR 328.3(a)(7)), only wetlands adjacent to “waters of the United States” are defined as jurisdictional. The proposed rule changed this term from “adjacent wetlands” to “adjacent waters.” Adjacent non-wetland and non-tributary waterbodies (e.g., lakes or ponds) are presently jurisdictional only if navigable, or otherwise have an interstate commerce connection to a traditionally navigable waters. The proposed rule would revise the definition to state “all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5)...” would be jurisdictional based on a significant nexus with traditional navigable waters. As a result, under the proposed rule, ponds, lakes, and even shallow groundwater – though the federal agencies protest otherwise – that are adjacent (but not a tributary) to traditional navigable waters, or their tributaries (including ephemeral streams), would become jurisdictional by rule. The proposed rule also uses terms to define “adjacent” like “neighboring,” “riparian area,” and “floodplain,” without defining these terms, thus not fulfilling the intended purpose of the proposed rule to reduce confusion and uncertainty. The State objects to this expansion of federal jurisdiction to waters that may not have a significant nexus to a navigable water. (p. 27-28)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one

seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a confined surface or shallow subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule. See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition.

Groundwater remains exempt from the definition of “waters of the United States” under the final rule.

City of Palo Alto, California (Doc. #12714)

- 3.376 The definition of all “waters” adjacent to other jurisdictional waters needs to be clarified. Existing requirements cover only adjacent wetlands, yet the concept is expanded in the rule to include all waters. (p. 4)

Agency Response: For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.” In addition, in response to comments asking the agencies to clarify the term “waters,” the final rule, preamble, and TSD provide additional examples and further guidance.

City of Stockton, California (Doc. #15125)

- 3.377 The definition of all “waters” adjacent to other jurisdictional waters needs to be clarified. Existing requirements cover only adjacent wetlands, yet the concept is expanded in the rule to include all waters. (p. 3)

Agency Response: For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.” In addition, in response to comments asking the agencies to clarify the term “waters,” the final rule, preamble, and TSD provide additional examples and further guidance.

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

- 3.378 LADWP recommends that the Proposed Rule be modified to: [...]
Limit adjacent Waters to wetlands that have a quantifiable impact; (p. 8)

Agency Response: What the commenter means by “quantifiable” is unclear, but

the final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule. See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition.

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

- 3.379 Re-shaping the definition of "Wetlands adjacent to water" to "All waters, including wetlands, adjacent to waters" will have substantial impacts. "All waters" in the new definition has the ability to vastly expand waters that would become jurisdictional under the CW A. The Congressional Research Service Report¹³⁴ states: "Under the proposed rule, wetlands, ponds, lakes, and similar water bodies that are adjacent to traditional navigable waters, interstate waters, and the territorial seas, as well as waters and wetlands adjacent to other jurisdictional waters such as tributaries and impoundments, would be jurisdictional by rule." (p. 1)

Agency Response: For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.”

Board of Supervisors, Sutter County, California (Doc. #19657)

- 3.380 To address these issues, we request that the agencies make the following changes to the Proposed Rule:

Revise the proposed language of 33 C.F.R § 328.3(a)(6) to limit adjacent waters to wetlands. Also, clarify that adjacency to another wetland is not a sufficient basis to establish jurisdiction over a wetland. Suggested language: "Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (a)(5) of this section." Note that this represents only a ministerial change to the current regulations at 33 C.F.R § 328.3(a)(7). (p. 8)

Agency Response: The agencies disagree with the commenter’s views on narrowing the definition to “wetlands.” The agencies have defined adjacent waters to include some of those waters that were previously covered under the (a)(3) provision of the 1977 regulation, as the findings are supported by a scientific and legal basis. The waters covered and the bases are explained in the preamble and TSD.

The agencies also deleted a parenthetical from the existing “adjacent wetlands” regulatory provision. The phrase “other than waters that are themselves wetlands” was intended to preclude asserting CWA jurisdiction over wetlands that were

¹³⁴ EPA and the Army Corps' Proposed Rule to Define "Waters of the United States," Claudia Copland, June 10, 2014f

simply adjacent to a non-jurisdictional wetland. Such waters do not meet the definition of "adjacent" under the rule since waters must be adjacent to an (a)(1) through (a)(5) water, so the phrase is unnecessary and confusing. With this change, the agencies are protecting all waters that meet the definition of "adjacent" as "waters of the United States," and eliminating confusion caused by the parenthetical. For example, where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary's ordinary high water mark are jurisdictional because they are "neighboring" to the tributary, regardless of the wetlands' position relative to each other.

Federal StormWater Association (Doc. #15161)

- 3.381 The proposed change from "adjacent wetlands" to "adjacent waters" and broad expansion of the concept of "adjacent" have caused tremendous uncertainty regarding the status of wetlands, ponds, water storage systems, and water conveyances that lie in a floodplain or riparian area or that have a groundwater connection, however distant, or where water can move overland to a navigable water. (p. 4)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

In addition, for the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter's assertion that by changing "adjacent wetlands" to "adjacent waters," they have expanded the scope of the definition of "waters of the United States."

Association of Equipment Manufacturers (Doc. #16901)

- 3.382 The agencies should revise the proposed rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 5)

Agency Response: The Agency did not adopt the commenters' approach as it would, as demonstrated in the preamble and TSD, exclude many waters that have a "significant nexus" to traditionally navigable waters, interstate waters and the territorial seas.

Leigh Hanson, Inc. (Doc. #15781)

- 3.383 The proposed rule's expanded definition of "adjacency" to include both wetlands and waters hydrologically isolated from a tributary but located within the tributary's floodplain is troublesome. Many of our operations now are near these wetlands, tributaries, ponds, lakes, etc. and runoff from and to these areas often cross our property.

If these water bodies will be subject to regulation, erosion control methods (which can include sloping of property) and possibly dropping of sediments will be required prior to discharging into the water bodies (including ditches, settling ponds, and other conveyances that could become jurisdictional under the proposed rule) that were designed to handle this water. Approximately 35% of our aggregate operations would have to be evaluated for additional sedimentation controls. (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.”

American Exploration & Mining Association (Doc. #13616)

- 3.384 The proposed rule asserts jurisdiction over “[a]ll waters, including wetlands, adjacent to” a traditional navigable water (TNW), interstate water, territorial sea, impoundment, or tributary and gives the agencies broad discretion to “recapture” waters and features that were previously considered to be “isolated.” 79 Fed. Reg. at 22,263. For the first time, the proposed rule extends the concept of jurisdiction by virtue of adjacency to non-wetland waters. Essentially, all waters within the floodplain or riparian area of a jurisdictional water or waters that have a shallow subsurface hydrological connection to a jurisdictional water have a significant nexus and will be jurisdictional by rule.

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. The agencies should revise the proposed rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The Agency did not adopt the commenters' approach as it would, as demonstrated in the preamble and TSD, exclude many waters that have a "significant nexus" to traditionally navigable waters, interstate waters and the territorial seas. For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter's assertion that by changing "adjacent wetlands" to "adjacent waters," they have expanded the scope of the definition of "waters of the United States."

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of "adjacent," as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

National Sustainable Agriculture Coalition (Doc. #15403)

- 3.385 The proposed rule states that, "all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) [traditionally navigable waters, interstate waters, territorial seas, impoundments, and tributaries of these waters] of this section" constitute waters of the United States under the CWA.¹³⁵ NSAC supports the inclusion of wetlands as possible adjacent waters covered under section (a)(6) of the proposed rule. While some have argued that wetlands should never be considered adjacent waters, we recognize the interconnected nature of hydrologic systems and that wetlands adjacent to a jurisdictional water will have a significant effect on the water's chemical, physical, and biological integrity. Recommendation: Keep wetlands as possible adjacent waters covered in section (a)(6) of the proposed rule. (p. 4)

Agency Response: Wetlands continue to be possibly adjacent waters under the final rule.

Coeur Mining, Inc. (Doc. #16162)

- 3.386 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 mines and industrial facilities which rely on ponds for their operations. The Agencies should revise the proposed rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 7)

Agency Response: The Agency did not adopt the commenters' approach of limiting the adjacent category to wetlands as it would, as demonstrated in the preamble and TSD, exclude many waters that have a "significant nexus" to traditionally navigable waters, interstate waters and the territorial seas.

¹³⁵ Proposed Rule at 17

In addition, the agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

Barrick Gold of North America (Doc. #16914)

3.387 Restrict the “adjacency” concept to adjacent wetlands. (p. 29)

Agency Response: See response to similar comments elsewhere in this document.

Irvine Ranch Water District (Doc. #14774)

3.388 The proposed rule revises the existing jurisdictional category of “adjacent wetlands,” which limits WOTUS consideration to only wetlands, to include all “adjacent waters.” The breadth of this category of adjacent waters will result in a wide range of water infrastructure becoming jurisdictional. IRWD does not believe it is EPA’s intent to regulate water reuse facilities, retention and detention basins, groundwater recharge basins, constructed wetlands, and similar water and wastewater infrastructure that is often located adjacent to a WOTUS. (p. 4)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition. See response to similar comments elsewhere in this document regarding exclusions.

National Corn Growers Association (Doc. #14968)

3.389 Wetlands and “waters” are categorically WOTUS in the proposed rule if they are “adjacent” to a tributary. Adjacency is defined as bordering, contiguous or neighboring. We strongly suggest that any condition of adjacency apply only in the case of wetlands, and that the more nebulous “waters” not be included. There are innumerable instances in farm fields of small depressions that could have ponded water in them after an average rainfall for brief periods of time, or even for part of a season yet not meet wetland criteria. Such features could easily be interpreted to be “waters” as considered in this adjacency definition, and such features could be found to be WOTUS if they are near a drainage feature that is also found to be a WOTUS under the proposed rule. We strongly recommend that only wetlands be considered possibly adjacent WOTUS in this instance. (p. 22)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition.

The Agency did not adopt the commenters’ approach as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas. Further, the agencies note that “puddles” are expressly exempted by the rule.

North Dakota Farmers Union (Doc. #16390.1)

- 3.390 [W]e fear the Agencies’ efforts to extent the former “adjacent wetlands” category to “adjacent waters” will result in bootstrapping a water to a non-navigable water that has a nexus to a navigable water, then determining that the first water is jurisdictional.

Recommendation: We recommend that any analysis of the significant nexus between an adjacent wetland and a navigable water include chemical, physical, and biological integrity.

Recommendation: We recommend limiting “adjacent waters” to wetlands that 1) are adjacent to a navigable water, interstate water, or territorial sea and 2) have a significant nexus to that navigable water. (p. 3)

Agency Response: With regard to the commenter’s first concern, under the rule, only waters “adjacent” to an (a)(1) through (a)(5) water are jurisdictional.

Regarding the first recommendation, to the extent the commenter is arguing that for there to be a “significant nexus” a water must have a significant effect on the chemical, physical, and biological integrity of a traditionally navigable water, interstate water, or the territorial seas, the Agency disagrees for the reasons discussed in Compendium 5.0 Significant Nexus.

The Agency did not adopt the commenter’s approach in its second recommendation as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas.

Iowa Poultry Association (Doc. #19589)

- 3.391 The proposed rule further expands the term “adjacent wetlands” to “adjacent waters” and defines those waters as “waters located within the riparian area or floodplain of a water... or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” (proposed rule at 22207). Therefore the definition of adjacent water as used in the proposed rule makes any water in a riparian area or floodplain jurisdictional without regard to the significant nexus test required by Justice Kennedy’s concurring opinion in Rapanos. The agencies have again stated that it is not their intent to regulate all waters within a riparian area or floodplain, yet, that is exactly what the language of the rule provides. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining

“neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

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

- 3.392 The Rule proposes to revise the existing jurisdictional category of “adjacent wetlands,” which currently limits jurisdiction to only wetlands, to include “adjacent waters.” By Rule, *adjacent waters* would have a significant nexus; therefore, all *adjacent waters* would be subject to regulatory oversight under the CWA without the need for a case-specific significant nexus analysis. The proposed category of *adjacent waters* may significantly expand regulatory oversight under the CWA for features that were not previously subject to regulation under the CWA; therefore, the City of Chesapeake will not support the expansion of regulatory oversight under the CWA further into the watershed unless there is more than *speculative or insubstantial* scientific evidence that a significant nexus exists between a special aquatic resource and a TNW. (P. (p. 4))

Agency Response: The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a *significant* nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule. See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition.

For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.”

Florida Federation of Garden Clubs (Doc. #5725)

- 3.393 We support the Agencies’ determination that all adjacent wetlands are “Waters of the U.S.” Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. (p. 2)

Agency Response: The rule continues to make all adjacent wetlands jurisdictional by rule.

Clearwater Watershed District; et al. (Doc. #9560.1)

- 3.394 We oppose the replacement of "adjacent wetlands" with "adjacent waters" and believe that this proposal is not legally supported by the Clean Water Act and its caselaw. As proposed, this section of the rule represents the largest expansion of jurisdiction by the agencies over regulated waters. [...]

RECOMMENDATION: We recommend that the agencies limit the definition of adjacent waters to those wetlands that are adjacent to navigable waters, interstate waters, and territorial seas, and for which a significant nexus between the adjacent wetland and the navigable water is established. (p. 6-8)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition.

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

The Agency did not adopt the commenters’ approach (i.e., change “waters” back to “wetlands”) as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas.

Duke Energy (Doc. #13029)

- 3.395 The concept of adjacency should remain as currently regulated, which only includes adjacent wetlands, not expand this category to all other waters. (p. 12)

Agency Response: See prior response.

Southern Company (Doc. #14134)

- 3.396 The agencies propose to expand the concept of adjacency to include all “waters” adjacent to TNWs or tributaries. This expansion from “wetlands” to “waters” is not adequately justified in the proposal. The scientific community and regulated industry are generally familiar with what a “wetland” is (though there is confusion about when a given wetland is jurisdictional). But the concept of adjacent “waters” is new. The agencies make this change without adequate justification and guidance and seemingly without reference to or an assessment of the Corps’ 1987 Manual. (p. 38)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.”

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and

TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

In addition, in response to comments asking the agencies to clarify the term “waters,” the final rule, preamble, TSD, and responses to other comments in this document provide additional examples and further guidance.

Although the commenter’s point regarding the “the 1987 manual” is unclear, the agencies note that the definition of “wetlands” that is provided in the rule is the same as that presented in the 1987 Corps of Engineers Wetlands Delineation Manual and the accompanying Regional Supplements. That said, the definition of “wetlands” is outside the scope of today’s rulemaking.

NiSource Inc. (Doc. #15112)

- 3.397 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 that rely on industrial ponds for their operations. Agencies should revise the proposed rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 6)

Agency Response: See response to similar comments elsewhere in this document.

American Wind Energy Association (Doc. #15208)

- 3.398 AWEA takes issue with the fact that the Agencies do not give a scientifically backed justification as to why downstream effects of the pollution of tributaries and adjacent waters are to be treated differently than the effects of pollution on wetlands. If wetlands provide for different physical, chemical, and biological benefits to downstream navigable waters compared to tributaries and adjacent waters, AWEA requests the Agencies include those justifications within the final rulemaking. (p. 6)

Agency Response: The key to the agencies’ interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: waters are “waters of the United States” for purposes of the CWA if they, either alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Significant nexus is not purely a scientific determination. While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute’s goals, objectives and policies, the case law the agencies’ technical expertise and experience when interpreting the terms of the CWA, including “waters of the United States.” The agencies determined by rule that covered tributaries in combination with other covered tributaries located in a watershed that drains to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, and biological integrity of that water and

that covered adjacent waters located in a watershed that drains to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, and biological integrity of that water. The rule also establishes two exclusive circumstances under which a significant nexus determination is made. The significant nexus standard is the applicable standard for all waters evaluated as to their jurisdiction under the Clean Water Act. See Significant Nexus Compendium and Science Compendium.

Washington County Water Conservancy District (Doc. #15536)

- 3.399 Clarify that “adjacent” waters under category (6) are limited to adjacent wetlands, the only type of water body the Supreme Court has indicated can be categorically regulated on the basis of adjacency. (p. 13)

Agency Response: See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent and the CWA.

SCANA Services, Inc. (Doc. #15660)

- 3.400 We are concerned that the change in language from “adjacent wetlands” to “adjacent waters” could result in structures such as stormwater treatment ponds or industrial holding ponds being brought under jurisdiction. (p. 2)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.”

Xcel Energy (Doc. #18023)

- 3.401 [T]he agencies should revise the Proposed Rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 8)

Agency Response: See response to similar comments elsewhere in this document.

American Rivers (Doc. #15372)

- 3.402 American Rivers is strongly supportive of the Agencies’ proposal that “all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section” are defined as “waters of the United States.”¹³⁶ This is supported by sound science as well by as the legislative and judicial history of the CWA. This proposed language is a change from the existing definition, which was limited to “adjacent wetlands” and covered other adjacent nonwetland waters, as jurisdictional under the (a)(3) “other waters” category where they were subject to a significant nexus determination. We also support the proposed rule’s addition of the definitions “neighboring,” “floodplain,” and “riparian area” in order to better delineate the term “adjacent.” (p. 20)

Agency Response: Please see the preamble and TSD for a discussion of the changes the Agency made to the proposed definition of “adjacent” in response to

¹³⁶ At 22263

comments seeking additional clarity, consistency and certainty.

Environment Council of Rhode Island (Doc. #3532.2)

- 3.403 Our organizations support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreational activities. (p. 2-3)

Agency Response: The rule continues to provide that all adjacent wetlands are "waters of the U.S."

Save The Bay (Doc. #13221)

- 3.404 We support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost. (p. 2)

Agency Response: The rule continues to provide that all adjacent wetlands are "waters of the U.S."

Clean Water Action (Doc. #14654)

- 3.405 Our organizations support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and community safety and. Wetlands protect the water quality of entire watersheds by filtering pollutants. Wetlands also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost. (p. 2)

Agency Response: The rule continues to provide that all adjacent wetlands are "waters of the U.S."

Clean Water Action et al. (Doc. #14884)

- 3.406 Our organizations support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost. (p. 2)

Agency Response: The rule continues to provide that all adjacent wetlands are "waters of the U.S."

Audubon California, et al. (Doc. #15200)

- 3.407 Our organizations support the Agencies' determination that all adjacent waters are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. In California, rivers that once fed wetlands have been channelized by more than 1600 miles of levees. Despite those man-made barriers, the floodplains created by these rivers still exist, and still provide the benefit of seasonal wetlands, which are hydrologically connected to the rivers. The proposal to protect these adjacent waters will help protect water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost. (p. 3)

Agency Response: The rule continues to provide that all adjacent wetlands are "waters of the U.S."

Red River Valley Association (Doc. #16432)

- 3.408 The Proposed Rule includes within the scope of CWA jurisdiction "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment." By declaring all adjacent waters-not simply adjacent wetlands, as the current rule and past guidance do categorically jurisdictional, the Proposed Rule includes many waters not previously subject to federal regulation, which is contrary to the agencies' assertion that the proposal does not expand jurisdiction. The definition of "adjacent" is overly broad, impermissibly relying on groundwater connections to capture "neighboring" waters that are not actually adjacent and otherwise would not fall within CWA jurisdiction. (p. 2)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing "adjacent wetlands" to "adjacent waters" broadens the scope of the definition of "waters of the United States." In addition the agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments - seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Although the definition of "adjacent" no longer contains provisions addressing shallow subsurface connections (which the agencies assumes the commenters means by its reference to "groundwater") the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) –

(3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections, where applicable, can be important in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

U.S. Chamber of Commerce (Doc. #14115)

- 3.409 Significantly, the Agencies have not offered a defensible rationale to explain why the adjacency concept should be extended to non-wetland waters. There has long been a reasonable argument that wetlands that actually abut navigable waters without any clear boundary between the wetlands and waters should be jurisdictional WOTUS. This is based upon the view that such adjacent (actually abutting) wetlands are probably inseparably bound up with jurisdictional waters and therefore have a significant nexus with them. But there is no rationale for extending this adjacency concept to non-wetland waters because non-wetland waters will always be non-abutting (and therefore have no significant nexus). (p. 28)

Agency Response: The agencies disagree with the commenter that non-wetland waters have no significant nexus; the agencies’ significant nexus determination for adjacent waters is in the preamble and TSD. See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.”

Nebraska Cattlemen (Doc. #13018.1)

- 3.410 The entire analysis of “adjacency” in Supreme Court case law goes no further than wetlands adjacent to these major tributaries. However, EPA has illegally expanded their jurisdictional authority with the proposed rule by reading “wetlands” completely out of the “adjacency” and “significant nexus” analysis and is now claiming to assert not only “adjacent wetlands” automatically jurisdictional but that all “adjacent waters” are. (Proposed rule at 22269). (p. 11)

Agency Response: See the TSD, Section 1, for a response to comments asserting that changing “adjacent wetlands” to “adjacent waters” broadens the scope of the definition of “waters of the United States.”

See the Legal compendium, preamble and TSD for responses to comments addressing whether the rule is consistent with Supreme Court precedent and the CWA.

The agencies' basis for including waters other than wetlands within the concept of adjacency is also explained in the preamble and TSD.

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

North Dakota Soybean Growers Association (Doc. #14594)

- 3.411 The Agencies propose to retain the existing definition of "adjacent," they also propose new definitions of "neighboring," "riparian area," and "floodplain." These definitions not only expand the universe of jurisdictional waters far beyond the traditional concept of "adjacency" (and the Supreme Court's interpretation of that concept discussed above), they create profound uncertainty as to which waters and areas are likely to be jurisdictional. There has been no defensible rationale to explain why the "adjacency concept" should be extended to non-wetland waters. There has long been a reasonable argument that wetlands that actually abut navigable waters without any clear boundary between the wetlands and waters could be jurisdictional WOTUS. This is based upon the fact that actually abutting wetlands are probably inseparably bound up with jurisdictional waters and therefore have a "significant nexus" with them. But there is no rationale for extending this adjacency concept to non-wetland waters because non-wetland waters will always be non-abutting waters. (p. 10-11)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

See the TSD, Section 1, for a response to comments asserting that changing "adjacent wetlands" to "adjacent waters" broadens the scope of the definition of "waters of the United States." For the reasons discussed in the preamble and TSD, the agencies disagree that the Supreme Court has limited the type of waters that may be regulated as "adjacent" to wetlands.

The agencies' basis for including waters other than wetlands within the concept of adjacency is also explained in the preamble and TSD.

Ducks Unlimited (Doc. #11014)

- 3.412 Jurisdiction by rule for adjacent wetlands and other waters: We agree with the agencies' finding, based on the weight of the scientific evidence presented in the Report and the Appendix, that adjacent waters such as riparian and floodplain waters "*significantly affect the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters*" due to the existence of a significant nexus. The preamble of the proposed rule states the science-based conclusion that "*all adjacent waters should be jurisdictional by rule because the discharge of many pollutants (such as nutrients, petroleum wastes and other toxic pollutants) into adjacent waters often flow into and thereby pollute the traditional navigable waters, interstate waters, and the territorial seas.*" This conclusion is also consistent with the current legal framework and reflects Justice Kennedy's statement that "the agencies' existing regulation "rests upon a reasonable

inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” And again, the Court in their Riverside Bayview decision stated that while “not every adjacent wetland is of great importance to the environment of adjoining bodies of water,” “if it is reasonable for the Corps to conclude that in the majority of cases adjacent wetlands have significant effects on water quality and the ecosystem, its definition [of adjacency] can stand.” Thus, not only do these examples show that the Supreme Court supports a “weight of the evidence” approach to using and applying the underlying science, in each of these cases they do so in the context of adjacent waters. So, the agencies are on firm scientific and legal ground with respect to their categorical inclusion of adjacent waters as jurisdictional “waters of the U.S.” (p. 15)

Agency Response: The final rule retains the provision stating that all adjacent waters are jurisdictional by rule. The agencies have, however, revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. For more details, including the bases for these changes, see the preamble and TSD.

Western Resource Advocates (Doc. #16460)

- 3.413 WRA supports the agencies’ proposal to make adjacent waters and wetlands jurisdictional by rule rather than on a case by case basis (as other waters). Because of the importance, and relatively scarcity of water and wetlands in the arid and semi-arid West, wetlands and waters that are adjacent to TNW, interstate and tributary waters, and their impoundments have a significant nexus to the jurisdictional waters because they “are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.”¹³⁷ Thus, they should themselves be jurisdictional. (p. 18)

Agency Response: The rule continues to provide that all adjacent wetlands are “waters of the U.S.”

Texas Wildlife Association (Doc. #12251)

- 3.414 The proposed approach is certain to sweep in many features that have only remote and insubstantial connections with traditional navigable waters. Waters that previously were 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 recreational ponds constructed by TWA members. The agencies should revise the proposed rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 5)

Agency Response: The Agency did not adopt the commenters’ approach of limiting the adjacent category to wetlands as it would, as demonstrated in the preamble and TSD, exclude many waters that have a “significant nexus” to traditionally navigable waters, interstate waters and the territorial seas.

¹³⁷ Rapanos, 547 U.S. at 780-81.

In addition, the agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of “adjacent,” as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.”

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

- 3.415 The regulation of all adjacent “waters” is an expansion of jurisdiction beyond even pre-SWANCC levels; the agencies should limit the types of adjacent waters they are proposing to regulate categorically: As the agencies acknowledge (see 79 Fed. Reg. at 22207), the proposal to regulate all adjacent “waters” goes beyond what their rules have heretofore addressed, which has always been only adjacent “wetlands.” See 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 122.2. The basis for the proposed new approach is that pollutants discharged into adjacent waters “often” flow into and pollute TNWs and interstate waters. See 79 Fed. Reg. at 22210. The agencies argue that these adjacent (non-wetland) waters have “often” been regulated in the past as “other waters” that could affect interstate commerce. See 79 Fed. Reg. at 22207. This was not always the case, however, as the case cited by the agencies in the preamble demonstrates. See *San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007) (pond located adjacent to San Francisco Bay not regulated).

The fact that some (but not all) of what the agencies now consider to be adjacent waters were regulated under the (now rejected) interstate commerce test for jurisdiction set forth in the existing rules, and the fact that pollutants “often” flow from certain types of adjacent waters into TNWs, do not form a sufficient basis to categorically regulate all adjacent waters. This appears to be an example of the agencies regulating based on administrative convenience (ease of regulation) rather than a sound legal footing. In their quest to provide certainty and avoid having to make case-by-case determinations, the agencies have proposed an over-reaching regulation of all “adjacent waters.”

Recommendation: To the extent the agencies can expand jurisdiction beyond wetlands to other types of adjacent waters in a manner that is consistent with Supreme Court precedent, they should more clearly articulate the types of adjacent waters that are being categorically regulated, as well as those that are not being so regulated. (p. 32-33)

Agency Response: The agencies have revised the definition of “adjacent,” in

particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.” (The agencies note that the proposed rule preamble at 79 Fed. Reg. at 22207 cited by the commenter merely states that non-wetland waters have not historically been treated as “adjacent” in the definition of “waters of the U.S.,” not that they have not been included in the definition at all.) In addition, the commenter’s reliance on *Cargill Salt* is misplaced as the Court did not reach the question of whether the pond in that case could be found jurisdictional under the interstate commerce provisions of the then-existing rule.

As explained more fully in the preamble and TSD, the agencies have determined that “adjacent” waters have a significant nexus based on the record for today’s rule and thus are appropriately jurisdictional by rule. As is also made clear in the preamble and TSD, and consistent with the Supreme Court’s decision in *Riverside Bayview* and Justice Kennedy’s opinion, the fact that a water meeting the definition of “adjacent” might not have a significant nexus individually does not prevent the agencies from regulating adjacent waters as categorically jurisdictional.

Note that for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, a case-specific significant nexus determination is required. Waters beyond these limits are not regulated. Please see the preamble and TSD for additional detail.

3.3. FLOODPLAINS

Following are the specific comments received on the proposed rule and responses on “floodplains:”

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

- 3.416 To address some of the problems described above, Pennsylvania proposes the following specific revisions to definitions in the rule:

Floodplain - Define moderate to high water flows in term of a certain rain event. The lands adjoining a channel or conveyance that have been or may be expected to be inundated by flood waters in a 100-year frequency flood. (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain as this commenter suggests. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

New Mexico Department of Agriculture (Doc. #13024)

- 3.417 "Floodplain. The term 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 water flows."

The U.S. Geological Survey defines the term floodplain as "a strip of relatively flat and normally dry land alongside a stream, river, or lake that is covered by water during a flood."¹³⁸ Floodplains are hydrologically defined by flood intervals. Flood intervals can range from 10 to 500 years yet the proposed definition does not include information about which flood interval the Agencies plan to use. This means floodplains defined by the longest interval can be several times larger than the smallest; therefore, NMDA requests clarification on which interval the Agencies intend to use.

Similarly, if the designated boundaries of floodplains or flood zones change for any reason, the public should be notified by the Agencies how the changes will impact the jurisdictional status of waters on or near their property. (p. 12)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The designation of the 100-year floodplain will better enable the public to determine whether their property is jurisdictional at any time. Also, the CWA 404 program recognizes that site characteristics can change; this is not a new issue. Corps Regulatory Guidance Letter (RGL) 05-02 reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District

¹³⁸ United States Geological Survey. "Water Science Glossary of Terms." April 3, 2014. <http://water.usgs.gov/edu/dictionary.html>

Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

- 3.418 Flood intervals can range from 10 to 500 years yet the proposed definition does not include information about which flood interval the Agencies plan to use. (p. 27)

Agency Response: See response above.

North Carolina Forest Service, NC Dept. of Agriculture (Doc. #14122)

- 3.419 Remove entirely the proposed new term "floodplain" and its associated definition. Justification for Comment : Attempting to define and apply the term ' floodplain ' will only add great confusion, because undoubtedly the regulated community will confuse the proposed USEPA/WOTUS use of this term with the USDHS/FEMA use of this term, and confusion will arise regarding how, when, where, and what frequency of " floodplain" is being referenced, depending upon the purpose of the intended activity on the ground; and which federal or state agency is involved with regulatory oversight of that activity. Just because flooding occurs within an area, does not necessarily mean that the floodwaters, nor the land itself, should be considered a WOTUS. Because of storm intensity, hydro logic alterations (ie: dikes, berms, dams, channelization, impoundments), and an extensive legacy of impervious surface land-use changes, many floodplain zones today now extend well beyond the reach of traditionally navigable waters and easily identifiable wetlands. We are concerned that if the term ' floodplain ' is retained in the proposed rule as-is, then the new WOTUS rule will essentially capture any piece of land which has ever, may ever, or could possibly be flooded by any storm event in the future. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. Those documents also explain how the Agency will work with other agencies, where appropriate, to implement the 100-year floodplain aspect of the rule. As the Agency will use applicable FEMA maps where available and coordinate with other agencies as appropriate, the agencies are confident that the public will not be confused by the use of the 100-year floodplain in today’s rule.

With respect to the commenter’s concerns regarding the potential to regulate waters in floodplains that do not have a significant nexus to traditionally navigable waters, interstate waters or the territorial seas, as explained more fully in the preamble and TSD, the agencies have determined that “adjacent” waters have a significant nexus based on the record for today’s rule and thus are appropriately jurisdictional by

rule. For waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, a case-specific jurisdictional determination is required. Waters beyond these limits are not regulated. Please see the preamble and TSD for additional detail.

The agencies reiterate that only waters, not land, are subject to today’s definition of “waters of the United States.”

State of Oklahoma (Doc. #14773)

- 3.420 [T]he proposed WOTUS rule introduces new definitions that are inconsistent with those used by other federal, state and local agencies. Particularly troubling are those related to floodplains and ephemeral streams. Like many other states, Oklahoma has chosen to use a definition of floodplain established by the Federal Emergency Management Agency (FEMA), but the Agencies have developed a new and extremely broad definition that will only add to the confusion of developers and the regulated community. Even more troubling is that EPA will determine exactly where a floodplain exists. To provide better continuity, the Agencies should change the meaning of floodplain within the proposed WOTUS rule to a definition already understood by citizens, such as the FEMA definition.

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The agencies made use of the 100-year floodplain in part because it is well understood by the public. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream

flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

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

- 3.421 To address some of the problems described above, Pennsylvania proposes the following specific revisions to definitions in the rule:

Floodplain — Define moderate to high water flows in term of a certain rain event. The lands adjoining a channel or conveyance that have been or may be expected to be inundated by flood waters in a 100-year frequency flood. (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain, as suggested by this commenter. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Florida Department of Environmental Protection (Doc. #15080)

- 3.422 The proposal would define "floodplain" to mean 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 water flows. 79 Fed. Reg. at 22,207. The proposal does not appear to establish a measure of "moderate to high" water flows.

The Department asks that the federal agencies clarify their proposed use of "moderate to high water flows" as a defining characteristic of a floodplain. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides

specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.423 The proposal does recognize flooding frequency to be relevant to determining whether a water is located in a floodplain. 79 Fed. Reg. at 22,209. The federal agencies appear to reserve for future, case specific determination, however, the specific flooding frequency that would be applied to establish the floodplain of any individual core federal water or tributary:

As a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone). 79 Fed. Reg. at 22,209.

The Department asks that the federal agencies clarify whether the agencies intend for the definition of floodplain to vary based on case-specific factors. Similarly, the Department asks that the federal agencies clarify whether the agencies intend to identify at the time of a jurisdictional determination the flooding frequency necessary to establish the scope of a floodplain. If so, is there opportunity to refine the jurisdictional category such that it does not include any water simply located in a floodplain? (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The agencies considered a number of different approaches to identifying the floodplain, including using higher and lower flood intervals. As discussed more fully in the TSD and preamble, for waters in the 100-year floodplain within 1,500 feet of the ordinary high water mark of an (a)(1) through (a)(5) water, the agencies determine there is a significant nexus with the downstream traditional navigable waters, interstate waters, or the territorial seas and these areas are critical to protect “waters of the United States.” Based on a review of the scientific literature, the agencies’ technical expertise and experience, and the implementation value of drawing clear lines, the rule establishes a distance limit for floodplain waters to

meet the definition of “neighboring” and thus to be “waters of the United States” by rule. This distance limitation was established in order to protect vitally important waters within a watershed while at the same time providing a practical and implementable rule. The agencies are not determining that waters in the floodplain farther than 1,500 feet from the ordinary high water mark never have a significant nexus. Rather, the agencies are using their technical expertise to promulgate a practical rule that draws reasonable boundaries in order to protect the waters that most clearly have a significant nexus while minimizing uncertainty about the scope of “waters of the United States.” Because waters beyond these limits may have a significant nexus, the rule also establishes areas in which a case-specific significant nexus determination must be made. For further detail, see the TSD and preamble.

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

- 3.424 There is little clarity or predictability in jurisdictional determinations of adjacent waters if floodplains will be determined by such vague terms as moderate to high flows or the flood interval will be based on the agencies’ best professional judgment. What is considered to be high flows? There is a significant difference in the scope of protection depending on the flood interval, e.g. a 2 year versus 500 year that is used to delineate the floodplain

Recommendation: The rule should be explicit as to how the floodplain will be determined. Moderate and high flows should be defined. (p. 11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain

maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Ohio Department of Natural Resources, et al. (Doc. #15421)

- 3.425 MRM: Various agencies have different definitions for determining what land area is considered a “floodplain”. The proposed definition as part of this ruling is such that “The term floodplain means an area bordering inland or coastal waters that are formed inundated during periods of moderate to high water flows.” Many agencies use a certain “storm event” in defining floodplain. Therefore, the appropriate floodplain is open to interpretation.

The proposing agency indicates they do not have authority to regulate land and therefore are not asserting jurisdiction over floodplains. It is unclear what authority and area that the agency proposes to determine as jurisdictional and is somewhat contradictory to what they are stating. (p. 12)

Agency Response: See previous response.

Nebraska Department of Roads (Doc. #16896)

- 3.426 A new definition of floodplain was added to the rule, and the definition could be broadly interpreted. NDOR does not support a broad definition of floodplains. If broadly interpreted, additional waters could be considered jurisdictional and subject to permitting by the Corps. Due to the flat grade of the floodplains along Nebraska’s major river systems, many of our highways are located within this proposed broadly defined floodplain definition, and could cause an otherwise non-jurisdictional area to be jurisdictional. Under this definition, it’s conceivable that a regulator could claim jurisdiction over a water located miles from any of Nebraska’s major river channels, simply by virtue of that water being located in the floodplain. Due to the potential implications of this, it would be appropriate to add elements of proximity and significance to the definition, to ensure that the intent of the rule is met. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The

bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

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

- 3.427 In response to the query on how to further define the floodplain, Caltrans recommends that features with a confined surface connection within the 100 year floodplain be considered adjacent, all features outside of the 100 year floodplain be excluded from jurisdiction, and features within the 100 year flood plain without a confined surface connection be subject to a significant nexus analysis. We feel that this approach would be implementable as well as follow the available science. (p. 2)

Agency Response: See previous response.

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

- 3.428 The floodplain definition is not tied to or consistent with the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Aside from potential conflicts between federal agencies, this could be very confusing and complicated to integrate at the local level, and could conflict with local floodplain ordinances as well. How a floodplain is defined should be consistent across federal agencies. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information

can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Murray County Board of Commissioners (Doc. #7528)

- 3.429 Leaving a definition of the floodplain to the best judgment of the field staff removes the agencies' goals of creating efficiency and clarity. It requires consultation from field-staff for a boundary line that can be determined without agency involvement. The floodplain rule should be applied evenly across the board. For clarity, it would be reasonable to conclude that the floodplain should follow an interval that is common and to be expected regularly for a tributary or navigable water. Waters within a floodplain of a common interval could be reasonably expected to have a significant nexus to navigable waters downstream. RECOMMENDATION: We recommend that the agencies use a 10 year floodplain interval for analyzing adjacent waters as neighboring. (p. 7-8)

Agency Response: See previous response. The agencies made use of the 100-year floodplain in part because commenters noted that it is well understood by the public and widely available.

Southern California Association of Governments (Doc. #8534.1)

- 3.430 The rule states that "when determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example 10 to 20 year flood interval zone)." Through the definitions of "adjacent" and "neighboring", the proposed rule would appear to potentially include floodplains as jurisdictional a 10 to 20 year interval represents a flood boundary far from an "ordinary" condition. This would represent a substantial increase in jurisdictional waters. (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD. As a result of these changes, and as discussed in more detail in the preamble, the rule does not represent an increase, but rather a decrease, in jurisdictional waters.

However, because the 100-year floodplain can be extremely large in some areas of the country, particularly near large rivers, the agencies again chose to provide

increased clarity and certainty by establishing a 1,500-foot limitation in the rule as a class to ensure that waters that provide important functions significantly affecting the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas are protected.

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

- 3.431 The floodplain definition is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Aside from potential conflicts between Federal agencies, this could be very confusing to landowners and complicated to integrate at the local level. It is extremely likely that these definitions will create conflict with local floodplain ordinances as well. Floodplain definitions must be consistent between and among all Federal agencies. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. To the extent the issue remains relevant, the standard the agencies use to designate a floodplain for the purposes of identifying “waters of the U.S.” should not create “conflicts” with local floodplain ordinances, as those ordinances will be used for different purposes.

In addition, when determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Hamilton County Engineer's Office (Doc. #8669)

- 3.432 The definition of "floodplain" should be further refined. As stated, a floodplain is 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 water flows." The terms "present climatic conditions" and "moderate to high water flows" should be defined to limit the floodplain to those flood events with a more recent history (rolling 20-year interval). And, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S.'" should be highlighted in the definitions. (p. 4)

Agency Response: See previous response.

Hampton Roads Planning District Commission (Doc. #9612)

- 3.433 The proposed definition for floodplain may have unintended conflicts with other federal, state and/or local regulations and ordinances. It is uncertain whether this new federal definition is consistent or will create conflicts with existing federal regulatory programs that utilize the term floodplain. The proposed definition does not meet the goal of clarifying the definition of "neighboring." The HRPDC proposes the following underlined changes, "The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is regularly inundated one or more times per year. (p. 3)

Agency Response: See response to similar comments elsewhere in this document.

City of Chesapeake (Doc. #9615)

- 3.434 The Rule proposes a new definition for the term "floodplain." It is uncertain whether this new federal definition is consistent or will create conflicts with existing federal regulatory programs that utilize the term floodplain. For example, the Federal Emergency Management Agency (FEMA), DEQ and local counties utilize the term floodplain to require flood insurance and institute specific building codes. Proposing a new definition of floodplain within the CWA may have unintended conflicts with other federal, state and/or local regulations and ordinances which regulate development within the floodplain. (p. 5)

Agency Response: See response to similar comments elsewhere in this document.

Board of Supervisors, Imperial County (Doc. #10259)

- 3.435 Floodplain: The current definition does not have any limiting language with regard to size of floodplains. Further, Imperial County would like clarification relative to the timeframe of "present climatic conditions," as well as the formula for deciding if a feature is experiencing a period of "moderate to high water flows." (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in

particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Milan Township Board of Trustees (Doc. #13044)

- 3.436 The definition of “floodplain” should be further refined. The terms “present climatic conditions” and “moderate to high water flows” should be defined to limit the floodplain to those flood events with a more recent history. (p. 1)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Maricopa County Board of Supervisors (Doc. #14132.1)

- 3.437 The new definitions include “floodplains” as a factor in whether a water is “neighboring” to another WUS. While the definition may be technically correct it does not refer to a frequency (i.e. 100-year flood event) and will be confusing to the public accustomed to the Federal Emergency Management Agency definition when it is also used for identifying a WUS. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

City of Dallas, Texas (Doc. #14513)

- 3.438 The proposed definition for "floodplain" is inconsistent with the existing regulatory definition of Floodplain (Executive Order 11988, 40 CFR 59 through 80 (in particular 44 CFR 60.3)). The current floodplain definition is quantified through rigorous, peer-reviewed, scientific hydrologic and hydraulic analyses of the stream and contributing watershed. There is no corresponding quantification associated with "an area ... formed by sediment deposition from such waters under present climatic conditions ... and inundated during periods of moderate to high flows." Because this creates two different regulatory definitions for the same term, the proposed definition may create confusion for thousands of communities like Dallas that participate in the Federal Emergency Management Agency flood management program. There is no need (p. 1-2)

Agency Response: See previous response.

North Carolina Soil and Water Conservation Commission (Doc. #14790)

- 3.439 The SWCC opposes the floodplain being used as a boundary to automatically determine jurisdiction as it will cause confusion, inconsistent interpretations in the field, and undue burden to the regulated community. While EPA and USACE have stated that using a flood frequency in the definition will result in inconsistent floodplain land areas throughout the country, it will at least provide a definition that is transparent for all landowners. If EPA and USACE wish to include the floodplain as a regulatory tool, a flood frequency should be designated. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

San Joaquin County Board of Supervisors (Doc. #15017.1)

3.440 The definition of "floodplain" should also be further refined. As stated, a floodplain is 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 water flows." The terms "present climatic conditions" and "moderate to high flows" should be defined to limit the floodplain to those flood events with a more recent history (e.g. a rolling 20-year interval). And, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S.'" should be highlighted in the definitions. (p. 4-5)

Agency Response: See previous response.

National Association of Counties (Doc. #15081)

3.441 The proposed definition states that floodplains are defined as areas with “moderate to high water flows.”¹³⁹ These areas would be considered “water of the U.S.” even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a “floodplain?”

Further, it is major problem for counties that the term “floodplain” is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies. (p. 10)

Agency Response: See response to similar comments elsewhere in this document.

¹³⁹ Id

City of Stockton, California (Doc. #15125)

- 3.442 The proposed rule would categorically include all "waters" within a floodplain or riparian area as waters of the U.S. This is in contrast with existing regulation which covers adjacent wetlands, because the proposed rule extends jurisdiction to include all "waters." The geographical extent of the proposed rule is unknown because it does not define criteria for determining the boundaries or characteristics of the "floodplain" or "riparian area." Instead, the rule assures that EPA will use its best professional judgment to determine the boundary for these areas.

This uncertainty will likely generate significant agency review, subjective decision-making, and potentially litigation. We strongly urge the agencies to include science-based criteria and greater clarity of adjacent and neighboring "waters" and a definition of floodplain and riparian areas that is not arbitrary. We are familiar with the flood zone mapping and insurance requirements of the Federal Emergency Management Agency that identifies floodplains and relies upon local governments to adopt the ordinances necessary to manage land use and building requirements in the floodplain. However, the proposed rule opens the prospect for an arbitrary floodplain identification process that would subject an area to every aspect of the Clean Water Act. Even more disconcerting would be the identification of a "riparian area" in which all waters would be jurisdictional, yet no agency we are aware of maps riparian areas, and this rule does little to establish criteria for defining such areas that would be subject to the Clean Water Act. (p. 2)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain

maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Carroll County Board of Commissioners (Doc. #15190)

- 3.443 The floodplain definition is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Aside from potential conflicts between Federal agencies, this could be very confusing to landowners and complicated to integrate at the local level. It is extremely likely that these definitions will create conflict with local floodplain ordinances as well. Floodplain definitions must be consistent between and among all Federal agencies. (p. 2)

Agency Response: See response to similar comments elsewhere in this document.

City of Greeley, Colorado, Water and Sewer Department (Doc. #15258)

- 3.444 Define "floodplain" with reference to a specific flood recurrence interval. The underlying flood interval should be one that recurs frequently enough to ensure that the underlying connection is "more than speculative or insubstantial." Such recurrence interval should be no less frequent than one in five years. (p. 6)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Brady Township Supervisors, Clearfield County, Pennsylvania (Doc. #16480)

- 3.445 The definition of "floodplain" should be further refined. As stated, a floodplain is 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 water flows." The terms present climatic conditions and moderate to high flows should be defined to limit the floodplain to those flood events with a more recent history (rolling 20-year interval). And, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S.'" should be highlighted

in the definitions (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

San Bernadino County, California (Doc. #16489)

- 3.446 "Floodplain": The definition of a "floodplain" is not specifically defined, and is therefore subject to interpretation and may lead to inconsistent determinations. Similarly, it is proposed that "adjacent waters" within the floodplain will be "jurisdictional by rule". Depending on the final definition of a "floodplain", jurisdiction of "adjacent waters" may be significantly greater than would otherwise be determined under existing criteria, which utilize specific regional (climatic) guidance. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.447 It is unclear whether the agencies are proposing to completely discard current floodplain determination criteria, wherein assessment of the floodplain involves application of existing regional guidance documents. These existing guidance documents are specifically formulated to take into account regional climatic conditions and hydrogeomorphic forms.

The current guidance document for the arid west region of the United States, divides floodplain determination into two general categories: 1) Perennial channel forms; and 2) Ephemeral/Intermittent channel forms which may include alluvial fans, compound channels, discontinuous ephemeral channels, single-thread channels with associated floodplains, and anastomosing channels. In all channel forms, the "active floodplain" is described as not exceeding the 10-year event.¹⁴⁰ All channelized areas above this mark

¹⁴⁰ U.S. Army Corps of Engineers, A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States, (August 2008). See, section 1.3 "Stream Geomorphology" at

are considered "paleochannels" formed from rare storm events. These paleo channels are typically associated with upland areas, and are typically not considered jurisdictional.

It is implied in the proposed regulations that the floodplain might "equate" to the 100-year FEMA floodplain. The DPW asserts that using the 100-year floodplain as a bright-line demarcation for jurisdiction of adjacent waters is a one-size-fits—all approach which does not conform with hydrologic realities. Given that the term "floodplain" is given significant jurisdictional effect wherein "adjacent waters" located within the floodplain are "jurisdictional by rule", using the FEMA 100-year rate map for determining the floodplain, would lead to a finding of jurisdiction over "adjacent waters" and "other waters" at significantly greater rate than what would otherwise be determined using the USACE' existing science-based regional guidance. (p. 10-11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Regarding the commenters assertion that the agencies are expanding jurisdiction, please see the Adjacency essay above as well as the preamble and TSD. Furthermore, the guidance document discussed above is for identifying vertical boundaries of a tributary NOT the outer limits of a floodplain. Therefore, the agencies determined there is not a conflict with the manual.

Palm Beach County, Florida (Doc. #16647)

- 3.448 The definition of "floodplain" should be further: refined. As stated, a floodplain is 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 water flows." These terms should be defined to limit the floodplain to those flood events with a more recent history. Given the history of flood control and development in South Florida and frequency of significant rain events, extensive data is available to determine the frequency of flooding. Additionally, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S,'" should be amended to define uplands to include a temporal component articulating limits on how far back agency staff can reach to find jurisdiction. Lastly, in areas such as South Florida where there is a pronounced interface between groundwater and surface water, the agencies should seek comment on and promulgate a regional rule that recognizes the practical realities of the situation on the ground. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in

particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. As other commenters have noted, 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 response to the commenter’s concern about the accuracy of the FEMA maps when applied to specific regions, the agencies recognize that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

City of St. Petersburg (Doc. #18897)

- 3.449 The proposed rule has the effect of encroaching on the City's police power. This rule would force the City to modify their own watershed and storm water management practices to comply with new federal regulations, resulting in potential changes to the City's comprehensive land use plans, floodplain regulations, and watershed plans, as well as increased exposure to the permitting process. Further concerns are raised by the introduction of a new definition of floodplain that may conflict with FEMA and state and local definitions of the term. (p. 4)

Agency Response: See response to similar comments elsewhere in this document.

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

- 3.450 The term floodplain is not defined using flood intervals, which is a necessary stipulation on the size of the floodplain, which can range from 10 to 500 years. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Maui County (Doc. #19543)

- 3.451 The term floodplain does not match the definition used by the Federal Emergency Management Agency in the context of floodplain management. Floodplains are areas bordering coastal or inland waters that are inundated during periods of moderate to high water flows. This is the broadest possible definition of a floodplain. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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

- 3.452 The definition of “floodplain” should be further refined. As stated, a floodplain is 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 water flows.” The terms “present climatic conditions” and “moderate to high water flows” should be defined to limit the floodplain to those flood events with a more recent history (rolling 20-year interval). And, the statement in the proposed rule that “uplands in a floodplain are never considered ‘waters of the U.S.’” should be highlighted in the definitions. (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a

provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Board of Supervisors, Sutter County, California (Doc. #19657)

- 3.453 The definition of "floodplain" should be further refined. As stated, a floodplain is 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 water flows." The terms "present climatic conditions" and "moderate to high water flows" should be defined to limit the floodplain to those flood events with a more recent history (rolling 20-year interval). And, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S.'" should be highlighted in the definitions. (p. 7)

Agency Response: See previous response.

California State Association of Counties (Doc. #9692)

- 3.454 The current definition does not have any limiting language in regards to how large floodplains can be. According to FEMA, any piece of land can be flooded. Further, CSAC would like clarification in regards to the time frame of "present climatic conditions" as well as the formula for deciding if a feature is experiencing a period of "moderate to high water flows". CSAC believes the metrics of 2-year or 5-year flow frequencies used by the Corps in the past are appropriate. Floodplain is an inappropriate and expansive criterion for determining the extent of the Clean Water Act. Floodplain should not be used for the proposed rule. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. The agencies made use of the 100-year floodplain in part because it is well understood by the public, as other commenters have noted.

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

- 3.455 The Floodplain definition is particularly vague as the phrase "periods of moderate to high water flows" is completely undefined. NAFSMA urges the EPA to specifically

define Floodplain as the inundation area from a two-year storm. Typically, a two-year storm fills the low flow area and over time has the most geomorphic influence in shaping a floodway and is reasonable and specific approach to defining Floodplain in conjunction with the Neighboring definition. (p. 4)

Agency Response: See previous response.

Western Coalition of Arid State (Doc. #14407)

- 3.456 While significant nexus and riparian areas are defined terms, floodplain is not. The determination of what waters are within a floodplain and are adjacent waters due to their shallow subsurface connection will be ultimately left to the permitting agency or field personnel using their best professional judgment to establish if the water body in question is within reasonable proximity of another (a)(1) through (a)(5) water. We do not see how this creates a clear, understandable bright line for anyone determining which waters are adjacent and warrant CWA protections, and those that do not. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Western Coalition of Arid States (Doc. #14407)

- 3.457 Why is there a separate definition for floodplains in this proposed rule? FEMA has been working with states and local jurisdictions to update its Flood Insurance Rate Maps over the past several years, and state and local governments are adopting and updating hazard mitigation plans based on those maps. The Biggert-Waters Flood Insurance Reform Act of 2012 required FEMA to contract to prepare a Report on how FEMA can improve interagency and intergovernmental coordination on flood mapping, which was released in November 2013. Given all of the work that has already been going into the new FEMA flood maps and the emphasis on stakeholder coordination, we believe it would make more sense if EPA and Army Corps worked off the same understanding of what a floodplain is.

EPA and Army Corps also seem confused among themselves on what standard they based their definition of floodplain. While the explanation of the proposed rule indicates that the definition of floodplain used is scientifically based (page 22207), question 17 of EPA’s Q&A document states “The proposed rule does not define floodplain because there is no scientific consensus on how to do so.” It is further difficult to believe that adjacent (or neighboring) waters in a floodplain are to be determined on a case-by-case basis on the best professional judgment of which flood interval to use – here described as the 10- or 20-year flood zone (22209). If the standard can keep changing, how does this

create a bright line category for a jurisdictional water? In addition, the commonly understood distinction between floodplains as used by FEMA is a 100-year or 50-year flood zone. Consistency among federal agencies, and among federal, state and local government, should be considered instead. (p. 10-11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

North Carolina Department of Agriculture and Consumer Services (Doc. #14747)

- 3.458 In the proposed rule, EPA and USACE introduce new definitions for the terms adjacent, neighboring, riparian area, and floodplain. These terms are far too broad in scope, and have no geographic limit. This creates more confusion, and additional concern that jurisdiction will be expanded by the proposed rule.

Specifically, the proposed definition of floodplain will cause confusion, inconsistent interpretations in the field, and most importantly, undue burden to the regulated community. NCDA&CS opposes the floodplain being used as a boundary to automatically determine jurisdiction. This definition and the reliance on the floodplain should be removed from the rule. However, if the floodplain is retained in the rule to determine jurisdiction, the definition must be revised to provide regulatory certainty.

While EPA and USACE have stated that using a flood frequency in the definition will result in inconsistent floodplain land areas throughout the country, it will at least provide a definition that is transparent for all landowners. If EPA and USACE wish to include the floodplain as a regulatory tool, a flood frequency must be designated.

If EPA and USACE are unable to determine an adequate definition of floodplain, this reference should be removed from the rule. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Muckleshoot Indian Tribe Fisheries Division (Doc. #16369)

- 3.459 We are also concerned that portions of the 100-year floodplain areas would be excluded from the definition of waters of the US. In the draft rule on page 22209, there is a suggestion that one could use a flood return frequency less than 100 years which may eliminate some portion of the 100-year floodplain from consideration as a water of the US (and the 404 jurisdiction that goes with it). This approach seems to contradict the FEMA BiOP and NFMS analysis regarding floodplain needs of ESA listed salmon (see <https://www.fema.gov/medialibrary/assets/documents/30021>). (p. 1-2)

Agency Response: The agencies have further refined the definition of “neighboring” in the rule to provide greater clarity and consistency. The definition in the rule does not use the terms “floodplains” as defined in the proposed rule to define “neighboring,” as it does not provide the clarity requested by the public. The definition in the rule establishes a threshold based on a 100-year floodplain interval associated with traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. However, because the 100-year floodplain can be extremely large in some areas of the country, particularly near large rivers, the agencies again chose to provide increased clarity and certainty by establishing a 1,500-foot limitation in the rule as a class to ensure that waters that provide important functions significantly affecting the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas are protected. Additionally, wetlands, ponds, lakes, oxbows, impoundments, and similar water features are also protected when they lie entirely or partially within 100 feet of the OHWM of a water identified in paragraphs (a)(1) through (a)(5) of the rule without regard to the presence or absence of a 100-year floodplain. The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, as well as the need to provide clarity and certainty for the public and the regulating agencies.

Rhode Island Rivers Council (Doc. #16367)

- 3.460 Additionally, there are concerns that the definition of “floodplains” could create unintended complications. The definition, “sediment deposited by water under present climatic conditions”, would create the need for additional professional fieldwork and would not be verifiable via remote sensing techniques. The utilization of flood maps to establish the boundaries of floodplains would streamline the process and create less uncertainty. It is already potentially impossible to differentiate such sediment deposition from that deposited from either overland flow or stormwater discharge. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The

bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Maine Municipal Association (Doc. #16630)

- 3.461 At a minimum, EPA and Army Corps definitions ought to agree with other federal agency definitions, for example the Federal Emergency Management Agency's definition of "floodplain", which differs from the definition proposed in this rule. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

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

- 3.462 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. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

U.S. Chamber of Commerce (Doc. #14115)

- 3.463 “Floodplain” - The definition of “floodplain” relies on the undefined term “waters” and the concept of “bordering.” And while the definition employs a measurable concept – an area that actually has been inundated by, and was formed by sediment deposition from, actual waters – the return period for such inundation is not specified at all. Is this the 10-year, 50-year, 100-year, or 200-year floodplain? It is not reasonable for the Agencies to simply say, as they have in the proposal, that they will use their “best professional judgment” to answer this question on a case-by-case basis. 79 Fed. Reg. 22,209. (p. 29)

Agency Response: See previous response.

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

- 3.464 Further, this rulemaking’s approach only adds additional confusion by incorporating nebulous, subjective terms to key terms discussed in the proposal. Such terms and definitions include the lack of a specific inundation period or rain event when discussing floodplains (i.e., the necessary qualifier of an area being a floodplain based on a 100-year storm), as well as unnecessarily broad definitions of “tributary” and “adjacent waters.” (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Indiana Cast Metals Association (Doc. #14895)

- 3.465 “Floodplain” is defined as an area that has been inundated by actual waters or was

formed by sediment deposition from actual water. The proposed rule does not, however, specify whether it is the 10- year, 50-year, 100-year or 200-year floodplain that is included in the definition. Using “best professional judgment” to answer this on a case-by-case basis (as is suggested in the proposed rule) provides no meaningful guidance as to what areas are to be included as a floodplain for purposes of designating waters of the U.S. subject to CWA jurisdiction. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

American Foundry Society (Doc. #15148)

- 3.466 Furthermore, “floodplain” is defined as an area that has been inundated by actual waters or was formed by sediment deposition from actual water. The proposed rule does not, however, specify whether it is the 10-year, 50-year, 100-year or 200-year floodplain that is included in the definition. Using “best professional judgment” to answer this on a case-by-case basis (as is suggested in the proposed rule) provides no meaningful guidance as to what areas are to be included as a floodplain for purposes of designating waters of the U.S. subject to CWA jurisdiction. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.467 Accordingly, “adjacent waters” in the proposed rule is a vague and overly broad concept that could include an area as vast as the 200-year floodplain of the Ohio River valley. Landowners in these areas or any area within miles of a navigable water or tributary could never be sure if routine activities on their land would trigger federal water permit requirements covered by the CWA. This is not the clarity and certainty that metal casting operations and other landowners need. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in

particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

American Council of Engineering Companies (Doc. #15534)

- 3.468 It should be of interest to note that the Federal Emergency Management Agency (FEMA) defines “floodplain” as follows: “Any land area susceptible to being inundated by flood waters from any source.” (<http://www.fema.gov/national-flood-insurance-program/definitions>). The proposed rule significantly alters FEMA’s definition, going well beyond established policy, raising concerns that the impact may not be fully understood. More study is needed in this area before proceeding. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations,

topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Business Council of Alabama (Doc. #15538)

3.469 The proposed rule indicates that the determination of a floodplain will be made by the agencies using best professional judgment. An example is given of using 10 to 20 year flood zones. The agencies go on to request comment on whether the rule text should provide greater specificity with regard to how the agencies will determine if a "water" is located in the floodplain of a jurisdictional water. One has to assume that the "water" being referenced in the floodplain is one of these "other waters" that is to be evaluated on a case by case basis. The situation that will arise in a 20 year floodplain and particularly a 100 year flood plain is that the area where potential jurisdictional water may occur is significantly increased as the larger floods. As acres of floodplain increase in size this increases the number and frequency of proposed project reviews that our members would have to conduct to determine if a jurisdictional WOTUS may be impacted. This of course increases the man power needed to make these determinations and in many cases would increase costs due to project delays. There is no argument that most, if not all, wetlands located within any given floodplain would satisfy the definition of WOTUS. It is the other areas within the given floodplain that has the greatest possibility of causing confusion. In years when the precipitation is wetter than normal a number of pools of water may develop that would satisfy the definition of "adjacent waters". In years when there is drought conditions or rainfall is less than average it should be more difficult to prove the same quantifiable number of "adjacent waters". In these drier years of precipitation events swales, rills, and ponded waters could be much more difficult to verify even with field observations. Because there are on-going changes to watershed areas out of the floodplains due to man caused or natural occurrences this will result in evolving changes within the floodplain making it much more difficult to categorize whether certain areas qualify as "adjacent waters". (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Water Advocacy Coalition (Doc. #17921.1)

- 3.470 The proposed rule determines that all waters within the floodplain or riparian area of a jurisdictional water or that have a shallow subsurface hydrological connection to a jurisdictional water categorically have a significant nexus and will be jurisdictional by rule. *Id.* at 22,207. The science does not support such a categorical determination. As the GEI Report explains, “adjacent waters exist on a gradient of connectivity, and the science has not identified the point on that gradient (i.e., the strength of connectivity) where the significant nexus falls.”¹⁴¹ Thus, the agencies fail to provide scientific analysis or references that support the proposed per se regulation of all adjacent waters. (p. 59)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

- 3.471 Floodplain: Even though it is common practice and scientifically sound to define the floodplain by a recurrence interval, the agencies have not done so, leaving it to be defined by the cop on the beat. This is contrary to common scientific and administrative practice and certainly will lead to confusion and unpredictability. How will the agencies identify floodplain? Will the agencies map the floodplains or rely on FEMA maps? Will it be the actual floodplain at the time of the permit application (requiring the agencies to map it for every jurisdictional determination), or will it be the floodplain as depicted in the latest flood map? What areas count as “within the floodplain”? Are areas behind levees still in the floodplain for purposes of “adjacency” determinations? (p. 62)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are

¹⁴¹ GEI Report, Exhibit 6 at 4.

“adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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

- 3.472 The definition of floodplain, as proposed, hinges on the concept of sediment ..." deposition under present climatic conditions", and "periods of moderate to high water flows". From a practical standpoint, it will be very difficult to determine and agree upon in the field, or in an office, the limits of sediment deposits from "present climatic conditions". In addition, it is not known what is meant by the phrase "periods of moderate to high water flows". This term needs to be defined more clearly. Alternately, the Federal Emergency Management Agency (FEMA) has an extensive, well established program for determining floodplains based on a 1% chance of inundation (the 100-year floodplain), that is utilized in current federal and state programs, including Section 404 of the CWA. The proposed rule should retain the existing application of FEMA floodplains and not complicate the already complicated CWA regulatory program with another federal definition and determination process. (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream

flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Portland Cement Association (Doc. #13271)

3.473 Floodplains should not be determined based on a case-by-case test. One of the fundamental problems with the case-by-case significant nexus test is that it is a case-by-case test. On the margins, where jurisdiction is questionable, case-by-case tests provide no certainty to the regulated community, require the unnecessary expenditure of resources (time and money) of both the regulated community and the regulators, and enhances the potential for litigation. PCA strongly believes that the proposed rule should increase clarity and therefore decrease case-by-case analyses. Instead of doing so, the Agencies' proposal decreases clarity and increases the use of case-by-case tests. The Agencies' proposed definition of floodplains is one such example - even in this "always jurisdictional" portion of the test, there is the potential need for a case-by-case analysis, since the agencies will be using their "best professional judgment to determine which flood interval to use."¹⁴² The Agencies should not compound the existing uncertainty through the creation of new case-by-case tests such as the one for floodplains. (p. 17).)

Agency Response: See previous response.

National Ready Mixed Concrete Association (Doc. #13956)

3.474 [T]he term "floodplain" is poorly defined. While the agencies have tried to come up with a clearly defined term - an area that actually has been inundated by, and was formed by sediment deposition from, actual waters – how often such inundation is necessary for coverage is not specified at all. There is a tremendous difference between a 10-year, 50-year, 100-year, or 200-year floodplain and leaving it up to the agencies' "best professional judgment" to answer this question on a case-by-case basis will result in increased regulatory uncertainty and confusion.¹⁴³ (p. 9)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides

¹⁴² 79 Fed. Reg. at 22209.

¹⁴³ 79 FR 22209

specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Commercial Real Estate Development Association (Doc. #14621)

- 3.475 The amorphous definition of floodplain in the Proposed Rule does not provide the public a “bright line” that is publically available and definable on the ground. We recommend that you delete this definition and replace with:

Any land area susceptible to being inundated by water from any natural source that is subject to a one percent or greater chance of flooding in any given year as depicted on the most recent Federal Emergency Management Agency Flood Insurance Rate Map, i.e., the 100-year floodplain, or if an area not currently mapped by FEMA meets both of the following conditions:

1. The flooding source has a contributing drainage area of at least one square mile, or
2. The resulting inundation with a one percent or greater chance of flooding in any given year from a natural source of water is at least one foot **deep** and 25 feet wide. (p. 5)

Agency Response: See previous response.

Vulcan Materials Company (Doc. #14642)

- 3.476 The inclusion of flood plains and associated riparian areas without definition of the flood criteria to use in defining the flood plain creates confusion and uncertainty regarding the extent of jurisdictional coverage. Irrespective of the flood criteria, the inclusion of flood plains applies the CWA jurisdiction broadly without evaluation of whether connectivity or other jurisdictional criteria are present. Flood plains are defined based on the probability of some periodic flood event; not CWA jurisdictional criteria. The purpose and objectives of defining flood plain locations and flood hazard zones have different statutory and regulatory basis from the CWA jurisdictional determination process, and the processes are not interchangeable. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies' expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are "waters of the United States" without the need for any additional analysis. Note that the significant nexus analyses performed for "adjacent waters" are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

O'Neil LLP (Doc. #14651)

3.477 The proposed definition for the term "floodplain" is too unclear, potentially inappropriately expansive, and thus capable of misuse by Agency personnel to significantly expand the area of Agency jurisdiction beyond the definition of "waters of the U.S." used in the CWA. The Agencies' description of floodplains that exist in "moderate to high water flows" does not provide any reasonable or sufficient amount of clarity to this term. What constitutes a "moderate to high water flow?" Who determines what constitutes the "moderate to high water flow" for any particular site or area? What standard is to be used? The Proposed Rule is silent on this aspect of this new definition. The Federal Emergency Management Agency maps 100- year floods, five-year floods and so forth, but in the Preamble the Agencies reject such definitions as too prescriptive. Instead, the Agencies explain in the Preamble that they have intentionally selected a malleable standard. As currently proposed, the Rule does not allow the public to understand or know what areas the Agencies intend to capture within their jurisdiction by use of this term. Such clarity must be provided in a revised Proposed Rule which is then recirculated for public comment and further agency consideration. (p. 2)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain, as suggested by many commenters. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD. For responses to questions about whether the agencies should repropose the rule, see Topic 10 (Legal issue) of this response to comments document. The agencies agree that the 100 year floodplain mapped by FEMA provides clarity and the rule uses the 100 year flood plain in defining "neighboring" for purposes of adjacency.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Business Alliance for a Sound Economy (Doc. #14898)

- 3.478 The definition of the term “neighboring” also includes waters in the floodplain of a jurisdictional water. See 79 Fed. Reg. at 22,207. The Proposed Rule defines the term “floodplain” but leaves determination of the extent of the floodplain interval to the agencies “best professional judgment.” Id. at 22,208. By leaving the appropriate floodplain interval undefined, the Proposed Rule gives the agencies broad discretion to assert jurisdiction over waters and wetlands with only minimal and sporadic connections to a jurisdictional water. This creates the possibility that the definition will include wetlands that do not truly have a “significant nexus.” Additionally, it creates an ambiguity in the definition that will make it difficult for regulated parties to determine whether a floodplain wetland will be considered jurisdictional by the Corps. (p. 3)

Agency Response: See previous response.

Staker Parson Companies (Doc. #15618)

- 3.479 In addition to lack of the upland pit exemption in the permit itself, EPA’s approach is especially problematic when considering the expansion of the criteria for “adjacency” by vaguely defining the terms “neighboring,” “riparian,” and “floodplain,” and allowing “adjacency” jurisdiction to be established through a “shallow subsurface” connection. The EPA states that these terms were added to provide greater “consistency and clarity and certainty” but admit that “application” of these terms would be based “in part on best professional judgment”. For example, the definition of “floodplain” has no clear limit and the determination of the appropriate flood interval may vary depending on the size of the tributary involved. In some cases, an agency reviewer could use the 10 year flood interval zone while another reviewer looking at essentially the same kind of tributary could use the 100 year interval. A reviewer who uses a 100 year flood interval zone

could find that wetlands and waters within that large floodplain-- a considerable distance from a traditional Navigable Water would become jurisdictional "by rule" as "neighboring" without any site specific analysis. Another reviewer might apply only the 10 year frequency flood and could find that wetlands or waters the same distance from a similar stream are not jurisdictional "by rule." The 100 year flood zone areas could literally encompass hundreds of square miles. (p. 1-2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Kansas Independent Oil & Gas Association (Doc. #12249)

- 3.480 The term "floodplain" is defined to mean "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 water flows." The suggestion that

variable climatic conditions will cause the regulatory analysis of what constitutes a "floodplain" to change, literally with the weather, presents a challenge to permitting and compliance strategies. The regulatory programs that build upon the definition of "waters of the United States" are based upon the mutual understanding of the regulatory elements that must be achieved. Leaving open whether an area is, is not or will become subject to all CWA "waters of the United States" regulatory programs with no guidance except sediment deposition by climate conditions creates an amorphous noun in the word "floodplain." The arbitrary and capricious nature of this term relative to the CWA "waters of the United States" statutory goals is unacceptable under law and policy. (p. 16)

Agency Response: See previous response.

Pennsylvania Coal Alliance (Doc. #13074)

- 3.481 What flood interval(s) should be used to evaluate the presence of adjacent waters? The selection of a floodplain interval should be consistent, not arbitrarily chosen by regional offices of the Corps. For example, many state and federal regulatory requirements are based on modeling the 100-year storm event. The longer the storm interval, the larger the floodplain and the larger the number and extent of potential waters that could be present within the floodplain. (p. 15)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Devon Energy Corporation (Doc. #14916)

- 3.482 To the extent that floodplains are considered in the determination of jurisdictional waters, the use of floodplains should be limited to categorically exclude from the Agencies' jurisdiction those waters outside the floodplain boundary. In order to make a determination of WOTUS for water bodies occurring within a floodplain additional criteria such as the consideration of the physical, chemical and biological characteristics of these waters has to be considered in conjunction with some appropriate flood reoccurrence interval.

Large tributaries in low gradient topography will generally have large floodplains whereas small tributaries upstream located in steep gradients will have the smaller floodplains. It therefore may be appropriate for the agencies to consider a floodplain associated with a lower flood reoccurrence interval (1.5 to 2 years) when determining adjacency for a smaller stream and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. (p. 6-7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

- 3.483 EPA and ACE (collectively “agencies”) staff asserts there is a geographic limitation on the subsurface connection, but it is not included in the proposed rule. A “floodplain” is an area that, among other things, “is inundated during periods of moderate to high water flows.”. The proposed flood plain definition does not specify a return period year. Domtar recommends that the definition of “flood plain” specify a 5-year recurrence component. Floods with longer expected recurrence intervals cover much larger areas, and the further one gets away from an actual WOTUS, the more tenuous the connection and less likely any potential adverse effect. Certainly the fact that an area may be flooded once every 100 years, or even once every 25 years [or every 10 years], is no indication that any waters located in that area have a significant effect on the ecology of the river causing flooding, which concerns species whose lifespans and recovery rates are far shorter. (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

- 3.484 Floodplain — What flood interval(s) will be used to evaluate the presence of adjacent waters? Many state and federal regulatory requirements are based on modeling the 100-year storm event. The shorter the storm interval arbitrarily applied by the agencies, the larger the floodplain and the larger the number and extent of potential waters that could be present within the floodplain. (p. 10)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Kentucky Oil and Gas Association (Doc. #16527)

- 3.485 The term adjacent refers to waters in the riparian zone or floodplain of a water as defined in the proposed rule (page 22199). To eliminate objectivity and clearly establish those water features over which jurisdiction will be asserted, KOGA suggests two valid and objective measures by which jurisdiction can be clearly identified. For larger order streams, the Federal Emergency Management Agency (FEMA) has conducted exhaustive studies to determine the 100 year floodplain. For those streams, KOGA suggests that jurisdiction be asserted for any water within the 100 year floodplain as determined and mapped by FEMA.

RECOMMENDATION: For larger order streams, jurisdiction should be clearly defined and asserted for any water within the 100 year floodplain as determined and mapped by the Federal Emergency Management Agency. (p. 7-8)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.486 For smaller order streams for which a mapped floodplain is not available, KOGA recommends that jurisdiction be asserted only over those waters within the riparian zone. The width of the riparian zone can be clearly delineated by the vegetation within

the area. However, due to the inherent subjectivity associated with this approach, KOGA recommends the riparian zone be defined as a specific distance from the ordinary high water mark of the channel. The Regulatory Branch of the U.S. Army Corps of Engineers often requires stream mitigation activities provide a minimum of 50 feet riparian zone. Thus, a 50 foot zone as measured from the ordinary high water mark of each channel should be sufficient for asserting jurisdiction if it is sufficient for stream mitigation purposes. Furthermore, as part of the Coastal Zone Act Reauthorization Amendments (water.epa.gov/polwaste/nps/czara/ch3-2b.cfm), EPA states: Generally, SMAs should have a minimum width of 35 to 50 feet” (page 2, Section 4). SMA refers to Streamside Management Area, which EPA’s report indicates, “... is also commonly referred to as ... a riparian management area or zone” (page 1, Section 2). The document proceeds to state, “SMAs are widely recognized to be highly beneficial to water quality and aquatic habitat. Vegetation in SMAs reduce runoff and traps sediments generated from upslope activities, and reduces nutrients in runoff before it reaches surface waters ... Canopy species provide shading to surface waters, which moderates water temperature and provides the detritus that serves as an energy source for stream ecosystems. Trees in the SMA also provide a source of large woody debris to surface waters. SMAs provide important habitat for aquatic organisms (and terrestrial species) ... (page 1, Section 2)

This definition of SMA closely resembles widely accepted definitions of riparian zones, and both USACE and EPA agree that 50 feet is a sufficient width. Therefore, KOGA recommends the final rule reflect this distance as acceptable for asserting jurisdiction for adjacent waters associated with smaller order streams.

RECOMMENDATION: For smaller order streams for which a mapped floodplain is not available, the agencies should clearly state that jurisdiction will only be asserted over the riparian zone as defined by a specific distance (50ft) from the ordinary high water mark of the channel. (p. 8-9)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. Further, where the floodplain is 100-feet or less, the agencies determined that waters within 100-feet of an (a)(1)-(5) water perform a myriad of critical chemical, physical, and biological functions associated with the downstream water and thus are appropriately regulated as “neighboring” and jurisdictional by rule.. Therefore, the agencies have employed a minimum distance threshold of 100-feet. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

National Farmers Union (Doc. #6249)

3.487 The preamble also asks for specific comment "on whether the rule text should provide

greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water.¹⁴⁴ The agencies should uniformly use a 20 year flood interval zone when evaluating these waters. This will provide the regulated community with certainty without inhibiting the agencies' ability to protect waters of the United States, since waters not captured within this zone will still be jurisdictional under the "significant nexus" test if they have the potential to impact a jurisdictional water. (p. 5-6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Because the 100-year floodplain can be extremely large in some areas of the country, particularly near large rivers, the agencies again chose to provide increased clarity and certainty by establishing a 1,500-foot limitation in the rule as a class to ensure that waters that provide important functions significantly affecting the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas are protected. Additionally, wetlands, ponds, lakes, oxbows, impoundments, and similar water features are also protected when they lie entirely or partially within 100 feet of the OHWM of a water identified in paragraphs (a)(1) through (a)(5) of the rule without regard to the presence or absence of a 100-year floodplain. The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

Franconia Township (Doc. #8661)

- 3.488 The definition of "floodplain" should be further refined. As stated, a floodplain is 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 water flows." The terms "present climatic conditions" and "moderate to high water flows" should be defined to limit the floodplain to those flood events with

¹⁴⁴ at 22209

a more recent history (rolling 20-year interval). And, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S.'" should be highlighted in the definitions. (p. 3)

Agency Response: See previous response.

Alameda County Cattlewomen (Doc. #8674)

- 3.489 The definition of “floodplain” is also addressed in Sec. I. b. above. The definition of floodplain in the proposed rule has been left overly broad by the agencies, providing maximum administrative flexibility for regulators, while leaving livestock owners guessing whether water features on their property are or are going to be within the floodplain designated by a regulator. Additionally, it is unclear from the proposed rule whether the entire floodplain itself is a “water of the U.S.”

According to the U.S. Geological Service the Mississippi River floodplain includes over 30 million acres.¹⁴⁵ The proposed rule does not prevent a regulator from determining that every open water within the 30 million acres that make up the entire Mississippi River floodplain is jurisdictional. Within those 30 million acres are numerous natural ponds, perennial ditches, isolated wetlands, and isolated prairie potholes. Based on the proposed rule, the regulator decides using their “best professional judgment” the size and scope of the floodplain.¹⁴⁶ The proposed rule continues that it can be the same as the FEMA 100-year floodplain, but does not have to be. (Id. at 22236).

ACCW assert this does not provide clarity, but expands the type and number of waters that are jurisdictional under the CWA, and flies in the face of the Supreme Court decisions that clearly stated there is a limit to federal jurisdiction.¹⁴⁷ The definition of floodplain in the proposed rule recognizes no limit when, and with the stroke a regulator’s pen, every water within a 30 million acre plot would become federal waters. Should the agencies choose a floodplain frequency such as 100-year, 50-year, or 5-year, ACCW would make specific comments to that frequency. Because the agencies failed to provide any sort of specificity for the regulated community, we cannot meaningfully comment on every possibility the agency might choose. Instead, the agencies should withdraw the proposed rule, fill in the many gaps that are prevalent throughout the proposal and re-propose the rule.

The agencies’ proposed rule also is unclear to the floodplain itself, leaving open the interpretation that the floodplain itself is a “water of the U.S.” If every open water in a floodplain is a “water of the U.S.,” then it could mean that when the water is out of its bank and covering the land in the floodplain, that is an “open water” and automatically a “water of the U.S.” And of course, just like tributaries, just because the water recedes and is not present does not mean that jurisdiction ends. Can the agencies clarify this confusion for the public. We understand that the agency stated in the proposed rules, “Absolutely no uplands located in “riparian areas” and “floodplains” can ever be

¹⁴⁵ USGS, available at http://www.umesc.usgs.gov/reports_publications/psrs/psr_1997_02.html.

¹⁴⁶ Proposed rule at 22209; “When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determining which flood interval to use.”

¹⁴⁷ SWANCC at 172; “We cannot agree that Congress’ separate definitional use of the phrase “waters of the United States” constitutes a basis for reading the term “navigable waters” out of the statute.”

“waters of the United States” subject to jurisdiction of the CWA,” (Proposed Rule at 22207), but if the floodplain itself is a “water of the U.S.” then there is actually no “uplands” located within it. It is also unclear from the proposal what the agencies mean by “uplands,” making the proposal even more perplexing. ACCW believe that floodplains should not be “waters of the U.S.” and the agencies should make that clear in a new proposed rule. ACCW encourage the agencies to re-think their proposal to make all open waters in a floodplain or riparian area jurisdictional by rule. It is limitless. The agencies must find a way to limit their jurisdiction to within the bounds set for it by SWANCC and Rapanos. (p. 19-20)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. For responses to comments about public comment opportunities for the rule, please see Topic 10 (Legal issues) of this response to comments document. The agencies agree that the 100 year floodplain mapped by FEMA provides clarity and the rule uses the 100 year flood plain in defining “neighboring” for purposes of adjacency. As discussed in the preamble, the final rule has been clarified so that only waters may be “waters of the US” not all the land within the floodplain.

Nebraska Cattlemen (Doc. #13018.1)

- 3.490 Floodplain is defined as “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 water flows.” (Proposed rule at 22207). In practice floodplains are further distinguished by intervals of time, i.e. 10 or 20 year flood interval zone.

This term is legally significant because waters in the same floodplain as a traditionally navigable water are considered adjacent and jurisdictional by rule under the proposed rule. *Id.* However, the proposed rule leaves entirely undefined at what flood interval a water will be jurisdictional, but rather leaves it entirely up to the regulator, “[w]hen determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use.” (Proposed rule at 22209). Complete discretion to determine at which flood interval, 10 to 100 year floodplain, provides practically limitless authority to EPA to determine when a water is jurisdictional and leaves the regulated community entirely without the ability to know what will and will not be regulated.

Not only does this lack of specification create confusion, it also violates Supreme Court case law which clearly states there is a limit to federal jurisdiction under the CWA. “We

cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute." *SWANCC v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

Similarly to floodplain the term "riparian" is legally important as every water within the same "riparian area" as a "water of the United States" is jurisdictional by rule under the proposal. However, EPA's definition of "riparian area" is so vague it fails to provide the regulated community with any direction. "The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." (Proposed rule at 22207). This definition is overly broad and provides no discernable limit to EPA. (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies' expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are "waters of the United States" without the need for any additional analysis. Note that the significant nexus analyses performed for "adjacent waters" are provided in section G of the preamble to the rule and Section VII of the TSD. The agencies determined also that the rule is consistent with the Supreme Court decisions and that analysis is provided in section I of the TSD.

Missouri Agribusiness Association (Doc. #13025)

- 3.491 The proposed rule leaves it to the agencies' "best professional judgment" to make determinations as to what flood interval to use for determining floodplains and for determining 'less than perennial flow.' For example, the proposed rule states there is *variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream.* (p. 3-4)

Agency Response: The agencies have revised the definition of "adjacent," in

particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

PennAg Industries Association (Doc. #13594)

- 3.492 Within the proposed rule, FEMA is not the cited source for floodplain determinations. Agriculture needs the ability to make "in field" decisions and for years, the FEMA maps have been the "go to" source. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, as suggested by the commenter, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Irvine Ranch Water District (Doc. #14774)

- 3.493 The rule also states that "when determining whether a water is located in a floodplain, the Agencies will use best professional judgment to determine which flood interval to use (for example 10 to 20 year flood interval zone)." Through the definitions of "adjacent" and "neighboring", the proposed rule would appear to potentially include floodplains as jurisdictional. A 10-20 year interval represents a flood boundary far from an "ordinary" condition. This would represent a substantial increase in jurisdictional waters. IRWD is concerned that such a rule change essentially negates the notion of ordinary flows and would functionally change the definition of WOTUS to include all flood flows. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

National Corn Growers Association (Doc. #14968)

- 3.494 Definition of Floodplain to Establish Adjacency--In the case of the use of a floodplain to determine adjacency, we suggest that for a floodplain wetland to be adjacent and therefore WOTUS there has to be a serious and persistent interaction between it and the tributary. We recommend that a floodplain defined as that portion of the area around a tributary that is covered by water in the event of a 5 year-24 hour rainfall event as traditionally defined by the National Weather Service. (p. 22)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Western Growers Association (Doc. #14130)

- 3.495 Where are the borders of a floodplain? The proposed new rule does not specify exactly how to determine the extent of a floodplain, and the agencies do not specify what kind of floodplain (e.g., 20 –year flood, 100-year flood, 500-year flood) they have in mind. A floodplain in Louisiana is much different than a floodplain in Arizona both hydrologically and physically. In fairness to the regulatory community, and for the ease of the regulators, Western Growers submits a standard floodplain throughout the United States should govern the adjacency requirement. The agencies should propose such a standard and provide the public an opportunity to comment upon it. (p. 16)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain, as suggested by many commenters. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. For questions about the need for further comment opportunities, please see the Legal Issues (Topic 10) section of this response to comments.

Mississippi Farm Bureau Federation (Doc. #14464)

- 3.496 The term "neighboring waters" includes "all waterbodies similarly situated within a floodplain or watershed" without defining the floodplain or what size watershed. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

National Chicken Council ; National Turkey Federation ; and U.S. Poultry & Egg Association (Doc. #14469)

- 3.497 “[F]loodplain” is defined as an area that has been inundated by actual waters or was formed by sediment deposition from actual water. However, the proposed rule does not specify whether it is the 10-year, 50-year, 100-year or 500-year floodplain that is included in the definition. Using “best professional judgment” to answer this on a case-by-case basis (as is suggested in the proposed rule) provides no meaningful guidance as

to what areas are to be included as a floodplain for purposes of designating waters of the U.S. subject to CWA jurisdiction.

Accordingly, “adjacent waters” in the proposed rule is a vague and overly broad concept that could include an area as vast as the 500-year floodplain of the Ohio River valley. Landowners in these areas or any area within miles of a navigable water or tributary could never be sure if activities on their land would trigger federal water permit requirements covered by the CWA. This is not the clarity and certainty that poultry and egg producers and other landowners need. (p. 6-7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

North Dakota Soybean Growers Association (Doc. #14594)

- 3.498 The proposed definition for a "riparian area" is "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes, plant and animal community structure in that area." Narrow strips of land directly abutting a waterway certainly "border" the waterway, but as one moves away from the waterway, the notion of "bordering" diminishes to the point of absurdity. The Agencies have provided no clarification as to how far a riparian area extends away from a water body. According to the proposal, "reasonable proximity," a concept itself that is subjective and vague, applies only when adjacency is established through a hydrologic connection for "water" that lies "outside of the floodplain and riparian area" of a tributary (emphasis added)¹⁴⁸. For "waters" within the riparian area, the proposal does not explain how far from a waterway the "bordering" area would extend.

"Bordering" area is further explained as a location "where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area," but it is entirely unclear what the Agencies mean by the "area" where such influence exists. Because the Agencies are attempting to rely on a functional, not spatial, definition for "riparian area," the proposed rule is hopelessly vague and subject to varying, case-by-case interpretations and applications to regulated parties. This is precisely the type of analysis that the Agencies claim that the WOTUS rule is designed to avoid!

The definition of "floodplain" relies on the undefined term "waters" and the concept of "bordering." While the definition employs a measurable concept, an area that actually has been inundated by, and was formed by sediment deposition from, actual waters, the

¹⁴⁸ 79 Fed. Reg. 22,207-08

return period for such inundation is not specified. Is this the 10-year, 50-year, 100-year, 200-year, or more floodplain? The Agencies cannot simply say, as they have in the proposal, that they will use their "best professional judgment" to answer this question on a case-by-case basis, as this, again, returns us precisely to the type of analysis they claim WOTUS rule is designed to avoid. (p. 11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Oregon Farm Bureau (Doc. #14727)

- 3.499 [T]he inclusion of “floodplain” is a new concept not previously relied upon by the agencies for making a jurisdictional determination, in effect expanding the jurisdictional reach of the CWA. As proposed, waters in a “floodplain” would become, by definition, jurisdictional. Similar as above, the definition of “floodplain” relies on the undefined term “waters” and the concept of “bordering.” And while the definition employs a measurable concept – an area that actually has been inundated by, and was formed by sediment deposition from, actual waters – the return period for such inundation is not specified at all. Is this the 10-year, 50-year, 100-year, or 200-year floodplain? The Agencies cannot simply say, as they have in the proposal, that they will use their “best professional judgment” to answer this question on a case-by-case basis.¹⁴⁹ (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. These maps are publicly available and provide a readily accessible and

¹⁴⁹ 79 Fed. Reg. 22,209

transparent tool for the public and agencies to use in locating the 100-year floodplain. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Colorado Agricultural Aviation Association (Doc. #15033)

- 3.500 Nor is there a geographic limitation to the area of a floodplain or definition of the flooding interval (e.g. 25-year versus SOD-year flood plain) and only the vague assurance that the agencies would apply BPJ for such jurisdictional determinations. (p. 4)

Agency Response: See previous response.

North Carolina Farm Bureau Federation (Doc. #15078)

- 3.501 The Agencies admit that there "is no scientific consensus" over which flood interval is appropriate for determining the floodplain when designating adjacent waters. EPA cannot rationally make a categorical determination that all waters in an unknown floodplain have a "significant nexus" to "navigable waters" and are thus "navigable waters" themselves when the Agencies have no idea which flood interval to use to determine the floodplain. Whether the Agencies seek to assign a single flood interval nationwide, or choose to assign a flood interval on a water-by-water basis, the decision will essentially be arbitrary. (p. 13)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The

bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies' expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are "waters of the United States" without the need for any additional analysis. Note that the significant nexus analyses performed for "adjacent waters" are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

- 3.502 In no case should waters outside of the floodplain and the riparian area (if these concepts are retained in a revised rule) be considered jurisdictional even if there is a shallow subsurface connection or a confined surface hydrologic connection, and even if the waters are proximate. This moves the rule from establishing identifiable scientific boundaries to jurisdiction to even more subjectivity by the regulators. This will allow regulators to make subjective judgment calls to declare as "jurisdictional" land and water areas outside of some identifiable boundary and makes the rule even more unclear. It eliminates all possibility that a farm or forest landowner will be able to rely on any objective means to establish boundaries of potential jurisdiction, such as the 1-year floodplain above, which could be identified on a topo map. (p. 13)

Agency Response: The adjacency provision is based on a review of the science, the agencies' expertise and experience, and the law; the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are "waters of the United States" without the need for any additional analysis. Note that the significant nexus analyses performed for "adjacent waters" are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

- 3.503 If the Agencies insist on including "floodplains" to capture jurisdictional waters in a proposed revised rule, the flood interval used to determine the floodplain should be no more than the 1-year flood (one-year flood). The 1-year flood interval will capture a reasonably small floodplain, and its area is the most likely scientifically to have waters that may have some influence on navigable waters. (p. 13)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to

today's rule as well as in the TSD.

American Forest & Paper Association (Doc. #15420)

- 3.504 [T]he definition of floodplain does not specify a particular frequency for the flood level that defines the extent of the floodplain. The definition of a floodplain should include a 5-year recurrence component. Floods with longer expected recurrence intervals cover much larger areas, and the further one gets away from an actual WOTUS, the more tenuous the connection and less likely any potential adverse affect. Certainly the fact that an area may be flooded once every 100 years, or even once every 25 years [or every 10 years], is no indication that any waters located in that area have a significant effect on the ecology of the river causing flooding, which concerns species whose lifespans and recovery rates are far shorter. In addition, any isolated water that is touched by a flood that occurs very infrequently would logically have little impact on the traditional navigable water due to the very high dilution from the flood waters, and certainly would not have a “significant nexus” with it. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Association of American Railroads (Doc. #15018.1)

- 3.505 The proposed rule defines “neighboring” as, among other things, “waters located in floodplains.” However, the definition of floodplain is defined broadly to include areas “inundated during periods of moderate to high water flows” under “present climatic conditions.” The failure to more clearly define “floodplain” renders the proposed rule unworkable and ambiguous. The Agencies suggest that a 500-year return interval could be used to delineate a floodplain. 79 Fed. Reg. at 22,236. As noted in the preamble, the likelihood of flood in a 500-year floodplain is once in 500 years, or 0.2 percent. The proposed rule leaves determination of the extent of floodplain to the Agencies “best professional judgment” rather than creating predictable scientific standards. Id. at 22,209. Without a clear definition of floodplain, the designation of waters in a floodplain as Waters of the United States is arbitrary and capricious. (p. 11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and

“floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

- 3.506 This comment pertains to Section 328.3 Definitions, (c)(4), Federal Register page 22263. “Moderate to high water flows” is not defined. CMSWS recommends defining these terms and providing a methodology to quantify the floodplain (e.g., begin at bankfull or the 2-year modeled event and does not extend beyond the 100-year modeled floodplain). (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

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

- 3.507 The Rule proposes a new definition for the term "floodplain." It is uncertain whether this new federal definition is consistent or will create conflicts with existing federal regulatory programs that utilize the term *floodplain*. For example, the Federal Emergency Management Agency (FEMA), DEQ and local counties utilize the term *floodplain* to require flood insurance and institute specific building codes. Proposing a new definition of *floodplain* within the CWA may have unintended conflicts with other federal, state and/or local regulations and ordinances which regulate development within the floodplain. (p. 5)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

County of San Diego (Doc. #14782)

- 3.508 The proposed rule should provide guidance for how floodplains will be used in jurisdictional determinations. Public safety should always remain the top priority even if the agencies take jurisdiction in the floodplain. Provisions should be included to allow for maintenance activities within the floodplain to ensure public safety. The floodplain boundary is generally defined as 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 water flows. While the proposed rule states that location in a floodplain of Waters of the US will cause a waterbody to be jurisdictional by rule, the proposed rule falls to define the floodplain boundary. The boundary needs a more specific definition, along with guidance on how flood plains are used in jurisdictional determinations, and if FEMA-mapped flood plains are applicable. Riparian areas are also broadly defined, with no limiting scope to the size or characteristics that may define an area. Because floodplain and riparian zones are insufficiently defined, they leave room for interpretation and potential citizen CWA lawsuits related to County-owned or maintained water bodies in floodplains or riparian zones.

EXAMPLE: Ditches and channels that are located within a floodplain would likely be considered Waters of the US. Without a specific definition of floodplain jurisdiction, it will be difficult to manage these areas. Depending on whether 50-year, 100-year, or 500-year boundaries are used, the area of a floodplain could change drastically. Questions and concerns will arise when issues regarding maintenance and oversight of these areas are under consideration. Areas must be appropriately defined by floodplain to dictate which permits and regulations are applicable to a specific area, as the area could range from a few feet to several miles based on the floodplain size. Safety in these areas should be a top priority, which could be compromised by slow permitting processes and confusion regarding jurisdiction. (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Orange County Public Works, Orange County, California (Doc. #14994)

- 3.509 The definition of "floodplain" is vague. Floodplain should be defined as the area inundated by a storm with a two-year recurrence interval. (p. 3)

Agency Response: See previous response.

Arizona Public Service Company (Doc. #15162)

- 3.510 APS recommends that the Agencies clarify whether any floodplains are exempt. For example, a 100-year or larger floodplain covers a much larger area, yet, by definition, it occurs, on average, once every 100 years. APS supports the Agencies proposal regarding floodplains as jurisdictional but with a limit to the outward extent from the bed or channel median. To support this recommendation, APS questions whether or not impacts or potential discharges in the bed or channel of the floodplain have the potential to reach the outer perimeter of the 100-year floodplain. It is possible that the outer perimeter within the floodplain, on a project-by-project basis, may not in fact be impacted. Also, floodplains are neither static nor stable. Keeping the JD for at least the outer perimeter of the floodplain (guidance on how to determine this would be needed) on a project-by-project basis provides flexibility to ensure the current limits of the floodplain are considered. Additionally, it ensures that areas that once may have been located within a floodplain but which are no longer located therein are not included in the jurisdictional area. (p. 9)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-

year floodplain is an important aspect 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.

When determining the outer threshold of an “adjacent water” the line is drawn perpendicular to the OHWM or high tide line of the (a)(1) through (a)(5) water, as defined in the rule, and extended landward from that point. If there are breaks in the OHWM, the line should be extrapolated from the point where the OHWM is observed on the downstream side to the point where the OHWM is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground. Where the limit is not clear in the field or discrepancies may occur among different methods, the agencies will identify the outer extent of the threshold.

Additionally, as per Corps Regulatory Guidance Letter (RGL) 05-02, the RGL reaffirms that all approved geographic jurisdictional determinations completed and/or verified by the Corps must be in writing and will remain valid for a period of five years, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15443.1)

- 3.511 The definition of the term “floodplain” in this section of the Proposed Rule includes the phrase “formed by sediment deposited by water under present climatic conditions.” This applies a standard that would be difficult to verify: what is the source of observed sediment- climatic conditions or the discharge from a stormwater system? The uncertainty may require involved fieldwork to define boundaries far more commonly and efficiently identified by the use of flood maps. We recommend that the definition of floodplain be revised to streamline the process of defining a floodplain through a method that does not involve detailed (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Clearwater Watershed District; et al. (Doc. #9560.1)

- 3.512 Leaving a definition of the floodplain to the best judgment of the field staff removes the agencies' goals of creating efficiency and clarity. It requires consultation from field-staff for a boundary line that can be determined without agency involvement. The floodplain rule should be applied evenly across the board. For clarity, it would be reasonable to conclude that the floodplain should follow an interval that is common and to be expected regularly for a tributary or navigable water. Waters within a floodplain of a common interval could be reasonably expected to have a significant nexus to navigable waters downstream.

RECOMMENDATION: We recommend that the agencies use a 10 year floodplain interval for analyzing adjacent waters as neighboring. (p. 8)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Duke Energy (Doc. #13029)

- 3.513 [I]t becomes important to know the extent of the floodplain in question. However, the agencies leave this subjective determination of flood interval up to the “best professional judgment” of the permitting agency. The extent of a 100-year floodplain will be vastly different from one for 2, 10 or 25 years. As expected, under a 100-year floodplain standard, a water or wetland situated miles away from a TNW, which has a hydrologic connection with the river or stream once every 100 years, could be considered “adjacent.” Not only will this aspect of the proposed rule lead to inconsistencies in practice, it seems improbable that it could support a “significant nexus” determination or jurisdiction by rule, since the area in question could be far removed from the river or stream spatially and temporally with a lengthy flood interval.

Several other questions also arise, such as, how will agencies identify the floodplains? What areas count as “within the floodplain?” What about dry (upland) areas within the floodplain that become inundated during flood conditions, but lack all three wetland parameters during normal conditions? The agencies are adamant that they are not regulating land¹⁵⁰, but at what point does a land become a water? Will the agencies map the floodplains or rely on FEMA maps? Will it be the actual floodplain at the time of the permit application (requiring the agencies to map it for every jurisdictional determination) or will it be the floodplain as depicted in the latest flood map? (p. 35)

¹⁵⁰ EPA Ditch the Myth, Page 2; www.epa.gov/ditchthemyth; EPA Blog by Nancy Stoner, Page 3 (June 30, 2014) (See Appendix A)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Southern Company (Doc. #14134)

- 3.514 Southern Company notes that separate terms and definitions for both “riparian area” and “floodplain” are unnecessary and inadvisable. Both definitions appear to be targeting the same concept. But the agencies do not provide any meaningful justification or basis for needing separate definitions for these terms. We are concerned that, by including unnecessary definitions and duplicative concepts without offering any scientific or technical basis for doing so, the proposed rule will invite confusion, inconsistency, and litigation. Additionally, by leaving the definition and scope of both “riparian area” and “floodplain” to the best professional judgment of the permitting agency, the proposal creates more uncertainty and creates the need for a case-by-case analysis. Southern Company suspects that the agencies could attempt to resolve some uncertainty by

defining floodplain based on some set interval (e.g., the five year floodplain) and cautions the agencies that doing so could require permittees to undertake costly and unnecessary site-specific floodplain surveys. We note further that the readily available Federal Emergency Management Agency (“FEMA”) floodplain maps are too coarse – looking at 100- and 500-year floodplains – for purposes of defining adjacency. (p. 39)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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National Lime Association (Doc. #14428.1)

- 3.515 NLA agrees with the preamble’s recognition of the variability in the size of floodplains. While we also agree that size of the tributary and topography are two other factors that can be relevant, NLA contends that the frequency of flooding, i.e., the flood interval zone, is the most relevant criterion of the three. Moreover, depending on the appropriate

length of the flood interval chosen, both the size of the tributary and topography factors will effectively be subsumed within the interval's length. NLA therefore disagrees with the preamble's proposition that "[i]t may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream." (p. 14)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

- 3.516 NLA believes the definition of "floodplain" needs to specify a floodplain interval zone and that the interval that is selected would have a high probability of occurrence; not one whose probability is remote. NLA therefore supports the Agencies' adoption of a shorter floodplain interval zone, such as 5 years, over the 10-year floodplain interval zone suggested in the preamble. At the very least, the Agencies have failed to explain why waters that may only be physically connected to a jurisdictional water no more than once every 10 years will have a significant effect on the biota of the jurisdictional water, especially when the life spans of such biota are typically a fraction of 10 years. Moreover, such biota would be experiencing a lot of other effects from the flooding far more significant than the infrequent and temporary effects from a neighboring otherwise non-jurisdictional water.¹⁵¹ Not only would a 5-year interval have the highest occurrence probability at the present time (as well as for the foreseeable future), it would also be the least speculative and thus the most appropriate measure to incorporate into the definition of "floodplain." Moreover, geographical size and scope of the 10-year interval can always be increased later in a subsequent rulemaking if, based on increases in the frequency of more intense and severe storms over a period of time, a new and larger 10-year floodplain "norm" is subsequently demonstrated to exist. (p. 15)\)

Agency Response: See above response

- 3.517 Finally, after selecting the most appropriate floodplain interval zone, the Agencies also need to publish maps displaying the resulting floodplains and floodplain coordinates, and other information that will enable both sources and the relevant permitting agencies to easily identify precisely all relevant floodplain boundaries. (p. 15-16)

Agency Response: When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency

¹⁵¹ For example, the effects of contaminants and other debris from widespread upstream sources caught up in and dispersed by such flooding would be far in excess of and more significant than the effects that might be caused by the infrequent and temporary overflow of a neighboring otherwise non-jurisdictional water.

Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

The Clean Energy Group Waters Initiative (Doc. #14616)

- 3.518 [W]e recommend that EPA limit the definition of floodplain to make clear that the area is inundated on a regular basis. We recommend the following definition:

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 water~~ on a regular basis that does not to exceed 10 year intervals. (p. 12)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Santa Clara Valley Water District (Doc. #14776)

- 3.519 The Proposed Rule would define "floodplain" as an area inundated during "moderate to high water flows." (79 Fed.Reg. 22263.) This definition is unnecessarily imprecise and subjective and could lead to inconsistent application or interpretation. What degree or

interval of flood is to be the basis of the assessment? 100-year? 500-year? 5-year? The agencies are silent on this and instead defer to the future "best professional judgment" of their staffs to determine which flood interval to use. (Id. at 22209.)

To promote regulatory consistency, the District recommends that floodplains be defined by more precise and objective criteria, such as are shown on the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps (FIRM) or other floodplain-information sources that are generally available to the public.

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

ERO Resources Corporation (Doc. #14914)

- 3.520 -[T]he proposed rule does not reference or recommend use of existing floodplain mapping and flood hazard products produced by the Federal Emergency Management

Agency. Since the proposed rule does not define moderate to high water flows, the flow levels are open to interpretation. Hydrologists typically define such flows by their predicted recurrence interval (e.g., a 10-year flood event). As currently proposed, it would be difficult for professionals, let alone the regulated public, to accurately delineate the floodplain to determine if a water or wetland is neighboring, and it is unlikely that professionals and agency personnel will be able to consistently apply and independently replicate floodplain delineations following the proposed definition. (p. 22)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Northern Colorado Water Conservancy District (Northern Water), Berthoud, Colorado (Doc. #15114)

- 3.521 Floodplains are typically defined by the frequency of a flood predicted to inundate up to a specific elevation (e.g., a 10-year or 100-year flood event). The proposed rule does not reference any specific criteria or mapping, and this would make it challenging to define jurisdictional limits. Similarly, the proposed rule does not provide an adequate definition of “riparian” that incorporates soil, biotic and hydrologic criteria that would allow practitioners to determine the boundaries in a consistent and predictable manner. Moreover, including the concepts of “riparian” and “floodplain” in the rule will likely not add to clarity, as the public is likely to confuse these areas as themselves being jurisdictional. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Nebraska Public Power District (Doc. #15126)

- 3.522 A rule that regulates all “waters” lying within a “floodplain” but leaves to case-by-case

judgment whether it's a two-year floodplain, a 100-year floodplain, or a 500-year floodplain does not promote clarity or consistency. This needs to be rectified. (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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

- 3.523 What flood interval(s) will be used to evaluate the presence of adjacent waters? Many state and federal regulatory requirements are based on modeling the 100-year storm event. The longer the storm interval arbitrarily applied by the agencies, the larger the floodplain and the larger the number and extent of potential waters that could be present within the floodplain. (p. 16)

Agency Response: See previous response.

SCANA Services, Inc. (Doc. #15660)

- 3.524 We ask that “floodplain,” as used in the proposed rule to encompass waters that would be brought into jurisdiction, be clarified to include the frequency, either 10 or 20 years. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Lower Colorado River Authority (Doc. #16332)

- 3.525 LCRA respectfully submits that there is high variability in the characteristics of floodplains which make it impractical to adopt a definition of floodplain that includes an interval limitation within which waters would always be considered adjacent and, outside of which, waters would always be considered not adjacent. Because of this, LCRA believes the best approach is to remove the term floodplain from the definition of

"neighboring" and the Proposed Rule. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Northern California Association (Doc. #17444)

- 3.526 The definition of “floodplain” should also be further refined. As stated, a floodplain is 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 water flows”. The terms “present climatic conditions” and moderate to high flows” should be defined to limit the floodplain to those flood events with a more recent history (e.g. a rolling 20-year interval). And, the statement in the proposed rule that “uplands in a floodplain are never considered ‘waters of the U.S.’” should be highlighted in the definitions. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Tucson Electric Power Company, UNS Energy Corporation (Doc. #19561)

- 3.527 As stated in the proposed rule, a floodplain is 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 water flows." No specific limitation is described in the proposed rule to define the exact limit of a floodplain. Floodplains can be described for any period of measurement, flood depth or other hydrologic criteria and can cover vast portions of the landscape.

Recommendations: We suggest the following with regards to defining the term floodplain:

- These terms represent climatic conditions and moderate to high flows should be

defined to limit the floodplain to those flood events with a more recent history. UNS suggests a 2.5, 5, or 10 year flood as the maximum storm event to define the limits of a "floodplain" that may be considered WUS in the proposed rule.

- Because floodplains in arid regions often contain numerous braided ephemeral channels, the statement in the proposed rule that "uplands in a floodplain are never considered WUS." should be highlighted and further explained in the definitions.
- The rule should indicate that the entire expanse (from one edge to the other) of floodplains should not be considered WUS in their entirety as WUS. (p. 6-7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

When determining the outer threshold of an “adjacent water” the line is drawn perpendicular to the OHWM or high tide line of the (a)(1) through (a)(5) water, as defined in the rule, and extended landward from that point. If there are breaks in the OHWM, the line should be extrapolated from the point where the OHWM is observed on the downstream side to the point where the OHWM is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground. Where the limit is not clear in the field or discrepancies may occur among different methods, the agencies will identify the outer extent of the threshold.

Ducks Unlimited (Doc. #11014)

- 3.528 With respect to “floodplains,” we find the definition scientifically reasonable but perhaps less clear than it could or should be. We note the reference to “formed by sediment deposition from such water under present climatic conditions...” We must assume that “climatic” in this definition was carefully selected on the basis of its science-based meaning, and that “current land use conditions” would not be used synonymously. Recent changes to the landscape, including levee construction and extensive land use change, have in many cases changed the height and frequency of flooding in and around many historic floodplains.

We further believe that while the seemingly heavy reliance on “best professional judgment” might lead to reasonable determinations in most cases, the situation for determination of the floodplain as described in the preamble leaves the regulated community very much in the dark. The definition of floodplain, or at least the intended administrative treatment of what constitutes a floodplain, requires additional treatment to provide greater clarity and certainty to the public, and better guidance to the many regulatory staff that the agencies have distributed across the country and who will be applying the rule to actual circumstances in the field.

We note reference to “10 to 20 year flood interval zone” in one spot, and we would consider that relatively high frequency flood zone as being too narrow to reflect the actual floodplain in many if not most circumstances. In light of the definition’s use of the phrase, “is inundated during periods of moderate to high flows,” we would expect something more on the order of 100 years to be a more reasonable approximation of “high flows,” especially given the increasing frequency of large floods in many areas and the increasing costs to society that are incurred in conjunction with these floods.

However, we also recognize that maps of flood zones do not exist for many, if not most, areas of the country outside urban and suburban areas. That being the case, we would suggest considering the use of more objective, science-based surrogate criteria such as soil classifications. The soils associated with the floodplain would certainly not be restricted to hydric soils, but given the definition’s reference to the central element of “sediment deposition,” we suggest there are elements of soil and/or geologic characterizations that could serve as a surrogate for helping to narrow the understanding and/or definition of floodplains for purposes of this rule. (p. 20)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one

seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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- 3.529 We find the definition of “floodplains” scientifically reasonable but less clear than it should be. The heavy reliance on “best professional judgment” promotes uncertainty and decreases clarity and predictability, and could lead to significant administrative, non-scientific inconsistencies across the country. We suggest considering the use of more objective, science-based surrogate criteria such as soil classifications as the basis for defining “floodplain.” We also believe that a 10 to 20 year flood zone is too narrow to reflect the actual floodplain in many circumstances, and that in light of the definition’s use of the phrase “is inundated during periods of moderate to high flows,” we suggest that something more on the order of 100 years is a more reasonable approximation of “high flows.” (p. 76)

Agency Response: See above response.

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

- 3.530 We commend the agencies for including in the proposed rule some additional clarification about how to identify which wetlands are “adjacent” to covered waters, but believe that the draft’s discussion of this issue can be improved further. First, we urge the agencies to clarify how field staff should consider floodplain location when evaluating adjacency. Although the draft indicates that waters within the riparian area or floodplain of a jurisdictional water will generally be considered adjacent, it does not specify which floodplain this includes. That is, it does not say that field staff should treat as “adjacent” any wetland within the 100-year (or some other period) floodplain of a jurisdictional water. We suggest the agencies provide this specificity, and suggest that the 100-year floodplain is an appropriate metric; it is also a criterion for which information should be readily available, as maps – outdated as many may be – are typically available for those areas. (p. 16)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.531 Adjacency should be determined using and chemical, physical, and biological factors. Certainly flooding is one measure that should be used to determine if a water is adjacent to another water. But, if for instance, certain amphibians regularly migrate to and from a wetland to a jurisdictional river, this should be taken into account to counter when determining any bright-line adjacency determinations. If the agencies only use a flood plain analysis to determine adjacency, the flood plain should be no smaller than the 100 year flood plain. We have discovered that the Federal Emergency Management Agency’s maps are often incorrect by significant amounts so anything less than the 100 year metric would not offer sufficient protection. (p. 43)

Agency Response: See above response.

- 3.532 [T]he flood interval should be no smaller than 100 years. (p. 45)

Agency Response: See above response.

Partners in Amphibian and Reptile Conservation (Doc. #7499.1)

- 3.533 40 CFR 230.3(u)(4) defines floodplain as “an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and inundated during periods of moderate to high water flows.”

Given the extent to which the landscape and climatic conditions are predicted to change in coming years, would use of “present” in this definition limit the effectiveness of the

rule by precluding the rule from protecting new areas that form, are restored, or are constructed as a result of these changing climatic conditions? (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

National Wildlife Federation (Doc. #15020)

- 3.534 We appreciate the agencies’ clear statements limiting the definition of “adjacent waters” to the waters located within the riparian area or floodplain – not the entire riparian area or floodplain which may include both upland areas as well as wetlands or open waters. See 79 Fed. Reg. at 22207 (“Absolutely no uplands located in ‘riparian areas’ and ‘floodplains’ can ever be ‘waters of the United States’ subject to jurisdiction of the CWA.”). With that important clarification, we support the agencies’ definition of riparian area to mean: “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area....” (p. 46)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.535 Similarly, we generally support the agencies’ science-based definition of “floodplain” to mean “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 water flows.” Id. We agree with Ducks Unlimited that the reference to “formed by sediment deposition from such water under present climatic conditions....” may warrant clarification to ensure that it does not infer “current land use conditions.” Recent landscape alterations, including levee construction and extensive land use change, have in many cases changed the height and frequency of flooding in and around many historic floodplains. (p. 46-47)

Agency Response: See above response.

- 3.536 We recognize – as do the agencies – that while reliance on “best professional judgment” will often lead to sound determinations, the preamble guidance for determining the extent of the floodplain leaves considerable uncertainty. We agree that additional guidance is necessary to provide greater clarity and certainty to the public, and better guidance to the regulatory staff who will be applying the rule in the field. The agencies’ proposal acknowledges the variability in the size of the floodplain and seeks comment on whether the rule text itself should provide greater specificity regarding “how the agencies will determine if a water is located in the floodplain of a jurisdictional water.” 79 Fed. Reg. 22209.

We urge the agency to consider the Connectivity Report,¹⁵² the SAB Connectivity Peer Review Report and the science-based recommendations offered during the public comment period in considering additional specificity that is scientifically sound. We consider the agencies’ reference to a “10 to 20 year flood interval zone” to be a relatively high frequency flood zone that is far too narrow to reflect the actual floodplain in many if not most circumstances. This narrow floodplain reference is inconsistent with the scientific literature and analysis in the draft Connectivity Report and the SAB Connectivity Peer Review Report, including the Connectivity Report’s definition of floodplain as an area “inundated during moderate to high flows.”¹⁵³ We support the proposed rule definition’s use of the phrase, “is inundated during periods of moderate to high flows,” and we expect something more on the order of 100 years to be a more reasonable approximation of “high flows,” especially given the increasing frequency of large floods in many areas and the increasing flood damage costs and loss of life that are incurred in conjunction with these floods.

We do not, however, support the use of existing flood insurance or other flood zone maps to define floodplain limits in most cases because it is our understanding that these are unavailable in many areas and are not accurate or up to date in others. Instead, we agree with Ducks Unlimited’s 2014 Rule Comments supporting the use of more objective, science-based surrogate criteria such as soil classifications. Given the definition’s reference to the central element of “sediment deposition,” the agencies should consider elements of soil and/or geologic characterizations that could serve as a surrogate for helping to narrow the understanding and/or definition of floodplains for purposes of this rule.

It is important that the agencies’ final definition of floodplain be premised on ecological function rather than geographic proximity. As a 2002 Corps guidebook for the Northern Rockies states, “It cannot be overemphasized ... that the wetlands and the ecological functions they provide are inextricably embedded within the context of the floodplain mosaic.”¹⁵⁴ Another Corps report confirms that the Upper Yellowstone River drainage

¹⁵² See, e.g., Draft Connectivity Report at Appendix A-5 (Definition of floodplain).

¹⁵³ Id

¹⁵⁴ Hauer et al, A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetlands Functions of Riverine Floodplains in the Northern Rocky Mountains, ERDC/EL TR-02-21 at 11 (2002), available at <http://el.erdc.usace.army.mil/elpubs/pdf/trel02-7.pdf>.

has many wetland mosaic complexes in the floodplain.¹⁵⁵ (p. 47-48)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

American Rivers (Doc. #15372)

- 3.537 We support the Agencies’ decision to clarify the term floodplain and agree with their definition. Floodplain is defined in the proposed rule as, “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 water flows.”¹⁵⁶

¹⁵⁵ U.S. Army Corps of Engineers, Wetlands Regulatory Assistance Program, “Upper Yellowstone River Hydrogeomorphic Functional Assessment for Temporal and Synoptic Cumulative Impact Analyses,” ERDC TN-WRAP-01-03 (2001).

¹⁵⁶ Definition of WOTUS, 79 Fed. Reg. at 22263

The Agencies should not further specify a floodplain as identified by a mandatory flood recurrence interval (e.g. 100-year floodplain). We do not believe enough information, is readily available for many streams, especially intermittent and ephemeral, and we want to make sure all streams and their floodplains are protected. For example, there are currently FEMA flood insurance rate maps that identify the 100-year floodplain for only 1.14 million miles of riverine and coastal floodplains.¹⁵⁷ EPA estimates that there are 3.5 million miles of rivers and streams in the U.S.¹⁵⁸ and NOAA estimates the total length of the U.S. shoreline is almost 95,500 miles.¹⁵⁹ Clearly with over 2.45 million miles of river and shoreline that are not represented on the FEMA flood insurance maps, they are inadequate resources to use as the default floodplain determination tool for CWA jurisdiction.

Furthermore, although there are some maps for the 100-year floodplain available, we believe that information is most suitable for its intended purpose of understanding flood risk. A critical problem with using the FEMA flood insurance rate maps for CWA jurisdiction is that they show areas behind levees as out of the 100-year floodplain. In the proposed rule, EPA rightly determines that “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 are ‘adjacent waters.’”¹⁶⁰ Despite the physical barrier providing some flood protection, a hydrologic connection to waters of the United States exists and seepage often occurs. During floods the hydrologic connection between a body of water and the leveed floodplain may become plainly visible when water appears on the landward side of a levee in the form of under-seepage, and boils, or through piping.

We do not believe flood recurrence intervals, and related maps are appropriate for understanding the ecology of floodplains. We believe that the Agencies should determine a floodplain for CWA jurisdictional purposes using their best professional judgment and the most current information available. Depending on the water body and the information available Agencies can apply a flood interval that is less than the 100-year storm and is best for the specific floodplain they are working with. The Agencies can also make in-field determinations looking at the topography, field indicators of overtopped banks (such as accumulated debris or sediment), or hydrologic history (such as tree and shrub species that prefer occasional flooding). (p. 21-22)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and

¹⁵⁷ Insuring our Future: Building a Flood Insurance Program We Can Live With, Grow With and Prosper With, before the before Subcomm. on Homeland Security of the S. Comm. on Appropriations, 113th Cong. 7 (July 22, 2014) (statement of FEMA Administrator Craig Fugate), available at http://www.appropriations.senate.gov/sites/default/files/hearings/FEMA%20%20HFIAA%20Hearing%20Stmnt_FINAL.pdf.

¹⁵⁸ EPA, Rivers & Streams (updated Mar. 13, 2013), <http://water.epa.gov/type/rs/>.

¹⁵⁹ NOAA, How Long is the U.S. Shoreline? (updated Feb. 14, 2014), <http://oceanservice.noaa.gov/facts/shorelength.html>.

¹⁶⁰ Definition of WOTUS, 79 Fed. Reg. at 22199.

“floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Association of State Floodplain Managers, Inc (Doc. #19452)

- 3.538 ASFPM recommends that the federal agencies adopt a definition of “floodplain” that takes into account biological, and hydrological as well as physical (hydraulic and geomorphological) considerations. Questions have been raised regarding the proposed definition of a floodplain for purposes of identifying waters that are “adjacent” and therefore Waters of the United States by rule. While many organizations have suggested options to provide greater certainty – e.g. by specifying use of a specific flood interval or use of existing FEMA maps - ASFPM recognizes the shortcomings of both of these approaches.

The default minimum FEMA standard 1% chance floodplain has no correlation to the interconnected waters of the United States from a biological, ecological or geomorphological standpoint. Rather, the basis for identifying FEMA floodplains has primarily been the result of identifying those areas that are the highest risk for property damage and human injury. That is why only 1/3 of the 3.5 million miles of streams, rivers and coasts have flood hazards identified and only half of those stream miles have detailed, engineering based studies. Further identification of floodplains for the purposes

of FEMA flood studies have continued to be prioritized based on areas that have a high degree of risk to humans and budgetary constraints.

In order to maintain the flexibility needed to accommodate a wide range of conditions based on the size and landscape position of the stream in question, we support the following definition ¹⁶¹ because it recognizes biological and hydrological functions, and also acknowledges and allows for alignment with long established definitions used in established state floodplain programs.

“The term floodplain means areas recognized by the federal government, states, local governments, or tribes that have been or may be inundated or are susceptible to being inundated by waters from any source when flows or water levels exceed normal levels. , including the bed and banks of the stream, river, ocean, or other body of water. It also includes areas subject to fluvial dynamics, channel migration, and other erosion or physical changes under flood conditions.”

We believe that there are sufficient methods available or under development (e.g. GIS and associated remote sensing data) to develop regional methods for identifying floodplains using this definition. The ability to align §404 and other CWA programs with existing state and tribal floodplain regulations by developing regional approaches will avoid a great deal of confusion that would occur with the use of two differing technical designations of the term “floodplain” in related regulatory programs. We recognize that this approach may reduce state to state consistency, but we believe that factor is outweighed by benefits of providing a clear and consistent regulatory framework within a state, as long as reasonable consistency with federal law is maintained. (p. 6-7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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¹⁶¹ See comments from ASFPM to EPA and the Corps of Engineers dated February 21, 2014 regarding The Connectivity of Streams and Wetlands to Downstream Waters

flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

The Wildlife Society (Doc. #14899)

- 3.539 We suggest removing the phrase “and is inundated during periods of moderate to high water flows” from the definition of “floodplain”. Many floodplains associated with rivers have adjacent wetlands that are not connected by surface water flow at moderate or high flows because of anthropogenic levees, dikes, or berms that restrict natural water flows. Alternatively, adding the word “historical” or “pre-modification” before “period” could also adequately change the definition to include many floodplains where levees restrict water movement unnaturally.

Although currently available risk-based Federal Emergency Management Agency floodplain classification maps (e.g., 100-year floodplain; FEMA 2014) may provide acceptable evidence of floodplain extent, we recommend the use of a science-based ecological definition of floodplain and the creation of a national floodplain database to simplify jurisdictional (p. 2-3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has

not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Earthjustice (Doc. #14564)

- 3.540 Earthjustice urges EPA to incorporate a more full definition of adjacency that is defined by the outer extent of riparian and floodplain areas and to include surface and subsurface connections and hydrology in a manner discussed by members of the SAB that focuses on actual connections and effects to downstream waters as opposed to the less specific descriptions offered. (p. 8)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Clark Fork Coalition (Doc. #19539)

- 3.541 As you finalize the rule, we urge you to make two additional clarifications. First, clarify the definition of floodplain. The definition of floodplain under the Clean Water Act should be an ecological definition of floodplain and not one defined by individual EPA/Corps staff. At a minimum, the definition needs to include the 100- year floodplain. A better approach would be for the definition to include any mapped 500-year floodplain and Channel Migration Zones, or similar mapped features. It makes sense to protect wetlands and "other waters" within ecological floodplains, because they are rare, and they play an important role in protecting clean water by filtering out

sediments, chemicals, and other material that would otherwise enter our waters. I also think that the EPA needs to determine which potholes can be protected as "waters of the United States" by studying the science between potholes and navigable streams. (p. 1-2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. For further discussion of potholes, see the preamble to the final rule and Topic 4 (other waters) of this response to comments document.

Galveston Bay Foundation (Doc. #13835)

- 3.542 The definition of floodplain should be clearer and be modified to match standard hydrological modeling definitions such as the 1-percent annual chance flood or the 10-percent annual chance flood to determine overflow connectivity. Following a standard definition used by other federal agencies would be a stronger and more understandable definition than the current one. (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Montana Audubon (Doc. #14755)

- 3.543 The EPA/Corps proposed rule’s definition of floodplain should be clarified. The definition of floodplain should, AT A MINIMUM, apply to a 100-year floodplain, because allowing staff to decide to use a standard less than the 100-year floodplain does NOT make sense. Using a smaller 10- or 20-year floodplain does not make sense because these floodplains have not been mapped, so relying on them would mean that decisions about floodplains would be left up to individual EPA/Corps staff—which is subjective and can change in different states and offices. In Montana, only 5% of our 100-year floodplains have been mapped (and 10 or 20-year floodplains have NOT been mapped). (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Lake County, Illinois Stormwater Management Commission (Doc. #15381)

- 3.544 328(c)(4) - Floodplain: This term is ambiguous and subject to wide interpretation... “inundated during periods of moderate to high flows.” How would that be consistently quantified, and by whom? Accordingly, we believe this definition should be removed from the proposed rule. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are

“adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.545 328(c)(2) - Neighboring : We suggest "or floodplain " be removed from this definition (consistent with our comment [#3] above). (p. 3)

Agency Response: See above response.

Consortium of Aquatic Scientific Societies (Doc. #14802)

- 3.546 The criteria for determining that waters in riparian areas and floodplains are “adjacent waters” and therefore included in the “Waters of the United States” look reasonable, and are well supported by scientific research showing that waters in these areas have strong ecological connections to jurisdictional waters or their tributaries. A key question raised by this definition is how to define “floodplain” in terms of return intervals or other criteria (p.22209 of the Federal Register listing). The suggestion that the extent of the floodplain be determined “by best professional judgment” seems problematic, and allows for considerable uncertainty and inconsistency in the delineation of “adjacent waters”, which seems incompatible with your broad goal of transparency, predictability, and consistency. We suggest that you adopt a more uniform approach, and choose a standard return interval (we suggest 100 years, because 100-year floodplains are widely mapped, and because bodies of water within the 100-year floodplain usually have obvious connections to jurisdictional waters) with which to define floodplains, perhaps allowing this standard to be overridden in exceptional cases by best professional judgment. Alternatively, if floodplain extent is to be determined by best professional judgment, the rule should more explicitly state what considerations are to be taken into account in applying this best professional judgment. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Society for Freshwater Science (Doc. #11783)

- 3.547 SFS does not support the application of a set width measure for floodplains. Floodplains vary in width by stream size and landscape, so a set width is not scientifically defensible.

We do not support limiting “adjacent” to only within the floodplain or riparian zone, since there are clearly waters with surface and/or shallow subsurface connections to tributaries or navigable waters that are not in these zones. This is especially true of small tributaries where floodplains and riparian zones may be narrower.

We recommend the Agency consider using the floodplain and/or riparian zone to set minimum distances for consideration and then extending the range of adjacency some variable distance beyond that based on regional models (e.g., statistical) of the average extent of waters with surface and/or shallow subsurface connections. We recommend the Agency consider using flood recurrence intervals and regional riparian zone models to define this minimum width and then develop the regional models of maximum distances for use in identifying the appropriate width for adjacency. We do not believe, however, that this will remove all need for assessing the adjacency of some waters on a case-by-case basis.

SFS supports the removal of the parenthetical “other than waters that are themselves wetlands”. The spatial position of waters within the adjacent spatial zone is immaterial, technically, to their importance to the integrity of receiving and downstream waters – their presence in such zones and/or relative to surficial or sub-surficial connectivity seems to be the only determining factor. (p. 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. For a discussion of the treatment of other waters, please see the preamble for today’s rule and topic 4 of this response to comments document.

Florida Stormwater Association (Doc. #14613)

- 3.548 Floodplain - As an alternative to our recommendation as contained in subparagraph 1 (above), we recommend that the definition of “floodplain” as used within the term “neighboring” be revised to specifically include only waters that are within the floodplain of a 20-year flood event. Leaving this phrase vague might encourage the inclusion of waters within, for example, the floodplain of a 100-year (or even higher) event - the inclusion of land that is usually dry. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are

“adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

- 3.549 The Floodplain definition is particularly vague as the phrase "periods of moderate to high water flows" is completely undefined. NAFSMA urges the EPA to specifically define Floodplain as the inundation area from a two-year storm. Typically, a two-year storm fills the low flow area and over time has the most geomorphic influence in shaping a floodway and is a reasonable and specific approach to defining Floodplain in conjunction with the Neighboring definition. (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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

- 3.550 Does the proposed rule make all waters in a flood plain federally regulated "waters of the U.S."? Please provide a detailed legal rationale and any supporting examples or precedent. (p. 11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the

territorial seas and therefore are “waters of the United States” without the need for any additional analysis. Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

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

- 3.551 As I read the proposed rule, all waters in a floodplain are regulated unless expressly excluded. There is a limited exclusion for ponds that are used exclusively for stock watering, irrigation, settling basins, or rice growing. But I don't see any exclusion in floodplains for standing water in a field, rainwater, puddles, wet spots, or ponds that have other uses.

On July 1, Acting Assistant Administrator Stoner posted a blog that says that water in a field, ponds, and rainwater are excluded from regulation under the proposed rule. The questions and answers posted on EPA's website also says that water filled areas are excluded. On June 11, 2014, you told the House Transportation and Infrastructure Committee that backyards, wet spots, and puddles are excluded.

Where specifically in the rule are these exclusions for these features in floodplains? (p. 15)

Agency Response: Features that are subject to one of the exclusions in paragraph (b) of the rule are excluded from the definition of “waters of the US” even if they might otherwise be covered under the list of waters provided in paragraph (a).

- 3.552 Your proposed rule defines "flood plain" as "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 water flows." The determination of what water is in a flood plain is left to the best professional judgment of EPA and Corp officials.

We are currently in the Holocene geologic time period and the most recent climactic phase of that time period (the Subatlantic) began 2500 years ago. As some read your definition, EPA and the Corps could decide to regulate any "water" located in an area that that has been flooded in the past 2500 years.

How does the rule define "present climatic conditions?" Please provide a detailed legal rationale and any supporting examples or precedent. (p. 15)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

O'NEIL LLP (Doc. #16559)

3.553 The proposed definition for the term "floodplain" is too unclear, potentially inappropriately expansive, and thus capable of misuse by Agency personnel to significantly expand the area of Agency jurisdiction beyond the definition of "waters of the U.S." used in the CWA. The Agencies' description of floodplains that exist in "moderate to high water flows" does not provide any reasonable or sufficient amount of clarity to this term. What constitutes a "moderate to high water flow?" Who determines what constitutes the "moderate to high water flow" for any particular site or area? What standard is to be used? The Proposed Rule is silent on this aspect of this new definition. The Federal Emergency Management Agency maps 100year floods, five-year floods and so forth, but in the Preamble the Agencies reject such definitions as too prescriptive. Instead, the Agencies explain in the Preamble that they have intentionally selected a malleable standard. As currently proposed, the Rule does not allow the public to understand or know what areas the Agencies intend to capture within their jurisdiction by use of this term. Such clarity must be provided in a revised Proposed Rule which is then recirculated for public comment and further agency consideration. (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain as suggested by the commenter. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD. For more information on the reasons the rule was not subject to additional public comment, please see Topic 10 (Legal Issues) of this responses to comment document.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations,

topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Regulatory Environmental Group for Missouri (Doc. #16337.1)

- 3.554 The proposed rule proposes to define for the first time the term “floodplain.” While we agree that it is a good idea to codify the definition of this important term, we respectfully do not agree with the definition proposed by EPA.

The proposed rule defines floodplain at 33 CFR §328(a)(4) to mean:¹⁶²

“Floodplain. The term 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 water flows.”

The proposed rule defines “adjacent” at 33 CFR §328(a)(1) to mean:¹⁶³

“The term adjacent means bordering, contiguous, or neighboring. Water, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent waters.’”

As seen above, the definition of the term “floodplain” includes the word “bordering,” and the word “bordering” is used in the definition of the term “adjacent.” Therefore, since all bordering waters are adjacent, and all “adjacent” waters are Waters of the U.S., by extension all floodplains are Waters of the U.S. according to the new definition. EPA’s proposed definition of “floodplain” is flawed because not all floodplains exhibit a significant nexus to a jurisdictional water and therefore not all floodplains should be classified as a Waters of the U.S. There are several situations when this occurs. One situation is when a floodplain is separated from the jurisdictional water by an U.S. Army Corps impermeable flood levee. By design the flood levee prevents a significant hydrological connection between the floodplain and the water. When flow does occur, it occurs infrequently and the direction of flow is always from the water to the floodplain and never from the floodplain to the jurisdictional water.

Another situation where no significant nexus occurs is when an otherwise dry floodplain, such as a grass field, is infrequently inundated with water from a jurisdictional water. These types of usually dry floodplains are identified by Federal Emergency Management Agency (FEMA) to be in a 100-year or 500-year floodplain. EPA briefly touches on this scenario in the proposed rule where it states that the term floodplain will often coincide with the 100-year floodplain as defined by FEMA. Interestingly however, EPA claims it

¹⁶² Defined identically at 40 CFR 110.1(3)(iv), 40 CFR 112.2(3)(iv), 40 CFR 116.3(4), 40 CFR 117.1(3)(iv), 40 CFR 122.2(c)(4), 40 CFR 230.3(u)(4), 40 CFR 232.2(3)(iv), 40 CFR 300.5(3)(iv), Appendix E to Part 300 Section 1.5(3)(iv), 40 CFR 302.3(3)(iv), and 40 CFR 401.11(3)(iv)

¹⁶³ Defined identically at 40 CFR 110.1(3)(i), 40 CFR 112.2(3)(i), 40 CFR 116.3(3)(i), 40 CFR 117.1(3)(i), 40 CFR 122.2(c)(1), 40 CFR 230.3(u)(1), 40 CFR 232.2(3)(iv), 40 CFR 300.5(3)(iv), Appendix E to Part 300 Section 1.5(3)(iv), 40 CFR 302.3(3)(iv), and 40 CFR 401.11(3)(iv)

may not be appropriate to use FEMA defined floodplains because the FEMA maps are not based on an ecological definition of the term “floodplain.” This statement is remarkable because EPA’s proposed definition of “floodplain” also is not an ecological definition. Also, an important fact about 100-year and 500-year floodplains is that when they do become wet from flood waters, the flood waters remain typically for only a few days or weeks. Therefore, since typically dry floodplain areas, like those designed by FEMA as a 100-year floodplain, do not exhibit a significant nexus to a jurisdictional water because the floodplains are infrequently wet, and when wet for only a short duration.

Finally, all the floodplain scientific literature in the proposed rule discusses floodplains containing waters and makes no distinction to floodplains that are dry except when a flood occurs. In essence the scientific analysis treats all floodplains as if they always contain water. This clearly is not appropriate because a grassy field floodplain would have a vastly different potential to impact the chemical, physical, and biological integrity nearby Waters of the U.S., than a floodplain that always contains water. In consideration of above points and several others not made, EPA should modify the proposed definition of the term “floodplain” to reflect the fact that a significant nexus does not exist at all floodplains so all floodplains should not be regulated as a Waters of the U.S. Instead, only floodplains known to exhibit a significant nexus to a jurisdictional water should be classified as a Waters of the U.S. Also, the EPA should consider modifying the definition of floodplain to include 5-year floodplain rate maps generated by FEMA as a possible “bright-line” method to identify a floodplain that is, or is not, a Waters of the U.S. (p. 9-11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year

floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

Painesville Township, Ohio (Doc. #15183)

- 3.555 The definition of "floodplain" should be further refined. The terms "present climatic conditions" and "moderate to high water flows" should be defined to limit the floodplain to those flood events with a more recent history (rolling 20-year interval). (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

California Central Valley Flood Control Association (Doc. #12858)

- 3.556 In this area of the regulation, you have asked commenters to weigh in as to an alternative standard that could be applied. In the State of California, as in other areas, existing definitions such as those already used by FEMA and the National Flood Insurance Program have guided many State policies and local investments. For example, these definitions already are referenced within the Central Valley Flood Protection Board’s Title 23 rules, which guide permitting and other flood control matters in California’s Central Valley and Delta. Adoption of a different and apparently arbitrary

definition of floodplain will cause confusion. It will almost certainly be implemented inconsistently, leading to arbitrary and capricious results. As shown by the FEMA experience, making an accurate determination takes substantial time and effort if done correctly. Staff will be overwhelmed by these determinations, and will necessarily be less responsive to other permitting requests, or these requests will be placed in limbo while determinations are being made.

Because of these potentially uneven and detrimental results, the Association recommends deletion of this new definition of floodplains altogether, due to the availability and common usage of existing Federal definitions, or codification of the floodplain definition used for the National Flood Insurance Program. (p. 5-6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

SC Chamber of Commerce Comments (Doc. #14535)

- 3.557 Agency staff has asserted there is a geographic limitation on the subsurface connection, but the proposed rule does not provide any threshold or other mechanism by which to judge the degree of connection. As a result, rather than providing additional clarity and simplicity, the rule adds complexity and uncertainty.

The definition for "floodplain" as an area that, among other things, "is inundated during periods of moderate to high water flows," also does not include criteria by which the inundation can be assessed. In practice, various Federal agencies use historic frequency to define thresholds and it seems reasonable for the agency to select a particular frequency of inundation to define the extent of the floodplain. Further, a longer flood interval, such as twenty years or longer, would subject large areas of the United States, specifically significant portions of those states along major river systems (the Mississippi River in particular), to CWA jurisdiction. (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Portland Cement Association (Doc. #13271)

- 3.558 The Agencies have not explained the meaning of "present climactic conditions" As proposed, the definition of floodplain requires a determination that sediment was deposited in an area under "present climactic conditions." Given that the definition is applying a geologic concept (sediment deposition), it is unclear whether the term "present" is colloquial (e.g., the last 100 years) or geological (e.g., the last 1 million years). The Agencies must clarify what is meant by "present climactic conditions" or else the term will not be subject to reasonable interpretation. (p. 14-15)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." To implement this change, the specific definitions for "riparian" and "floodplains" have been removed from the rule. Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

- 3.559 Defining a floodplain by the presence of “moderate to high flow” exceeds the scope of the CWA and is too vague.

As proposed, the definition of floodplain includes areas covered by “high flows.” (While the definition includes the use of the word “moderate,” since all areas inundated by moderate flows are also inundated by high flows, the inclusion of the word “high” in the definition renders the use of the word “moderate” irrelevant. Thus “moderate to high flows” simply means “high flows.”

The “high flows” standard is both beyond the scope of the CWA and too unclear. As to the lack of clarity, the Agencies acknowledge that the US government has promulgated standards for defining floodplains, used these standards for identifying floodplains, and in many cases mapped the areas subject to these definitions. These floodplains, associated with the Federal Emergency Management Agency’s (FEMA’s) regulatory authority are both well understood and their locations relatively identifiable. However, in the proposed rule, the Agencies have specifically decided not to use these already defined and readily-identifiable geographic areas. Instead, they intentionally selected a malleable standard. In the preamble, the Agencies acknowledge that:

There is, however, variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains. . . . whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the Agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. When determining whether a water is located in a floodplain, the Agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone).¹⁶⁴

In other words, the Agencies have elected to define *floodplain* so that its size floodplain will vary from case-to-case, reducing clarity. This problem is compounded by the fact that the Agencies’ description of “moderate to high water flows” is not common floodplain parlance.

Moreover, the nebulous term “high flows” could be interpreted so broadly that it could encompass huge swaths of the country. For example, the following map, from the US Census Bureau, depicts areas where significant flooding was occurring or imminent along the Mississippi River in May of 2011.¹⁶⁵ (p. 15)

Agency Response: See above response.

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

- 3.560 The term “neighboring,” for the purposes of the term “adjacent,” is defined to include waters located within riparian areas and floodplains. The term “floodplain” is defined as an area bordering inland or coastal waters that was formed by sediment deposition from

¹⁶⁴ 79 Fed. Reg. at 22209.

¹⁶⁵

Available

at

http://www2.census.gov/geo/maps/special/MississippiRiverArea/MSRiverFlood_RefMap_052411.pdf

such water under present climactic conditions and is inundated during periods of moderate to high water flows. With regard to floodplains, only one example of waters that would be covered (oxbow lakes) is provided. Additional examples should be provided, particularly examples that might be found in the arid west, to clarify what types of waters would be captured in this category. As mentioned above, if it is the intent of the Agencies to provide these details in technical manuals and Regional Guidance Letters, then Metropolitan requests that these documents be circulated for public review and comment before the proposed rule is finalized. (p. 11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Additionally, wetlands, ponds, lakes, oxbows, impoundments, and similar water features are also protected when they lie entirely or partially within 100 feet of the OHWM of a water identified in paragraphs (a)(1) through (a)(5) of the rule without regard to the presence or absence of a 100-year floodplain. The adjacency provision is based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that adjacent waters, as defined, alone or in combination with other covered adjacent waters in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

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

- 3.561 [W]e suggest that the floodplain/riparian area tests only be used to include waters in the A(6) category, not exclude them. Our concern is that some Corps districts will use a floodplain that is overly restrictive for the A(6) category. Waters that are arguably adjacent, should not be excluded from this category if they have a significant nexus to a jurisdictional water and simply fall on the wrong side of the flood plain line. Of course, such a water, if it did not fall within another category of waters by rule, would still have to go through a case-by-case analysis. (p. 17)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are

“adjacent.” To implement this change, the specific definitions for “riparian” and “floodplains” have been removed from the rule. Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. The preamble also discusses the regulation of “other waters”; see also Topic 4 of this Response to Comments document.

3.4. RIPARIAN AREAS

Following are the specific comments received on the proposed rule and responses on “riparian areas:”

New Mexico Department of Agriculture (Doc. #13024)

- 3.562 "Riparian area. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems." Again, although the CWA does not grant EPA jurisdiction over groundwater, this definition refers to groundwater using the term "subsurface hydrology." The first sentence of the paragraph states it is problematic because nonjurisdictional and, therefore, irrelevant considerations would be allowed to influence jurisdictional determinations. We recommend striking the qualifier "or subsurface" and leaving the wording, "The term riparian area means an area bordering a water where surface hydrology directly influences the ecological processes and plant and animal community structure in that area." (p. 11-12)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Although the definition of “adjacent” no longer contains provisions addressing shallow subsurface connections, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment

of the effects of shallow subsurface connections on such downstream waters may be appropriate.

The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today's rule and the TSD.

- 3.563 We recommend striking the qualifier "or subsurface" due to the fact that groundwater is not jurisdictional. (p. 27)

Agency Response: Please see comment response above.

North Carolina Forest Service, NC Dept. of Agriculture (Doc. #14122)

- 3.564 Remove entirely the proposed new term "riparian area" and its associated definition. Justification for Comment: While we recognize the value of ecological services derived from the riparian area, we are concerned that the new definition as proposed by USEPA will only create additional uncertainty and confusion when attempting to apply the proposed rule. The current proposed definition by USEPA includes phrases 'ecological processes ' and 'exchange of energy and materials.' These are theoretical conceptual phrases and are too broad and do not provide the regulated community adequate tangible indicators of where such a ' riparian area' may exist. Such a broad definition as proposed by USEPA would likely incorporate significantly greater areas of the landscape as being jurisdictional WOTUS than what is currently within jurisdiction, seemingly without regard to whether or not these land areas have a significant nexus to regulated waters, nor whether these areas include the three attributes commonly associated with delineating a wetland: hydrophytic vegetation, hydrology, and hydric soils. (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Ohio Department of Natural Resources, et al. (Doc. #15421)

- 3.565 The definition for the term "riparian area" is ambiguous and non-specific in the proposed rule, yet it is being used to justify the determination of adjacency for aquatic resources. As a result, determining if an aquatic resource is located within a "riparian area" and therefore "adjacent", will be extremely arbitrary and subject to both regulator and applicant bias. Yet despite this ambiguity, the agencies believe that they are justified in not requiring a significant nexus determination on adjacent aquatic resources within "riparian areas" to increase the efficiency of CWA permit evaluations. Unfortunately, the efficiencies gained will be at the cost of accuracy, and at the cost of the applicants through the increased number of CWA permits and mitigation required.

At a minimum, ODOT recommends the following clarification to the term "Riparian area". "The term riparian area means an area bordering a water of the U.S. where surface or subsurface hydrology from the water of the U.S. directly influences the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems." This modification would clarify that the hydrologic influence that defines the "Riparian area" comes from the tributary water (either surface or subsurface), rather than an unrelated hydrology source (such as a groundwater hillside seep discharge) that may be flowing toward the riparian area, but is not under the influence of the hydrology of the tributary water. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Although the definition of “adjacent” no longer contains provisions addressing shallow subsurface connections, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate.

The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

Board of Supervisors, Imperial County (Doc. #10259)

- 3.566 Imperial County acknowledges that while riparian areas are not jurisdictional in and of themselves, we nevertheless have concerns that the current definition is too broad. It is possible that an isolated water could be “connected” to a traditional WOTUS by a very large riparian area, thus becoming jurisdictional. Specifically, the language “...influence the exchange of energy and materials between those ecosystems” combined with the broad conclusions from the CR raise real concerns of isolated waters becoming jurisdictional via a large riparian area. We believe that the definition should not include sub-surface hydrology as a basis for connectivity and should require a substantial influence as opposed to simply an influence; the definition also should have some limiting language with regard to its possible size. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Although the definition of “adjacent” no longer contains provisions addressing shallow subsurface connections, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate.

The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

National Association of Counties (Doc. #15081)

- 3.567 The proposed rule defines “riparian area” as “an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” Riparian areas are transitional areas between dry and wet areas. Concerns have been raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined. (p. 10)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

San Bernadino County, California (Doc. #16489)

- 3.568 "Riparian Areas": The DPW is concerned that the proposed definition of "riparian areas" will carry a presumption of jurisdiction for all "riparian" plant communities bordering jurisdictional resources regardless of whether they are "remnant" vegetative

communities with no current surface or subsurface hydrologic dependency on the bordering surface water resource. Furthermore, the proposed Rule pertaining to bordering/adjacent riparian areas is an extension of CWA authority that is simply not supported by current U.S. Supreme Court jurisprudence, (p. 3-4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter’s assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

- 3.569 The definition of "riparian areas" includes areas "bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area."¹⁶⁶ The DPW is concerned that some plant communities might be defined as jurisdictional "riparian areas" solely based on their proximity to surface waters, incorrectly assuming that they are supported by subsurface flow or infrequent flood events.

In watersheds that have been altered for flood control purposes it is common to find remnant riparian resources that are no longer hydrologically supported by surface or subsurface flow from proximate surface waters. These may include deep-rooted trees, such as willows supported by shallow groundwater. Such plant communities are sometimes found bordering concrete-lined channels/conveyances.

Similarly, the arid Southwest includes region-specific plant communities such as Riversidean Alluvial Fan Sage Scrub (RAFSS), which are comprised of mostly upland (non-wetland) plants located in alluvial systems. RAFSS utilize periodic flooding to spread seeds and rejuvenate. As such, RAFSS might be characterized as influenced by the "ecological process" and thereby construed as jurisdictional riparian areas under the proposed Rule. Including such communities into the general definition of "riparian areas" is problematic because many alluvial systems in the regional watersheds have been historically altered for flood control purposes resulting in mature RAFSS communities which now exist completely outside of the active floodplain.

Notwithstanding that many drainage facilities are concrete-lined or separated by levees or

¹⁶⁶ Federal Register, at 22263. As to be defined under 33 CFR 328.3(c)(3).

berms, the DPW is concerned that many remnant riparian areas, which proximately border channels will be presumed to have hydrologic connectivity, thus placing the burden on the DPW or other permittees to prove that such a connection does not exist. Such a burden may be costly, particularly when attempting to determine flood returns and subsurface hydrology. Because riparian resources located above and beyond the Ordinary High Water Mark (OHWM) are not currently within the scope of federal CWA jurisdiction, providing such evidence creates additional costs not realized under current regulations.

It also should be noted that the EPA study used to substantiate "significant nexus" with respect to "riparian areas" is limited to conclusions based on a few regional examples and case studies, and does not address the specific hydro-geomorphic conditions or region-specific plant communities present in the arid Southwest.¹⁶⁷

It is also emphasized that Justice Kennedy's concurring opinion relating to "significant nexus" applies only to tributaries of navigable waters and their adjacent wetlands.¹⁶⁸ Similarly, the Court's seminal opinion in *Riverside Bayview* extends federal CWA jurisdiction only to wetlands adjacent to navigable waters.¹⁶⁹ The proposed extension of federal CWA jurisdiction to bordering and/or adjacent riparian areas is simply not supported by current U.S. Supreme Court jurisprudence, (p. 11-12)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter’s assertions, consistent with *SWANCC* and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

City of Portland, Bureau of Environmental Services (Doc. #16662)

- 3.570 The term riparian area needs greater clarification. The definition of riparian area is technically sound, however it is not practically applicable on the ground. It will require

¹⁶⁷ See, U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Office of Research and Development, Washington DC., EPA/600/R-11/098B September 2013. (Hereafter, "EPA Study") at sections 1.4.2, and 5.3.

¹⁶⁸ Generally see *Rapanos* beginning at 759.

¹⁶⁹ Generally see, *Riverside Bayview*, beginning at 474.

experts to determine whether there is a surface or subsurface hydrologic connection that influences ecological processes and plant and animal communities in the area. A minimum riparian width should instead be established based on the scientific literature (for example, Sweeny and Newbold, 2014). Waters connected through a shallow subsurface hydrologic connection that are outside the defined floodplain or riparian area should be evaluated on a case-by-case analysis to determine jurisdiction. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Although the definition of “adjacent” no longer contains provisions addressing shallow subsurface connections, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

Mississippi Valley Flood Control Association (Doc. #19488)

3.571 The definition of “riparian area” is especially troublesome for its breadth and ambiguity:

The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

The concept of “influenc[ing]” the ecosystem in the “area” bordering a water—by “surface or subsurface hydrology,” no less—is an amorphous and potentially far-reaching standard. It is also an unworkable one likely to make case-specific determinations complicated, prolonged, and burdensome. (p. 8)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are

“adjacent.” Instead, the rule now provides specific distance limits for **“neighboring”** waters. In addition, where the definition continues to use the term **“floodplain,”** it specifies the **“100-year”** floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Maui County (Doc. #19543)

- 3.572 Riparian area is vaguely defined to be an area bordering (rendering the definition circular; see "adjacent") a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. To determine whether a water is jurisdictional under this definition, project sponsors and regulatory agencies would have to agree on not just the location of the water and on the nature of the surface and subsurface hydrology, but also whether it is directly influenced by three separate items: the ecological processes, the plant community structure, and the animal community structure. (p. 4-5)

Agency Response: The agencies have revised the definition of **“adjacent,”** in particular the definition of **“neighboring,”** in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining **“neighboring”** based on a surface or subsurface hydrologic connection or provides that all waters within **“floodplains”** and **“riparian areas”** are **“adjacent.”** Instead, the rule now provides specific distance limits for **“neighboring”** waters. In addition, where the definition continues to use the term **“floodplain,”** it specifies the **“100-year”** floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

California State Association of Counties (Doc. #9692)

- 3.573 While CSAC acknowledges that riparian areas are not jurisdictional in and of themselves, there are concerns the current definition is too broad. It is possible that an isolated water could be determined to be "connected" to a traditional WOUS by a very large riparian area, thus becoming jurisdictional. Specifically, the language "...influence the exchange of energy and materials between those ecosystems" combined with the broad conclusions from the CR raise real concerns of isolated waters becoming jurisdictional via a large riparian area. CASC proposed the definition should: not include sub-surface hydrology as a basis for connectivity, require a substantial influence as opposed to simply an influence, and should have some limiting language in regards to its possible size. (p. 3)

Agency Response: The agencies have revised the definition of **“adjacent,”** in particular the definition of **“neighboring,”** in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining **“neighboring”** based on a surface or subsurface hydrologic connection or provides that all waters within **“floodplains”** and **“riparian areas”** are **“adjacent.”** Instead, the rule now provides specific distance limits for **“neighboring”** waters. In addition, where the definition continues to use the term **“floodplain,”** it specifies the **“100-year”** floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the

TSD.

Although the definition of “adjacent” no longer contains provisions addressing shallow subsurface connections, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, see the preamble to today’s rule and the TSD.

U.S. Chamber of Commerce (Doc. #14115)

- 3.574 “Riparian Area” - The Agencies propose to define a “riparian area” as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” Narrow strips of land directly abutting a waterway certainly “border” the waterway, but as one moves away from the waterway, the notion of “bordering” diminishes to the point of absurdity. The Agencies have provided no clarification as to how far a riparian area extends away from a water body. According to the proposal, the concept of “reasonable proximity,” which itself is subjective and vague, applies only when adjacency is established through a hydrologic connection for a “water” that lies “outside of the floodplain and riparian area of a tributary.” 79 Fed. Reg. 22,207-08 (emphasis added). For “waters” within the riparian area, the proposal does not explain how far from a waterway the “bordering” area would extend.

Moreover, the “bordering” area is further explained as a location “where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area,” but it is entirely unclear what the Agencies mean by the “area” where such influence exists. Because the Agencies are attempting to rely on a functional, rather than spatial, definition to describe “riparian area,” the proposed rule is hopelessly vague and subject to varying, case-by-case interpretations and applications to regulated parties. This is precisely the type of analysis that the Agencies claim that the WOTUS rule was designed to avoid. (p. 28-29)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

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

- 3.575 For example, in the context of “adjacent waters,” the Proposed Rule provides a new definition of “neighboring” as that term is utilized in the existing definition of “adjacent.” And within the concept of “neighboring,” the Proposed Rule provides definitions of “floodplain” and “riparian area,” to the effect that any feature within a floodplain or riparian area possesses the requisite significant nexus and is thereby pronounced categorically jurisdictional without further investigation or inquiry.

The problem is that there is no specificity provided in the Proposed Rule as to which floodplain is to be utilized or the parameters by which the boundaries of a given riparian area are to be established. To the contrary, the Proposed Rule acknowledges the essential role of these variables in any consideration of jurisdiction, but expressly defers determination of the appropriate determination of these variables to the “best professional judgment” of Agency personnel in the field at an unspecified future time. Proposed Rule at 22,209.

Experts can and will debate the appropriate floodplain for consideration and what the proper indicia of a given riparian area are or should be. That debate is not the point here. What cannot be denied is that the failure to assign the specific values being attributed to the core variables in the analysis underlying the Proposed Rule makes it impossible to definitively find, in advance and on an all-inclusive basis, categorical jurisdiction over the features for which the unspecified variable is definitional.

These assumption- and individual-judgment-rich terms are undefined in the Proposed Rule. Aside from the ambiguity and uncertainty of applying them in the field, it would be impossible for any purported scientific study to anticipate and incorporate every possible judgment call by Corps staff in the field throughout the country and defensibly make a categorical declaration of jurisdiction. (p. 24-25)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Water Advocacy Coalition (Doc. #17921.1)

- 3.576 Riparian areas: As with floodplains, the proposed rule leaves it to the agencies’ “best professional judgment” to determine the riparian area. 79 Fed. Reg. at 22,209. Again, this will lead to confusion and inconsistency across Corps Districts. What are the limits to the riparian zone? How is this determined or mapped? (p. 62)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a

provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. 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. It is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and does not effectively represent existing circumstances on the ground, such as streams or rivers migrating across their valleys over time or as a result of extreme flood events, with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. Additional supporting information can include historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics. Because identifying the 100-year floodplain is an important aspect 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.

When determining the outer threshold of an “adjacent water” the line is drawn perpendicular to the OHWM or high tide line of the (a)(1) through (a)(5) water, as defined in the rule, and extended landward from that point. If there are breaks in the OHWM, the line should be extrapolated from the point where the OHWM is observed on the downstream side to the point where the OHWM is lost on the upstream side. Therefore, waters may meet the definition of neighboring even where, for example, a tributary temporarily flows underground. Where the limit is not clear in the field or discrepancies may occur among different methods, the agencies will identify the outer extent of the threshold.

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

- 3.577 The definition of riparian area is altogether too vague and broad. Surface and subsurface hydrology influence 4 ecological processes and plant and animal community structures ... regardless of whether it is located near a water or not. At a minimum, the definition should say: riparian area means an area bordering water where surface or subsurface

hydrology of that water directly and significantly influence the ecological processes. (p. 5)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Portland Cement Association (Doc. #13271)

- 3.578 Hydrology-influenced ecological connectivity is not an independent basis for jurisdiction. The type of ecological connectivity identified in the proposed rule is not an appropriate basis on which to base federal jurisdiction, as it is indistinguishable from other types of ecological connectivity. All areas, upland and wetland, have “ecological processes and plant and animal community structures” and all are “directly influenced” by “surface or subsurface hydrology.” This is because water is necessary for life and therefore any hydrology influences the ecology. We challenge EPA to identify any area where surface or subsurface hydrology does not directly influence the plant and animal community structure in the area.

In short, therefore, this part of the “riparian area” definition simply asserts that an area is “neighboring” (and therefore “adjacent”) if it “borders a water.” Since “bordering” is already one of the three direct definitions of “adjacent,” this part of the definition of “riparian area” adds nothing to the proposed rule and should not be adopted. (p. 18)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

- 3.579 Energy and materials exchange is not a proper basis for jurisdiction. The second sentence of the definition of riparian area should also not be adopted. It asserts that such an area is a “transitional” one which “influences the exchange of energy and materials” between” aquatic and terrestrial ecosystems. This sentence is completely vague and, since it is devoid of any defined terms, could cover all area “bordering” a water. As it provides no guidance to the regulated community, it should not be adopted.

None of the relevant terms in this sentence – “aquatic ecosystem,” “terrestrial

ecosystem,” “exchange of energy” or “exchange of materials” – is defined. Without any parameters, this sentence is so broad that it covers all areas bordering a water. For example, an area over which stormwater flows would fall under this definition, since it would slow the stormwater and the biological or chemical material carried by it before it entered the water at issue. In this way, it would “influence the exchange of energy and materials between” the water and upland.

Thus this sentence, like the first sentence defining “riparian area,” fails to offer any distinction between areas covered by its terms and those not covered. It must not be adopted by the Agencies. (p. 18)

Agency Response: See above response.

- 3.580 The “riparian area” test is no more clear than the significant nexus test. Perhaps more unfortunately, the riparian area test is no more clear or more expeditious than the eight-year old “significant nexus” test which this test is supposed to clarify. Identifying an area whose hydrology directly influences the ecological processes and plant and animal community structure in an area will have to be done case-by-case, just like the current significant nexus test. And how to do so is no more obvious than how to identify an area under the significant nexus test that has chemical, physical and biological impacts on a downstream water.

This difficulty is compounded by the fact that none of the associated terms or phrase, like “ecological processes” “plant and animal community structure” or “exchange of energy and materials” are defined. Nor, for that matter, is the “area” of the necessary structure, which creates a circularity – one must look at an unidentified ecological “area” to determine the riparian “area.” All of these open-ended terms and phrases simply add to the potential for disagreement, and - because the Agencies are typically given deference in interpreting their ambiguous regulations - the potential for overregulation.

For these and the reasons described above, the Agencies should not adopt the definition of “riparian area” presented in the proposed rule. (p. 19)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

O’Neil LLP (Doc. #14651)

- 3.581 [T]he proposed definition for the term riparian area is too amorphous and potentially inappropriately expansive and thus capable of misuse by Agency personnel to significantly expand the area of jurisdiction beyond the Act’s definition of “waters of the U.S.” The Proposed Rule defines “riparian area” as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant

and animal community structure in that area." The Rule states that riparian areas are transitional areas between aquatic and terrestrial ecosystems that "influence the exchange of energy and materials between those ecosystems."

None of the associated terms, such as "ecological processes," "plant and animal community structure" or "exchange of energy and materials" is defined, and all of these terms are capable of significantly different and widely varying definitions by individual Agency regulators. If these terms are going to be used in the Rule, then very clear and specific definitions need to be proposed and agreed upon through further notice and comment rulemaking before they can be incorporated into the Rule; otherwise, the boundaries of what constitutes jurisdictional waters and what does not will be arbitrary and capricious, as interpreted by regulators on a case-by-case basis. Similar to the problem with the vaguely defined term "floodplain," this constantly varying (and inconsistent) set of definitional terms is extremely ill-advised and extraordinarily unfair to the regulated public, given, inter alia, that the CWA attaches criminal penalties to essentially strict liability offenses.

The Rule needs to clarify the circumstances under which areas of riparian vegetation will be subject to CWA jurisdiction, given that currently any riparian habitat within the limits of a stream's OHWM or that meet the three wetland criteria are already subject to CWA jurisdiction. The Agencies should clarify in this Rule that the Rule is not intended to create any expansion of the areas considered riparian habitat under existing Agency practice. Any expansion of the Agencies' jurisdictional authority under the CWA beyond this would first require explanation and justification as it would not be consistent with the stated intent of the Proposed Rule. Moreover, any such intended expansion needs to be described in a re-circulated proposed rule and subject to notice and comment rulemaking. (p. 2-3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter's assertions, consistent with *SWANCC* and *Rapanos*, the agencies have narrowed the definition of "waters of the United States" compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Pennsylvania Coal Alliance (Doc. #13074)

- 3.582 What are the boundaries of a riparian area? Clear guidance should be provided as to how “transitional areas between aquatic and terrestrial ecosystems” would be delineated, to eliminate subjective determinations that are open to significant disagreement. (p. 14-15)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

CONSOL Energy, Inc. (Doc. #14614)

- 3.583 In addition to traditionally recognized rivers, streams and wetlands, the proposed rule includes a third category known as “riparian areas”. These areas could include land surrounding the recognized traditional areas (transition areas between terrestrial and aquatic ecosystems), geographically isolated wetlands, flood plains, and even other areas connected through the subsurface. Again, The Connectivity of Streams and Wetlands to Downstream Waters report does not fully take into account the Corps’ 1987 wetland delineation manual requirements for determining the existence of a wetland. CONSOL believes that the selective choices in literature by the authors lead to an error in the analysis with respect to the required determinations of both wetland and riparian areas. This further illustrates that this report was not ready to be finalized when EPA drafted the proposed rule. We feel that further scientific evaluation is needed before such a wide reaching definition is justifiable. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. See also Topic 9 of this response to comments document for additional discussion of the scientific basis for this rule.

Devon Energy Corporation (Doc. #14916)

- 3.584 Under the Proposed Rule, a “riparian” area would not be jurisdiction in itself, however, it could be used as a mechanism to claim federal jurisdiction.
An exemption exists in the Proposed Rule that indicates that no uplands in a “riparian” area can ever be WOTUS, The Proposed Rule however fails to establish limits to the size

of a riparian area or define the types of animal, plant and aquatic life that may make an area “Riparian”.

Currently “riparian” area is a concept used in mitigation, not in jurisdiction. In its Nationwide Permit (“NWP”) Program, the Corps defines “riparian” areas as land.¹⁷⁰ Therefore, “riparian” is a definition that doesn’t fit with the Proposed Rule so it should not be used for the purpose of establishing WOTUS. (p. 7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

- 3.585 “Riparian area” is defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in the area.” This definition literally does not require any connection whatsoever to a jurisdictional water, whether hydrological or ecological. A topographic depression that frequently collects rainwater will generally be “an area... where surface or subsurface hydrology directly influence[s] the ecological processes and plant and animal community structure in” that topographic depression. As the definition of “riparian area” is currently worded, that topographic depression would be a WOTUS so long as it is “bordering” a WOTUS (a term not defined in the Proposal). To improve clarity, Domtar recommends the definition include a requirement for a physical connection between the hydrology of that area and the bordering WOTUS. (p. 4)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

- 3.586 Riparian area - What are the boundaries of a riparian area? How will "transitional areas

¹⁷⁰ 77 Fed. Reg. 10184, 10289 (Feb 21, 2012) (“Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines.”).

between aquatic and terrestrial ecosystems" be delineated? As written, the definition of "riparian area" would result in subjective determinations that are open to significant disagreement. (p. 10)

Agency Response: See response above.

Alameda County Cattlewomen (Doc. #8674)

3.587 The proposed rule expands its "adjacent wetlands" category to include all "adjacent waters," which now wraps every water within a floodplain or riparian in as a "water of the U.S." by rule. While ACCW disagree that this category should be expanded as such, we also disagree with the agencies vague description of "riparian area." ACCW would like the agencies to explain how a livestock producer should know whether a natural pond, or puddle in his pasture lies within an area where the "surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area?" The agencies have again failed miserably in providing any clarity to the public, its field personnel, or anyone else. All the agencies have done is provide themselves enough flexibility to find any water (however broad that term can be expanded) to be a "water of the U.S." ACCW assert that the agencies definition of "riparian area" is vague at best and does not articulate any discernible limit to their authority, violating both the CWA itself and the Commerce Clause of the Constitution. (p. 20)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD

Additionally, the final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Consistent with SWANCC and Rapanos, the agencies have narrowed the definition of "waters of the United States" compared to the longstanding, existing definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

"Adjacent waters" do not include any water excluded under paragraph (b) of the rule, such as groundwater, including groundwater drained through subsurface drainage systems, and puddles. Additionally, the rule maintains exclusions for waste treatment and prior converted cropland. Finally, waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.

Western Growers Association (Doc. #14130)

- 3.588 Where are the borders of a riparian area? Even more troublesome, the proposed new rule does not specify how to determine the extent of a riparian area. While a clarification of the floodplain considered would be helpful and appropriate, floodplains are nevertheless likely easier to delineate than “riparian areas.” The definition of “floodplain” emphasizes physical features and a number of entities already have mapped and delineate floodplains for a variety of other purposes. In contrast, because the EPA and Corps define “riparian areas” in terms of ecological function, additional clarification of this issue to the regulated community is even more critical in order for us to fully understand the proposed rule before it is finalized. Western Growers suggests that all association to “riparian areas” for the purposes of determining “adjacent waters” should be removed and a “floodplain” of standard size throughout the U.S., an easily determinable term and physical feature, should be the only factor determinable. In absence of deleting riparian from the proposed rule altogether, then the agencies must at least propose a more determinable, clearer definition of “riparian area”, add it to the proposed rule and submit it for public comment. (p. 17)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

National Chicken Council; National Turkey Federation; and U.S. Poultry & Egg Association (Doc. #14469)

- 3.589 “[R]iparian area” is defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” While this definition is vague and broad (particularly as it relates to ecological processes, communities and structures), there is no clarification in the proposed rule on how far a riparian area extends away from the water body. (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Oregon Farm Bureau (Doc. #14727)

- 3.590 According to the proposal, the concept of “reasonable proximity,” which itself is subjective and vague, applies only when adjacency is established through a hydrologic connection for a “water” that lies “outside of the floodplain and riparian area of a tributary.”¹⁷¹ Including this term will undoubtedly expose landowners, not the agencies, to real and personal financial risk and liability. That is also true for the other new terms and ambiguous definitions. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

North Carolina Farm Bureau Federation (Doc. #15078)

- 3.591 The term "riparian area" as described in the proposal suffers from an even greater flaw than "floodplain." Floodplains could eventually be delineated using topo maps, if a flood interval is indicated. "Riparian area" cannot be delineated in such a way and the determination of what is the "riparian area" is solely at the discretion of the regulator under the proposed rule. If more than one regulator is in the same field, it is doubtful that both would ever independently delineate the same area as the riparian area. Therefore, using the riparian area as defined to establish "adjacent waters" that are categorically jurisdictional is absolutely arbitrary. This certainly does not add clarity or reduce confusion as to what will be a "water of the US." (p. 13)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD

- 3.592 "Riparian area" should not be used at all to establish adjacency. These areas are too scientifically difficult to delineate and the application of this would be so inconsistent as to be arbitrary. (p. 13)

Agency Response: See above response.

¹⁷¹ 79 Fed. Reg. 22,207-08

Association of American Railroads (Doc. #15018.1)

- 3.593 The proposed rule’s definition of “riparian area” is vague and provides no meaningful guidance for the regulated community. The limits of the riparian zone, as well as how the zone will be determined or mapped, are unclear under the definition. Additionally, which types of animal, plant, and aquatic life may trigger this definition is unclear, because terms used in the definition—area, ecological processes, plant and animal community structure, exchange of energy—are themselves vague and undefined. As with floodplains, the proposed rule leaves it to the Agencies’ “best professional judgment” to apply the term “riparian area.” 79 Fed. Reg. at 22,208. This will lead to confusion and inconsistency among the Agencies and their District and Regional offices.

A quick search of Agencies’ guidance shows numerous inconsistent references to riparian. The EPA Connectivity Report defines riparian in the context of “uplands,” which are also undefined, implying riparian is separate from upland. EPA Connectivity Report, A-14, line 10-16. EPA guidance, however, references riparian as including uplands. Of course, as discussed in Section III.b.3, “upland” is not defined in the proposed rule, despite being used as a central feature for the ditch exclusion, and therefore referencing upland provides no guidance regarding what is considered riparian under the proposed rule. Further, other Federal agencies have vastly different definitions.¹⁷²

Without a definition of riparian area in the proposed regulation that provides meaningful guidance, the regulated community has no idea which water features are potentially Waters of the United States. This will create immense and unjustified expense, delay, consultation, and regulatory burden on the regulated community. (p. 12)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Airports Council International - North America (Doc. #16370)

- 3.594 On page 22263 of the Proposed Rule a “riparian area” is defined as: “the area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.”
- The above definition will result in a significant amount of work to determine if a surface or subsurface water would directly influence ecological processes and the plant and animal community structure. We believe accurately evaluating these factors will require extensive effort from both the person wishing to show that there is or is not an effect, and the EPA and/or Corps personnel who must review that information. (p. 5)

¹⁷² <http://cals.arizona.edu/extension/riparian/chapt1/table.html>.

Agency Response: See response above.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

- 3.595 This comment pertains to Section 328.3 Definitions, (c)(3), Federal Register page 22263. This definition of “riparian area” is unclear. There are no guidelines or definitions for how a riparian area will be determined. Lack of clear guidance will create an undue burden of proof for applicants that are required to define the extent of the riparian area for “waters of the United States”. CMSWS recommends narrowing the proposed definition of “riparian area” to something measurable and/or developing a riparian area identification methodology. (p. 2)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Duke Energy (Doc. #13029)

- 3.596 Similar to the floodplain definition, several questions arise, such as, what are the limits to the riparian zone? How will this area be determined or mapped? Is the area determined based on field conditions at the time of the permit application or from historical river data? (p. 37)

Agency Response: See response above.

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

- 3.597 With regard to riparian areas, the proposed rule notes that wetlands within riparian areas are considered adjacent to jurisdictional waters, a conclusion that is typically asserted by the Agencies under current practice (page 22209 of the Federal Register notice, bottom of middle column). The Agencies should clarify in the proposed rule that riparian areas that exist due to shallow groundwater, but that lack indicators for an OHWM and also fail to exhibit all three wetland criteria, are in fact not subject to CWA jurisdiction. (p. 11)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to

the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

Santa Clara Valley Water District (Doc. #14776)

- 3.598 It would define "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." (Id., emphasis added.) This definition makes no sense. The surface and subsurface hydrology of every area directly influences the ecological processes and community structure in that area: Dryness in an area will directly contribute to certain ecological processes and community structures in that area, whereas wetness will directly contribute to others in that area. The language in the Proposed Rule could potentially be read to cover every area. Surely this is not the intent for this regulation. Missing from this proposed definition is the concept that what defines riparian areas is that they are directly affected by their hydrological connection to adjacent waterbodies. Federal agencies have consistently incorporated this concept into their definitions of the term in the past, as demonstrated in a 2002 National Research Council report. (National Research Council (2002) Riparian Areas: Functions and Strategies for Management at 31.) The Bureau of Land Management, for example, has defined "riparian area" as "an area of land directly influenced by permanent water." (Id.) The U.S. Fish and Wildlife Service has likewise defined "riparian areas" as "plant communities contiguous to and affected by surface and sub-surface hydrological features of perennial or intermittent lotic and lentic water bodies", having "distinctively different vegetative species than adjacent areas" and/or "more vigorous or robust growth forms" than adjacent areas. (Id.) This concept should be incorporated into the Proposed Rule's definition of "riparian area." (p. 4-5)

Agency Response: See response above.

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

- 3.599 What are the boundaries of a riparian area? How will 'transitional areas between aquatic and terrestrial ecosystems' be delineated? How will riparian areas be distinguished from upland areas? As written, the definition of "riparian area" would result in subjective determinations that are open to significant disagreement. Further, because biological/hydrologic conditions evolve and change, using them to demarcate a geographical area would cause uncertainty in making these determinations and make it impossible to develop accurate, up-to-date mapping. (p. 16)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains" and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

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

- 3.600 The terms “riparian area” and “floodplain” further define “neighboring” for purposes of the term “adjacent.” “Floodplain” would be defined as “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 water flows.”¹⁷³ The definition of “riparian area” is especially troublesome for its breadth and ambiguity:

The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.¹⁷⁴

The concept of “influenc[ing]” the ecosystem in the “area” bordering a water—by “surface or subsurface hydrology,” no less—is an amorphous and potentially far-reaching standard. It is also an unworkable one likely to make case-specific determinations complicated, prolonged, and burdensome. (p. 8)

Agency Response: See response above.

Competitive Enterprise Institute et al (Doc. #15127)

- 3.601 The proposed rule defines “neighboring” as all “waters located within the riparian area or floodplain of a water” over which the Agencies have proper jurisdiction, “or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” Id. at 22,273. “Riparian areas” are further defined as the entire “transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.” Id. (emphasis added). And “floodplains” are defined in similarly expansive terms: “area[s] bordering inland or coastal waters that [were] formed by sediment deposition from such water under present climatic conditions and [are] inundated during periods of moderate to high water flows.” Id. (emphasis added).

How expansive is the area between ecosystems that “influence[s] the exchange of energy and materials” between them? Do “present climatic conditions” encompass the last decade? The last century? The period since the last ice age? How often does an area have to experience a flood to fall within the floodplain? Once a decade, or once a century? The regulation answers none of these questions. (p. 6-7)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to

¹⁷³ at 22,263.

¹⁷⁴ at 22,263.

the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

O'NEIL LLP (Doc. #16559)

3.602 Similarly, the proposed definition for the term riparian area is too amorphous and potentially inappropriately expansive and thus capable of misuse by Agency personnel to significantly expand the area of jurisdiction beyond the Act's definition of "waters of the U.S." The Proposed Rule defines "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." The Rule states that riparian areas are transitional areas between aquatic and terrestrial ecosystems that "influence the exchange of energy and materials between those ecosystems." (p. 3-4)

Agency Response: See response above.

3.5. CONFINED SURFACE AND SHALLOW SUBSURFACE CONNECTIONS

Agency Summary Response

Many commenters questioned whether “shallow subsurface and surface confined flow” are appropriate metrics for identifying in part the outer limits of “neighboring.” As “neighboring” has not been defined in the past for regulatory purposes and many members of the public indicated that not having a definition created a lack of clarity and inconsistent field practices across the nation, the agencies specifically requested public comment on the proposed definition.

First, with respect to the use of the term “shallow subsurface hydrologic connection” in the definition of “adjacent” and “neighboring”, in response to commenters’ concerns for clarity and certainty, the rule no longer uses this term to identify jurisdictional waters. Nor does the rule refer to “confined surface hydrologic connection.” However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent”, assessment of the effects of non-jurisdictional confined surface and shallow subsurface connections on such downstream waters may be appropriate. As commenters noted, such connections do impact the chemical, physical, and biological integrity of jurisdictional waters. In particular, the science strongly supports the important role shallow subsurface connections can play in assessing the effects on surface waters and, as a result, the record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. See discussion below and Technical Support Document. There is no basis in the statute or case-law to ignore the significant effects a water has on downstream waters simply because the connection exists through a non-jurisdictional (surface or subsurface) feature.

Second groundwater is not a “water of the United States” and is not regulated under this rule. To be clear on this point, the rule expressly excludes groundwater in paragraph (b). See further discussion of this exclusion in the Exclusions Compendium (Topic 7).

Even though groundwater is not regulated as a water of the United States, it is important to recognize how waters flow. As water moves downhill from a wetland, for example, towards

another water, such as a tributary, water flow can occur on the surface, in the upper part of the soil, or in deeper groundwater pathways. The subsurface hydrologic connections important to jurisdiction are those connections on the surface or in the upper part of the soil profile. Shallow subsurface water serves as a connection between waters, just as a culvert would provide a connection.

During storm events and snowmelt, water can move over a restricting layer and can reach the stream channel quickly. This subsurface flow serves as a connection between waters, such as the wetland and tributary, but is not considered a water of the US. Because of the rapid delivery of water to the tributary, this flow can have a significant effect on water quality. For example, water that was allowed to infiltrate into the soil and move through the shallow soil layer may be “treated” by the uptake of nutrients by vegetation, reducing nutrient loads to the tributary. On the other hand, during storm flows, the water may be transported so rapidly through soil that any contaminants in the water would be conveyed directly to the tributary. This delivery system is more direct when the subsurface connection is through man-made subsurface conveyance systems, such as drain tiles and storm sewers. In this case, there is no opportunity for vegetation to uptake nutrients, as the water is moved quickly through pipes or drains. The water containing potential contaminants, such as excess nutrients, is discharged directly into the tributary and downstream waters.

Shallow subsurface connections can also occur when a shallow watertable fluctuates within the soil profile, sometimes rising to or near the ground surface. The watertable is reflected in the water level of streams and lakes, and generally tends to follow surface topography. For example, local shallow watertables maintain the hydrology of prairie potholes and contribute to the flow in tributaries.

As stated above, water can flow in shallow local aquifer systems where water is near the land surface or in deeper intermediate and regional aquifer systems. For jurisdiction, shallow subsurface connections are the focus because of the direct influence on the quality of surface waters and in maintaining the hydrology of wetlands and other waters. Shallow flow occurs over short times and distances. Regardless, neither shallow nor deep groundwater is considered a water of the United States and are not regulated under the CWA.

Tools to assess shallow subsurface connection include reviewing the soils information from the NRCS Soil Survey, which is available for nearly every county in the United States. The soil survey has information on hydric soils, the hydrologic class of the soil, and the occurrence of a high or seasonal water table. Direct visual observations on the ground, such as noting a change in vegetation or evidence of hillslope springs or seeps can be indicators, as can direct measurements of the water table. For other specific issues related to implementation of the final rule, including the assessment of subsurface connections, see Implementation Compendium (Topic 12).

The agencies recognize that the science demonstrates that waters with a shallow subsurface connection to jurisdictional waters can have important effects on downstream waters. For purposes of a case-specific significant nexus analysis under the rule, a shallow subsurface hydrologic connection is lateral water flow over a restricting layer in the top soil horizons, or a shallow water table which fluctuates within the soil profile, sometimes rising to or near the ground surface. In addition, water can move within confined man-made subsurface conveyance systems such as drain tiles and storm sewers, and in karst topography. Confined subsurface systems can move water, and potential contaminants, directly to surface waters directly and

rapidly without the opportunity for nutrient or sediment reduction along the pathway. The agencies understand that there is a continuum of water beneath the ground surface, from wet soils to shallow subsurface lenses to shallow aquifers to deep groundwaters, all of which can have impacts to surface waters, but for significant nexus purposes under this rule, the agencies have chosen to focus on shallow subsurface connections because those are likely to both have significant and near-term impacts on downstream surface waters and are reasonably identifiable for purposes of rule implementation. As noted, the final rule expressly excludes groundwater, including groundwater drained through subsurface drainage systems, from regulation as waters of the United States. See the preamble to today's rule and the TSD for more information on this topic.

Following are the specific comments received during the public comment period on “confined surface and shallow subsurface connections” and the agencies’ responses:

Specific Comments

Alaska State Legislature, Alaska Senate Leadership (Doc. #7494.1)

- 3.603 Definitions and metrics should be provided for terms such as "other waters," "quantifiable flow rates," "significant nexus," and "shallow subsurface connection." (p. 1)

Agency Response: Please refer to the “other waters” and “significant nexus” parts of this document for responses to comments addressing those issues.

The rule does not use the term “quantifiable flow rates” so that term is not defined. In addition, the agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining “neighboring” based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

The agencies did not add a definition of “shallow subsurface connection” to the rule because that term is no longer used in the rule.

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

- 3.604 To address some of the problems described above, Pennsylvania proposes the following specific revisions to definitions in the rule:
Neighboring- Delete "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." (p. 6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. Among other things, as suggested by commenter, the rule no longer includes a provision defining “neighboring” based on a shallow subsurface hydrologic connection or a confined surface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

Texas Comptroller of Public Accounts (Doc. #10952)

- 3.605 One issue of particular concern for Texas is the need for the Agencies to clarify the difference between "shallow subsurface" and groundwater. The Agencies must make a clear distinction between "shallow subsurface hydrologic connections," which will be regulated under the CWA and groundwater, traditionally regulated by the states and not subject to CWA regulation. (p. 2)

Agency Response: See summary response.

New Mexico Department of Agriculture (Doc. #13024)

- 3.606 EPA has no jurisdiction over groundwater thus no jurisdiction over "shallow subsurface" water. We request striking the second half of the sentence, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Further, the term shallow in this definition is subjective and undefined by the Agencies. (p. 27)

Agency Response: See summary response for this section. The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining "neighboring" based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

Alaska State Legislature (Doc. #13566)

- 3.607 We recommend: Water making up the "shallow subsurface connection" has to occur within the rooting zone of the wetland vegetation. This definition properly distinguishes between "groundwater" and a "shallow subsurface connection." Clarifying these terms eliminates a degree of regulatory uncertainty. (p. 4)

Agency Response: See summary response. The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining "neighboring" based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the summary response and the TSD.

Texas Commission on Environmental Quality (Doc. #14279.1)

- 3.608 The TCEQ has two objections to using a subsurface connection as a criterion for adjacency. The first objection is that the determination of the existence and extent of a shallow subsurface hydrologic connection can be difficult. The second objection is that groundwater is not within the scope of the CWA. Conceivably, any groundwater connection, even those between surface waters that are distant from each other, might be construed as establishing adjacency, though presumably this is not the intent of this provision in the rule. (p. 7)

Agency Response: See summary response.

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

- 3.609 The Rule states that non-jurisdictional non-wetland swales and ephemeral upland ditches may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a TNW provided there is an actual exchange of water between those waters, and the water is not lost to deep groundwater through infiltration. The Rule explicitly exempts groundwater as a WOUS; however, the Rule proposes to regulate shallow subsurface groundwater connections between waters through non-jurisdictional features?

The concept of groundwater should be further explained and defined within the Rule as it relates to jurisdictional connections. Furthermore, the Rule proposes to regulate features within the upper reaches of the watershed that would not previously have been subject to CWA jurisdiction via non-jurisdictional connections. This new approach may extend regulatory oversight of the CWA over features that were not previously regulated; therefore, the City of Chesapeake will not support the expansion of regulatory oversight under the CWA further into the watershed through confined surface hydrologic connections or shallow subsurface groundwater connections. (p. 3-4)

Agency Response: See summary response and the responses to comments for Ditches and Exclusions for a discussion of how excluded ditches and non-jurisdictional features are considered in case-specific determinations under paragraphs (a)(7) and (a)(8) of the rule. The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining “neighboring” based on a confined surface or shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today’s rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. Contrary to the commenter’s assertions, consistent with *SWANCC* and *Rapanos*, the agencies have narrowed the definition of “waters of the United States” compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Also, please see the responses to comments elsewhere in this document regarding the subsection (b) groundwater exclusion.

County of Henry, Collinsville, Virginia (Doc. #10949)

- 3.610 The Rule states that non-jurisdictional non-wetland swales and ephemeral upland ditches may still serve as a "confined surface hydrologic connection" between an adjacent wetland or water and a navigable water provided there is an actual exchange of water between those waters, and the water is not lost to deep groundwater through infiltration. The Rule explicitly exempts groundwater as a WOUS; however, the Rule proposes to regulate shallow subsurface groundwater connections between waters through non-

jurisdictional features? (p. 2)

Agency Response: See response above.

Florida Department of Environmental Protection (Doc. #15080)

- 3.611 Under the proposal, a shallow subsurface hydrologic connection would include "lateral water flow through a shallow subsurface layer such as can be found in karst systems." 79 Fed. Reg. at 22,208. A shallow subsurface connection could also exist when waters are "in contact with the same shallow aquifer." Id. Shallow subsurface connections would "exhibit a direct connection to the water found on the surface in wetlands and open waters." Id. Water would not have to be "continuously present" in the shallow subsurface hydrologic connection. Id. The proposal does not appear to establish a measure for "shallow" subsurface hydrologic connections, subsurface layers, or aquifers.

The Department asks that the federal agencies clarify their proposed use of "shallow" as a defining characteristic of a subsurface hydrologic connection that would be used to assert federal jurisdiction over a surface water body. (p. 5-6)

Agency Response: See summary response.

- 3.612 The proposal does recognize that the strength of connectivity between water bodies "can be reduced as the distance between water bodies increases because of various factors such as soil characteristics, geology, climate, precipitation patterns, etc." 79 Fed. Reg. at 22,211. The proposal does not, however, appear to establish specific geographic limits for using shallow subsurface hydrological connections as a basis for determining adjacency. Where shallow subsurface hydrologic connections would extend outside of a riparian area or floodplain, the federal agencies appear to reserve for the future case specific assessments of distance between water bodies when determining adjacency. 79 Fed. Reg. at 22,207.

The Department asks that the federal agencies clarify whether case-specific factors such as distance between water bodies are relevant to the agencies' determination that all waters with a shallow subsurface hydrologic connection to a core federal water or tributary exhibit a significant nexus to a core federal water. Similarly, the Department asks that the federal agencies clarify whether there is any outer geographic limit or distance from a core federal water beyond which jurisdiction cannot be claimed using shallow subsurface hydrological connections. If so, is there opportunity to refine the jurisdictional category such that it does not include any water simply in contact with the same shallow aquifer as a core federal water or tributary? (p. 6)

Agency Response: See summary response. The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining "neighboring" based on a shallow subsurface hydrologic connection and instead, as suggested by the commenter, imposes specific distance limits on adjacent waters. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

With respect to concerns regarding the potential to regulate as “adjacent” waters in floodplains that do not have a significant nexus to traditionally navigable waters, interstate waters or the territorial seas, as explained more fully in the preamble and TSD, the agencies have determined that “adjacent” waters have a significant nexus based on the record for today’s rule and thus are appropriately jurisdictional by rule. For waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, a case-specific jurisdictional determination is required. Waters beyond these limits are not regulated. Please see the preamble and TSD for additional detail.

Please see the preamble and TSD for additional detail.

As discussed above, distance is important in determining threshold limits for (a)(6), (a)(7), and (a)(8) waters. Also, when performing a case-specific significant nexus evaluation the agencies must consider the factors identified in the rule, paragraph (c)(5).

Ohio Department of Natural Resources, et al. (Doc. #15421)

3.613 The Division is concerned that the federal agency has repeatedly stated that “groundwater is not subject to regulation under the CWA and that the proposal does not change that longstanding interpretation”. As indicated in the proposed language and definitions, shallow sub-surface flows and connectivity either through adjacent waters, neighboring waters, similarly situated waters, may in fact be considered jurisdictional. The proposing agency has not clarified how they will not require shallow ground water as jurisdictional? (p. 20)

Agency Response: See essay.

North Dakota Office of the Governor, et al. (Doc. #15365)

3.614 EPA does not provide meaningful clarification on how adjacent waters will be determined. The preamble fails to indicate how the agencies will determine if a shallow subsurface flow exists for adjacent waters. The examples provided on page 22208 of the preamble are speculative, stating “shallow subsurface connections may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches) where other wetland delineation factors may not be present” (emphasis added).¹⁷⁵ The preamble continues: “a combination of physical factors may reflect the presence of a shallow subsurface connection, including (but not limited to) stream hydrography (for example, when the hydrograph indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower than in the shallow subsurface”¹⁷⁶ (emphasis added). No field indicators are required to make this determination. (p. 8-9)

Agency Response: See summary response. The agencies have revised the

¹⁷⁵ 79 Fed. Reg. 22188, 22208.

¹⁷⁶ 79 Fed. Reg. 22208

definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining “neighboring” based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule and available techniques for identifying shallow subsurface connections are discussed in the preamble to today’s rule as well as in the TSD.

- 3.615 The inclusion of wetlands connected through shallow groundwater in the proposed rule is highly invasive of state water-management authority and needs to be removed. The relationship between ponded waters overlying shallow unconfined aquifers and surface waters is strongly mediated by the management of the intervening waters. This management can include disconnection – or partial/total depletion by pumping. All pumped ground water in these aquifers must be recovered from discharge to rivers or evapotranspiration. Pumping in some cases may remove poor quality waters, as when waters from evaporative discharge areas are drawn toward wells. Discharge areas may be converted to recharge areas by pumping. Moreover, the effects of management will vary with fluctuations in the climatic regime, which may enhance, moderate, or negate management impacts. These shallow aquifers are major sources of water for irrigation, towns, and industries in the northern Great Plains – in fact, one of the largest sources. Given past attempts by federal agencies in attempting to control water-table surfaces, it is highly probable that federal agencies will attempt to interfere with state groundwater appropriation using the proposed rule as justification. They will simply assert that the state has the right to appropriate groundwater for pumping and beneficial use, but local water table exposures are all WOTUS by virtue of groundwater connection with gaining streams they claim to be jurisdictional, and their water-levels cannot be altered by pumping – a hydrologic impossibility. Definition of these waters as WOTUS will inevitably result in federal incursion on state groundwater appropriation jurisdiction, either through direct intervention of agencies using the WOTUS claim or indirect intervention through appeal for EPA involvement.¹⁷⁷

In short, federal involvement through indirect claimed jurisdiction can be expected in almost all state water appropriations from shallow systems in North Dakota. This would render the aquifers virtually unavailable for beneficial use. Shallow unconfined glacial aquifers are a major source of water for irrigation, homes, industries, and municipalities in North Dakota and other states. State groundwater appropriation jurisdiction will mean nothing if permit holders are threatened by federal intervention if they pump. This is not to say that wetlands of major importance overlying aquifers should never be protected – the State does consider and implement protective measures for major resources like the Chase Lake refuge – only that these decisions belong to the State. (p. 10-11)

Agency Response: Although the precise situation presented by the commenter is unclear, the rule does not include as a “water of the US” all wetlands connected through shallow subsurface connections. Groundwater itself is expressly excluded from regulation under the rule. Wetlands are a water of the United States only

¹⁷⁷ The U.S. Fish and Wildlife Service during the 1990s challenged virtually every water permit application for ground-water pumping in Kidder County, ND and other areas based on what they considered to be unallowable impacts on their wetland easements. They were essentially claiming the right to control the water table, hence the aquifer itself.

when they are adjacent to one of the waters identified in paragraphs (a)(1) through (5) of the rule or are determined to have a significant nexus to a traditional navigable water, interstate water or territorial sea based on a case-specific finding under (a)(7) or (a)(8). As explained in the preamble and the TSD, the rule does not expand federal jurisdiction to either groundwater, traditionally managed by States, or to surface waters beyond what has been historically subject to regulation under the CWA. See summary response.

- 3.616 Using shallow groundwater connections to claim a nexus would allow EPA to inappropriately intervene in agricultural management. Due to the rapidly changing climate and frequent spring flooding in agriculture areas, North Dakota farmers need to frequently pursue temporary ditching and manipulation of the land to enhance water movement and allow for planting. Most of these areas contain shallow, unconfined aquifers that are connected with streams or drainageways to streams. This means that virtually any ponded area overlying shallow unconfined aquifers, which are major areas of agriculture, could be considered jurisdictional when EPA or other agencies decide so. A dangerous opportunity for EPA intervention, to the harm of the farmers, is created in the proposed rule.

A generic definition of all waterbodies connected through ground water as WOTUS is a large and unjustified federal jurisdictional encroachment. (p. 11)

Agency Response: See essay.

- 3.617 The connected surface water through shallow groundwater inclusion must be removed from this rule, disallowing EPA and the Corps from using these connections to determine federal jurisdiction. EPA and other agencies cannot interfere with state authority to not only appropriate ground water, but assure the use of the water appropriated. The shallow groundwater nexus can only apply to the confluence of a surface waterbody with a navigable stream. In addition, these waters are protected through state jurisdiction. (p. 11)

Agency Response: See above responses.

Office of the Governor, State of Utah (Doc. #16534)

- 3.618 The proposed rule also exempts groundwater from EPA and Army jurisdiction. However, this is undermined by the Proposed Rule's reliance on the hydrologic connections and in particular on "shallow subsurface hydrologic connections" as a basis for establishing jurisdiction." However, this term is not defined. Generally speaking, subsurface water is considered to be ground water, yet, ground water is specifically listed as exempted water in this proposal.¹⁷⁸ Further, the agencies have stated that if the waters are jurisdictional upstream, they remain jurisdictional if they disappear and then resurface downstream.¹⁷⁹ This conflict makes it very difficult to know where groundwater begins and how groundwater is different from a "shallow subsurface connection." More importantly this appears to be an unwarranted expansion of jurisdiction to groundwater while at the same time claiming that groundwater is exempt

¹⁷⁸ See 79 Fed. Reg. 222 63.

¹⁷⁹ See 79 Fed. Reg. 222 63.

from jurisdiction. (p. 8)

Agency Response: See summary response.

Pyramid Lake Paiute Tribe (Doc. #17472)

- 3.619 Throughout the proposed rule, the document loosely uses the term "shallow" to describe subsurface hydrologic water connection. The new rule should define a numerical value for the depth "shallow" to avoid confusion. (p. 1)

Agency Response: The rule no longer uses the term “shallow subsurface hydrologic connection.” See summary response for additional detail and guidance.

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

- 3.620 The inclusion of a shallow subsurface hydrologic connection in the proposed definition of 'neighboring' will likely require additional surveys and hydrologic monitoring on a regular basis to determine whether or not a feature has a connection to a jurisdictional water. These surveys are time consuming and costly; with the potential to substantially increase project costs. Caltrans recommends that the shallow subsurface flow be removed from the definition of 'neighboring' to prevent the delineation process from becoming an undue burden. Alternately, including visual indicators of a shallow subsurface flow to be used to identify a jurisdictional connection in place of hydrologic monitoring would allow for a straightforward implementation without substantial additional project costs. (p. 2)

Agency Response: See summary response. The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, as suggested by the commenter, the rule no longer includes a provision defining “neighboring” based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today’s rule as well as in the TSD.

Waters of the United States Coalition (Doc. #14589)

- 3.621 The sections of the Proposed Rule that would make a groundwater connection to waters of the United States sufficient to make wetlands and other isolated waters themselves waters of the United States violate the Supreme Court’s decision in SWANCC. (p. 42)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For

further detail, clarification and guidance, see responses to similar comments in this document, the preamble to today's rule and the TSD.

For a discussion of how this aspect of the rule is consistent with Supreme Court precedent, please see responses to comments in the Legal Compendium, the preamble and the TSD.

Harris County Flood Control District (Doc. #15049)

- 3.622 The District is concerned that while groundwater is not defined as a Water of the U.S., the proposed rule states subsurface connections could be used to show a significant nexus, contradicting the exemption of groundwater and adding uncertainty to the public and the regulators when trying to make jurisdictional determinations. Subsurface connections are not defined and therefore indistinct from groundwater in the proposed rule. (p. 2)

Agency Response: See summary response and responses above.

Lower Elkhorn Natural Resources District, Nevada (Doc. #15400)

- 3.623 The proposed definition of "waters of the United States" is contradictory in its treatment of the classification of groundwater as jurisdictional water. In one section of the proposed definition, groundwater can be considered jurisdictional water because of the new term "neighboring," which has, in its definition, the term "shallow subsurface water" (which we interpret to mean groundwater). Another section of the proposed definition states that groundwater is exempt from being classified as jurisdictional water regardless of the definition of the term "neighboring." If the latter is the case, then the term "shallow subsurface water" should simply not exist within the proposed definition of "waters of the United States." (p. 2)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the preamble to today's rule and the TSD.

For a discussion of how this aspect of the rule is consistent with Supreme Court precedent, please see responses to comments in the Legal Compendium, the preamble and the TSD.

Central Platte Natural Resources District (Doc. #15477)

- 3.624 Despite the Agencies' statements to the contrary, the Proposed Rule does include

groundwater, because without groundwater, there is no hydrologic link between many isolated waters and traditionally navigable waters. Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected. Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters. (p. 4)

Agency Response: See summary response and responses to other comments in this document, the preamble and TSD for an explanation of the basis for regulating “isolated waters” under this rule and for additional guidance on identifying shallow subsurface connections. Also, please see the responses to comments elsewhere in this document regarding the subsection (b) groundwater exclusion.

Association of Clean Water Administrators (Doc. #13069)

- 3.625 A final rule could provide increased clarity for identifying tributaries and adjacent waters if clearer definitions are developed. As currently stated, there are no clear bounds on the spatial extent of floodplains and riparian areas. Similarly, more detail is needed on the scope of a “shallow subsurface hydrologic connection”, i.e., how deep can water be located and still be considered “shallow” or, given the size of subterranean streams or surficial aquifers in some regions, how close must the waterbodies be located to become neighboring? While ACWA agrees that shallow subsurface flow can connect adjacent waters to a(1) through a(5) waters, the significance of the connection is a critical factor. The definition of “shallow subsurface hydrologic connection” should establish a limit beyond which a case-by-case significant nexus analysis would be needed to assert jurisdiction. Also, the rule language should clearly state that the shallow subsurface aquifer is, itself, not jurisdictional. (p. 3)

Agency Response: See summary response.

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

- 3.626 Paragraph (b)(5)(vi) exempts groundwater and the CWA jurisdiction clearly does not cover groundwater. However, “shallow subsurface hydrologic connection” is used in the proposed rule as a jurisdiction nexus. We believe this contradicts the exemption, and we request that the proposed rule refrain from reliance on “shallow subsurface hydrologic connection.” (p. 3)

Agency Response: See summary response.

Western Coalition of Arid State (Doc. #14407)

- 3.627 The agencies also use the term “waters” in a categorical reference to mean all rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made systems. Again, this broad language indicates that the agencies intend to treat essentially any feature that is wet, or has the potential to contain water, as an (a)(6) water that could be jurisdictional by virtue of its adjacency.

While the proposed rule does not change the definition of “adjacent,” which means

bordering, contiguous, or neighboring, it does add a definition for the term “neighboring”, which did not exist previously and vastly broadens the concept of adjacency and expands jurisdiction to other non-wetland waters. Under the proposed rule, neighboring waters include waters located within the floodplain or riparian area of a TNW, interstate water, territorial sea, or impoundment. If an area is not within a floodplain or riparian area, it can still be a jurisdictional adjacent water if it has a shallow subsurface hydrologic connection or confined surface hydrologic connection to a jurisdictional water.

This is ambiguous as shallow subsurface connections are not defined anywhere in the preamble or the proposed rule and will not always be physically evident. Furthermore, the proposed rule also states that all waters within the floodplain or riparian area of jurisdictional waters or that have a shallow subsurface hydrological connection to jurisdictional waters categorically have a significant nexus and will be jurisdictional by rule. (p. 4-5)

Agency Response: In response to comments asking the agencies to clarify the term “waters,” the final rule, preamble, TSD, and responses to other comments in this document provide additional examples and further guidance.

The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining “neighboring” based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today’s rule as well as in the TSD. See responses to other comments in this document, the preamble and TSD for additional guidance on identifying shallow subsurface connections.

Virginia Association of Counties (Doc. #15175)

- 3.628 The proposed rule has several discrepancies within the text that add to the confusion. For example, (t) (vi) of the proposed rule provides an exclusion of "groundwater." However, in section ([u] [2]), "neighboring" waters are defined as those "with a shallow subsurface hydrologic connection or confined surface hydrologic connection or confined jurisdictional water." So it would seem that although groundwater is excluded as a jurisdictional water under ([t][vi]) there are cases when groundwater may be jurisdictional if it meets a condition under ([u][2]).

Recommendation: The rule should state categorically that groundwater is not jurisdictional water, even in cases where groundwater may provide a hydrologic connection between jurisdictional surface waters. (p. 3)

Agency Response: See summary response and the responses to comments elsewhere in this document regarding the subsection (b) groundwater exclusion. The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of “waters of the United States.”

Oklahoma Municipal League (Doc. #16526)

- 3.629 What constitutes "waters with a shallow subsurface hydrologic connection"? If the latter are not groundwater under the proposal, what defines groundwater? (p. 5)

Agency Response: See summary response.

Washington State Water Resources Association (Doc. #16543)

- 3.630 Are there any temporal metrics for determining if groundwater flow is adequate to make the jurisdictional connection (for example, if it takes ten years for the subsurface flow to go from the source to the TNW, is the source jurisdictional) (p. 19)

Agency Response: See summary response, responses to other comments in this document, the preamble and TSD for additional guidance on identifying shallow subsurface connections and the relevance of such connections to jurisdiction.

Maine Municipal Association (Doc. #16630)

- 3.631 MMA respectfully suggests that your agencies consider removing non-wetland waterbodies with a surface or shallow subsurface hydrologic connection to jurisdictional waters from the definition of "neighboring". (p. 3)

Agency Response: The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, as suggested by this commenter, the rule no longer includes a provision defining "neighboring" based on a confined surface connection or a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

American Council of Engineering Companies (Doc. #15534)

- 3.632 Shallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency. Water does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection and the flow between the adjacent water and the jurisdictional water may move in one or both directions. While they may provide the connection establishing jurisdiction, these shallow subsurface flows are not "waters of the United States." (p. 3)

Agency Response: See summary response.

Minnesota Chamber of Commerce (Doc. #16473)

- 3.633 [T]he Agencies' should narrowly define and place limitations upon the term "shallow subsurface hydrologic connection" in the proposed definition of "neighboring." (p. 5)

Agency Response: See summary response.

- 3.634 The Agencies should narrowly define "shallow sub surface hydrologic connection" in section (c) (2) of the Proposed Rule. (p. 6)

Agency Response: See above response.

Association of Equipment Manufacturers (Doc. #16901)

3.635 [U]nder the proposed rule, waters and wetlands are regulable if they are "located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have "a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." See 79 Fed. Reg. at 22,262-63. The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval. *Id.* At 2,208. The proposal also fails to provide the limits of shallow subsurface hydrological connections" that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agencies. *Id.* (p. 2)

Agency Response: The rule has been revised to clarify the agencies' intent and address these comments. See summary response and response to comments on "floodplains" and "riparian areas."

Water Advocacy Coalition (Doc. #17921.1)

3.636 Shallow subsurface hydrologic connection: Under the proposed rule, waters can be "adjacent" and therefore jurisdictional if they have a "shallow subsurface hydrologic connection" to jurisdictional waters, but the agencies do not define that term. What is meant by "shallow"? Twelve inches? Five feet? Does "shallow subsurface hydrological connection" include manmade surface connections? Are there any limitations on the distance of the subsurface connection between the "adjacent" water and the nonnavigable water? Where does the shallow subsurface connection end and groundwater begin? The SAB Panel explained that "the preamble of the proposed rule did not provide a clear understanding of what are considered to be 'shallow' subsurface connections."¹⁸⁰ As one SAB Panel member noted, "Groundwater flowpaths can be in the shallow subsurface, where flow is limited in the soil, and where water flows from one water body to another in hours to weeks."¹⁸¹ Does this not suggest that the proposed rule is actually regulating groundwater?

Virtually all alluvial groundwater could be determined to connect to streams and rivers. The distinction between shallow subsurface flow versus groundwater is very vague and difficult to implement on the ground. For example, one agency reviewer could find that groundwater from a tributary has a "shallow subsurface" connection because it occasionally reaches the 12 inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system of a similar stream could find that the subsurface water was deep groundwater, although it occasionally inundates that root zone. The reviewer in the former case could then establish adjacency over a large area of the landscape, whereas the latter reviewer would not. The preamble states that the

¹⁸⁰ Rodewald Memo, Exhibit 7 at 7.

¹⁸¹ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 3 (comments of Dr. Allison Aldous). Other panel members raised similar questions regarding the distinction between shallow subsurface flow and groundwater. See, e.g., *id.* at 34 (comments of Dr. Michael Goosef) ("[I]f the surface water has left the channel by following hydraulic gradients that force it into the subsurface, is it still surface water? How long does it need to be in the subsurface to become groundwater?"); *id.* at 48 (comments of Dr. Michael Josselyn) ("The Final Science Report should more fully address differences between shallow groundwater connections and how they are defined.").

agencies will “assess the distance between the water body and tributary” to determine if they are in “reasonable proximity.” 79 Fed. Reg. at 22,207. How will the agencies determine if the water is within “reasonable proximity” of the jurisdictional water? (p. 62-63)

Agency Response: See summary response; the rule has been revised so that the term “neighboring” does not refer to subsurface connections.

- 3.637 Confined surface connections: The preamble states that, for purposes of this rule, confined surface connections “consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches.” 79 Fed. Reg. at 22,208. Such erosional features are categorically excluded under the rule, but the agencies treat them as connections that can establish adjacency. This use of non-jurisdictional connections to establish jurisdiction has no limiting principle. If these features are beyond the scope of CWA jurisdiction, why can they be used to establish jurisdiction? (p. 63)

Agency Response: The final rule has been revised so that the term “neighboring” no longer refers to confined surface connections. See both summary responses above.

- 3.638 In particular, the use of groundwater to establish connections is particularly problematic under the proposed rule. Groundwater is not regulated under the CWA.¹⁸² And, rightfully, the proposed rule excludes “groundwater, including groundwater drained through subsurface drainage systems.” 79 Fed. Reg. at 22,263. But, as discussed in section III.D.2., there is significant confusion surrounding the distinction between groundwater and “shallow subsurface hydrological connections.” For instance, this provision appears to mean that water will be regulated when it is present on the surface, but the same water will not be regulated as it flows through the ground to some downstream water, where it will become regulated again. The SAB Panel pointed out the lack of clarity with respect to “what are considered to be ‘shallow’ subsurface connections” and “the role of regional groundwater systems.”¹⁸³ This confusion is contrary to the agencies’ claims that the rule provides clarity and predictability. Moreover, as noted above, the proposed rule allows for groundwater to serve as a connection to establish adjacency under paragraph (a)(6) or for purposes of a significant nexus analysis for “other waters” under paragraph (a)(7). Allowing for jurisdiction to be established via groundwater connections can create liability and permitting obligations not previously required. (p. 73)

Agency Response: See summary response and response to comments addressing Exclusions (Topic 7).

Home Builders Association of Michigan (Doc. #7994)

- 3.639 Language in the proposed rules also states a water body may be a “water of the United

¹⁸² See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.”); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001) (“‘navigable waters’ do not include groundwater”).

¹⁸³ Rodewald Memo, Exhibit 7 at 7.

States" if it has a "shallow subsurface hydrological connection" to other jurisdictional waters. This specific language is indicative of the fact, despite their statements to the contrary, the Agencies may intend to use groundwater as a basis for CWA jurisdiction. (p. 2)

Agency Response: See previous response.

National Ready Mixed Concrete Association (Doc. #13956)

- 3.640 While NRMCA appreciates that the agencies are explicitly exempting groundwater from coverage,¹⁸⁴ this exemption is virtually meaningless given the inclusion of “shallow subsurface hydrologic connections.” As a practical matter, it is impossible to understand how CWA regulations can be effectively applied to two distinct surface waters connected only through a “shallow subsurface hydrologic connection” without ultimately expanding jurisdiction over the groundwater connection. Groundwater has never been regulated by the CWA and there are a myriad of state regulations concerning how groundwater is used and who has rights to the groundwater that do not distinguish between a “shallow subsurface connection” and groundwater. Furthermore, the agencies have been unable to articulate a clear distinction between groundwater and a shallow subsurface connection when asked in public forums.¹⁸⁵ The use of “shallow subsurface hydrologic connections” is too imprecise and broad to provide legal and regulatory certainty for establishing connections between waters, and will ultimately result in groundwater being regulated by the CWA. (p. 8-9)

Agency Response: See summary response and response to comments addressing Exclusions (Topic 7). Note that the significant nexus analyses performed for “adjacent waters” are provided in section G of the preamble to the rule and Section VII of the TSD, and the legal analysis is in section I of the TSD.

- 3.641 NRMCA recommends that the terms “shallow subsurface hydrologic connection or confined subsurface hydrologic connection” be removed completely from the rule and the agencies revise the proposed rule so that only wetlands can be jurisdictional by virtue of adjacency, and thus consistent with Supreme Court precedent.¹⁸⁶ (p. 9)

Agency Response: See above response. Additionally, the agencies have provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity. The agencies’ interpretation of the Supreme Court rulings is addressed in the responses to comments in the Legal Compendium, the preamble and the TSD.

O'Neil LLP (Doc. #14651)

- 3.642 [W]hen addressing the concept of "adjacency," the Agencies need to clarify what is needed to satisfy the Rule's requirements for sufficient sub-surface connections. Although the Agencies acknowledge (for example, on page 22208, third column) that only "shallow subsurface connections" satisfy the conditions for adjacency, and that

¹⁸⁴ 79 FR 22199

¹⁸⁵ Hearing on “Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule” Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, 11 June 2014

¹⁸⁶ 474 U.S. 121 (1985), 531 U.S. 159 (2001)

deeper connections do not, it is not clear in the Rule where the demarcation between these two types of connections occurs. Thresholds need to be established in the Rule so that the regulated public has certainty regarding how such conditions would be interpreted by the Corps in making determinations of its jurisdictional areas. (p. 3)

Agency Response: See summary response and response to comments addressing Exclusions (Topic 7).

Business Alliance for a Sound Economy (Doc. #14898)

- 3.643 The Proposed Rule's definition of the term "neighboring" includes waters with a "shallow subsurface hydrologic connection" to a jurisdictional water. See 79 Fed. Reg. at 22,207. Although some waters with shallow subsurface hydrologic may be neighboring, this is not necessarily true in all cases. As a result, this definition potentially encompasses wetlands with minimal connections to jurisdictional waters and that, as a result, do not truly have a "significant nexus." Further, the existence and volume of a subsurface hydrologic connection is not easily determined and therefore introduces a significant subjectivity into the scope of the Corps' jurisdiction. (p. 2)

Agency Response: See summary response. The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining "neighboring" based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

The final rule and its supporting documentation demonstrate that the agencies are today asserting jurisdiction over traditional navigable waters, interstate waters, the territorial seas, and those waters that have a significant nexus to them. For waters meeting the definition of "adjacent," as discussed more fully in the preamble and TSD, such waters are jurisdictional by rule, based on the significant nexus determination made in support of this rule.

Staker Parson Companies (Doc. #15618)

- 3.644 The arbitrariness of relying on best professional judgment is especially problematic in applying the shallow subsurface test to establish adjacency. While EPA attempts to distinguish groundwater, that distinction is very vague and difficult to implement on the ground. For example, one agency reviewer could find that groundwater from a tributary has a "shallow subsurface" connection because it occasionally reaches the 12 inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system of a similar stream could find that the subsurface water was deep groundwater although it occasionally inundates that root zone. The reviewer in the former case could then establish adjacency over a large area of the landscape whereas the latter reviewer would not. The rule itself is extremely confusing and misleading on the groundwater/shallow subsurface "alleged" distinction by its definition of groundwater. In many areas of the Mountain West Division, excavating sand & gravel in an upland area leads to groundwater. The proximity of sand and gravel deposits to rivers and streams generally indicates higher ground water levels, often within 3-6 feet of native ground. If shallow groundwater connections established adjacency, then how do

we determine where shallow groundwater ends and deeper groundwater begins? Virtually all-alluvial groundwater could be determined to connect to streams and rivers. Will the potential of a shallow subsurface connection to a regulated water lead to monitoring and mitigation? The practical consequences of the variations of "best professional judgment" over a rule that conflicts within itself are staggering. Moreover, this nebulous distinction creates an almost impossible burden to us to determine if "subsurface flow" is unregulated groundwater. The proposed rule does say that "a determination of adjacency based on shallow subsurface ...connection outside the riparian or floodplain area required clear documentation". However, the reality is that we would essentially have to prove lack of jurisdiction, not the reverse. (p. 2)

Agency Response: See summary response. Also, the agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. Among other things, the rule no longer includes a provision defining "neighboring" based on a shallow subsurface hydrologic connection. The basis for this revision to the proposed rule is discussed in the preamble to today's rule as well as in the TSD.

Leigh Hanson, Inc. (Doc. #15781)

- 3.645 While the proposed rule exempts groundwater, it allows the Corps to use a shallow subsurface connection as a basis to find that a wetland or water is adjacent to a tributary and is jurisdictional. This interpretation of the rule is particularly problematic for sand and gravel deposits along existing rivers or tributaries. The sand and gravel provides a porous layer that can easily allow water to travel several thousand feet to neighboring low lands. Spring flood conditions can create seasonal wetlands that quickly dissipate. Using subsurface connections to establish adjacency will reduce the availability of natural sands and may increase overall permitting time if Federal Emergency Management Agency (FEMA) Flood Plain permitting is required.

In addition, we have several hard rock quarries that are within 2,500 feet of neighboring rivers. Water travels through surface layers or fissures in the underlying granite or limestone requiring constant pumping to keep these mines dry. If these hydraulic flows were interpreted as subsurface connections, it is unclear how our water management infrastructure and permit conditions would need to be changed. Typically these mines have very high dewatering rates so any changes to permit conditions would carry considerable capital expense to mitigate. (p. 3-4)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For

further detail, clarification and guidance, see responses to similar comments in this document, the summary response, the preamble to today's rule, the TSD, and response to comments addressing Exclusions (Topic 7).

Pennsylvania Coal Alliance (Doc. #13074)

- 3.646 How will a subsurface hydrologic connection be determined? If proximity is a factor, a bright line rule would reduce confusion and provide clear guidance. (p. 15)

Agency Response: See summary response and response to comments addressing Exclusions (Topic 7). As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

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

- 3.647 A Colorado operator stated, "The proposed use of [shallow] groundwater as a basis to establish jurisdiction is very problematic. For a whole host of reasons, the implications are very troubling. We do not know how the agencies intend to define "shallow" groundwater connections. The proximity of sand and gravel deposits to rivers and streams generally indicates higher ground water levels, often within 3-6 feet of native ground. If shallow groundwater connections established adjacency, then how does one determine where shallow groundwater ends and deeper groundwater begins? Virtually all-alluvial groundwater could be determined to connect to streams and rivers. Use of (shallow) groundwater would significantly impact permitting and operation." (p. 26)

Agency Response: See summary response and response to comments addressing Exclusions (Topic 7).

- 3.648 A California operator stated that, "the inclusion of subsurface connections will increase complexity in the field analysis, increase time potential increase in costs." In the end, field surveys will potentially rely on subjective opinion on what is or is not subsurface connection or need for expensive and impactful subsurface monitoring. In California, it only rains in the winter and so in many cases, the analysis would only be able to be accomplished in the wet season further complicating and extending the time necessary to complete the permit process." (p. 26)

Agency Response: See above response.

- 3.649 An Aggregate producer operating at 12 locations in the West and Midwest noted that, "the interpretation of shallow subsurface connection is particularly problematic for sand and gravel deposits along existing river or tributaries. The sand and gravel provides a porous layer that can easily allow water to travel several thousand feet to neighboring low lands. This subsurface flow can form a connection to seasonally isolated wetlands that will not require permitting. Using subsurface connections to establish adjacency will reduce the availability of natural sands and may increase overall permitting time if FEMA flood Plain permitting is required...We have several hard rock quarries that are within 2,500 feet of neighboring rivers. Water travels through surface sand and gravel layers or fissures in the underlying granite or limestone...if these hydraulic flows were interpreted as subsurface connections it is unclear how our water management

infrastructure and permit conditions would need to be changed. Any changes to the permit conditions would carry considerable capital expense to mitigate." (p. 26-27)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the summary response, the preamble to today's rule, the TSD, and response to comments addressing Exclusions (Topic 7).

American Petroleum Institute (Doc. #15115)

- 3.650 Groundwater is not a "water of the United States" in the 2014 Proposed Rule,¹⁸⁷ and yet the definition of "neighboring" attempts to regulate "shallow subsurface hydrologic connections" and rely on these connections to expand jurisdiction.¹⁸⁸ This definition of adjacency is unreasonable because it presumes a significant nexus between the two waters without regard to the physical, chemical, and biological connection between the waters. Under this definition of "adjacency," the agencies (and citizen-suit-eager environmental groups) can assert jurisdiction over isolated waters based on unevaluated and unverified groundwater connections with navigable waters that have no significant effect on the physical, chemical and biological integrity of such waters. It is also unclear what constitutes a "shallow" groundwater connection. This is an overbroad and standardless expansion in jurisdiction, and given the per se treatment of adjacency, is likely to result in significant confusion to landowners and permitting authorities. (p. 29)

Agency Response: See summary response and response to comments addressing Exclusions (Topic 7). As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

National Sustainable Agriculture Coalition (Doc. #15403)

- 3.651 First, in the interest of clarity, the EPA and Corps should establish parameters for what constitutes a "shallow subsurface hydrologic connection." The word "shallow" is not defined in the rule, and while the preamble attempts to clarify what is meant by a "shallow subsurface hydrologic connection," several questions remain. For example, the preamble states that a shallow subsurface hydrologic connection is "lateral water flow

¹⁸⁷ At 22,263

¹⁸⁸ At 22,206

through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the vertical flow of water, or in karst systems, especially karst pans.”¹⁸⁹ Additionally, the preamble goes on to state that a shared shallow aquifer between a jurisdictional water and an adjacent water constitutes a “shallow subsurface hydrologic connection.”

We do not dispute that such connections would likely impact the chemical, physical, and biological integrity of the jurisdictional water, but more specific parameters—such as a maximum aquifer depth, or minimum contribution of flow measured by a hydrograph increase in the absence of tributaries— should be outlined in order to truly provide clarity to the regulated community. If the agencies intend to use this criterion to determine adjacency, they should codify a definition and process for identifying a shallow subsurface hydrological connection. Absent specific parameters, farmers, county governments, developers, even hydrologists will be playing a guessing game as to what the agencies consider a valid shallow subsurface hydrologic connection.

While our preference would be that the agencies develop these specific parameters, if the agencies are unable to do this, “shallow subsurface hydrologic connection” should be removed from the definition of neighboring. Providing little to no guidance in the rule regarding how a “shallow subsurface hydrologic connection” would be determined only creates unnecessary confusion. This is not to suggest that subsurface connections to jurisdictional waters should be overlooked and never used to determine jurisdiction, but rather that the determination should continue to be made on a case-by-case basis. Waters falling outside the floodplain or riparian area of a jurisdictional water and lacking a confined surface connection to such a water could still be considered jurisdictional as “other waters” using a case-specific significant nexus test. This would provide necessary flexibility for the agencies and the regulated community when determining the significance of a shallow subsurface connection between a jurisdictional water and an otherwise non-jurisdictional water.

Recommendation: Clarify specific parameters that will be used to determine the existence of a “shallow subsurface hydrologic connection” for adjacent waters. Or, if such parameters cannot be articulated, remove this criterion from the definition of neighboring. (p. 5-6)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a “shallow subsurface connection” to identify “adjacent” waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

3.652 Shallow subsurface hydrologic connection — How will a subsurface hydrologic connection be determined? If proximity is a factor, will there be a bright line rule? (p. 10)

Agency Response: See summary response. As discussed more fully above, the

¹⁸⁹ Proposed Rule at 22

rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

Louisiana Farm Bureau Federation (Doc. #1603.1)

- 3.653 The proposed rule however, states that if a wetland or open water has a surface or shallow sub-surface water connection to a river network, it affects the condition of downstream waters. EPA fails to specify how shallow such connections must be or what separates them from extensive groundwater networks which undercuts EPA's assurance that groundwater is not jurisdictional. (p. 2)

Agency Response: See above response.

Montana Wool Growers Association (Doc. #5843.1)

- 3.654 If the Agencies persist in promulgating a Proposed Rule that regulates waters "with a shallow subsurface hydrologic connection," the Proposed Rule must specify how to determine when a connection exists. Currently, the Preamble does not even explain what constitutes a "shallow" connection, other than by noting that it may occur within or below "the ordinary root zone" (12 inches). 79 Fed. Reg. at 222208. C. Section (a)(S): (p. 7)

Agency Response: See summary response.

National Farmers Union (Doc. #6249)

- 3.655 The agencies also request comment on whether water with only a small confined surface or shallow subsurface hydrologic connection to jurisdictional water should be exempt if it is outside a specified distance from the jurisdictional water. For the same reasons why the best approach to "adjacent waters" is to limit the category to waters within the floodplain or riparian area of a jurisdictional water as discussed above, placing a cap on the distance from jurisdictional water within which other waters may be considered "adjacent" is a second-best alternative. Under this approach, more waters that do not have the actual ability to affect the water quality of a jurisdictional water will be considered jurisdictional than the "floodplain and riparian area-only" alternative. This will result in greater administrative burden for the regulated community and the agencies. However, a bright-line rule limiting the area surrounding jurisdictional water in which a water may be found "adjacent" could still be referenced, increasing certainty compared to the regulatory framework as it exists today. (p. 5)

Agency Response: See summary response, as well as the other responses to comments in this Compendium.

Alameda County Cattlemen (Doc. #8674)

- 3.656 ACCW assert that the agencies' properly excluded groundwater from jurisdiction under the CWA, and similarly, have no jurisdiction over "shallow subsurface flow." This should not be a valid consideration under the "adjacent waters" analysis. (Proposed Rule at 22207). Similarly, it should not be a consideration under the significant nexus

determination under the “other waters” or any other category. (p. 25)

Agency Response: See summary response and responses elsewhere in the record.

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

3.657 The Clean Water Act is very clear that it does not grant the EPA and USACE jurisdiction over groundwater, but even though the agencies repeat in this section that groundwater is excluded, the language used throughout this rule demonstrates that EPA and USACE intend to regulate groundwater by proxy, using subsurface connections to extend its jurisdictional reach over surface waters at either end. (p. 9)

Agency Response: See summary response.

Louisiana Cotton and Grain Association (Doc. #12752)

3.658 The proposed rule does not define how deep a "shallow subsurface hydrologic connection" may go, but does state that water "does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection." So, if a non-jurisdictional rill is for one day hydrologically connected to a water in a riparian area or floodplain of a TNW, interstate water, territorial sea or tributary, that water is considered "adjacent" to the jurisdictional water if they are in "reasonable proximity," another undefined term apparently left to the opinion of an agency representative. Note that the Merriam-Webster dictionary defines adjacent as "not distant; having a common end point or border; immediately preceding or following." Like many other portions of the proposed rule, the vast expansion of jurisdiction over "adjacent waters," along with the vague and undefined guidelines, provides no guidance to farmers and landowners as to what the rule is attempting to clarify. It does, however, give federal agencies ample leeway to make determinations as they see fit. (p. 3)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

American Forest & Paper Association (Doc. #15420)

3.659 The Preamble states that the Proposal does not change existing law and regulation that groundwater is not subject to federal jurisdiction. However, a groundwater “subsurface connection” can provide the basis for a significant nexus finding between a WOTUS and a water that would not otherwise be a WOTUS. Agency staff have stated that there is a geographic component to a possible subsurface connection finding. Similarly the Preamble states that the “distance between water bodies may be sufficiently great that even the presence of an apparent hydrologic connection may not support an adjacency determination. The greater the distance, the less likelihood that there is an actual shallow subsurface or confined surface hydrologic connection.” 79 Fed. Reg. at 22211. Any final rule should include a geographic limit in the text of the rule itself. (p. 4)

Agency Response: The final rule does include geographic limits within the definition of “adjacency” and certain waters subject to individual significant nexus

analysis. The final rule does not use the term “subsurface connection” within the definition of adjacency, in response to comments, so no geographic limitation on that term is necessary. As discussed more fully above, the rule no longer uses a “shallow subsurface connection” to identify “adjacent” waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

Oklahoma Panhandle Agriculture and Irrigation Association (Doc. #15506)

- 3.660 We ask that any proposed rule specifically exempt groundwater by either removing the language related to shallow subsurface connections or specifically delegating these waters to the states. Groundwater should in no way be subject to federal regulation. (p. 2)

Agency Response: See summary response.

Utah Farm Bureau Federation (Doc. #16542.1)

- 3.661 The proposal also fails to provide the limits of “shallow subsurface hydrological connections” that can render a feature jurisdictional but instead again leaves this critical analysis to the best professional judgment of the agencies. (p. 5)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a “shallow subsurface connection” to identify “adjacent” waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

- 3.662 This comment pertains to Section 328.3 Definitions, (c)(2), Federal Register page 22263. The terms “shallow subsurface” (i.e. connected to same shallow aquifer or flow over bedrock on shallow soils) and “confined surface” hydrologic connections (i.e. ephemeral, intermittent, perennial uni-directional flowpaths) are not clear. These connections are too broad and difficult to determine in the field without an extensive investigation of the geology, soils and groundwater table. CMSWS recommends defining the terms “shallow subsurface hydrologic connection” and “confined surface hydrologic connection” to narrow the focus of any reasonable investigation and/or developing a practical and sufficient “neighboring” evaluation methodology. (p. 2)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a “shallow subsurface connection” to identify “adjacent” waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

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

- 3.663 The concept of groundwater should be further explained and defined within the Rule as it relates to jurisdictional connections. Furthermore, the Rule proposes to regulate features within the upper reaches of the watershed that would not previously have ne

subject to CWA jurisdiction via non-jurisdictional connections. This new approach may extend regulatory oversight of the CWA over features that were not previously regulated; therefore, the City of Chesapeake will not support the expansion of regulatory oversight under the CWA further into the watershed through confined surface hydrologic connections or shallow subsurface groundwater connections. (p. 4)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

Duke Energy (Doc. #13029)

- 3.664 [T]his raises further questions on the extent of "shallow subsurface connections." Where do "shallow subsurface connections" end and deeper groundwater connections begin? Who makes this determination and with what criteria? (p. 50)

Agency Response: See summary response.

RISE (Responsible Industry for a Sound Environment) (Doc. #14431)

- 3.665 The rule states it will not regulate subsurface flow, however, the definition of "neighboring [waters]" includes waters with a shallow subsurface hydrologic connection to a jurisdictional water. The definition appears to enable regulation of exempt waters via subsurface flow. (p. 2)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

Colorado Water Congress Federal Affairs Committee (Doc. #14569.1)

- 3.666 Who, i.e., the agencies or the project proponent, will determine if a subsurface connection exists, how will that determination be accomplished in practice, and what degree of connection is adequate to find that the waterbody of origin is jurisdictional; (p. 7)

Agency Response: See summary response. For further detail, clarification, and guidance on who will make the final determination, see responses to similar comments in the Implementation Compendium (Topic 12).

- 3.667 Are isolated waters without any direct surface or shallow subsurface connection to TNWs, but which periodically capture sheet flows containing pollutants, jurisdictional (should indicate they are not). (p. 7)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in

individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the preamble to today’s rule and the TSD.

Southern Nevada Water Authority (Doc. #14580)

- 3.668 SNWA recommends additional description be provided in the Proposed Rule regarding how the scope and scale of shallow subsurface hydrologic connections would justify jurisdiction. Much of Nevada is underlain by groundwater flow systems, where groundwater flows from one hydrographic basin to another at depths of several meters to thousands of meters. The groundwater may be chemically similar, having originated from mountain snow melt. However, these regional groundwater flow systems do not provide sufficient justification to extend CWA jurisdiction into these adjacent basins. SNWA opposes the extension of CWA jurisdiction into adjacent hydrologic basins based only on groundwater flow systems. (p. 3)

Agency Response: See summary response as well as other comments elsewhere in the record.

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

- 3.669 [T]he measurement of subsurface connections in practice is not well defined in the proposed rule. For example, the proposed rule states that only "shallow subsurface connections" satisfy the conditions for adjacency as opposed to deeper connections. The proposed rule does not indicate the depth at which a shallow subsurface aquifer becomes a deep aquifer for purposes of the proposed rule. Metropolitan notes that the Agencies have asked for feedback on whether waters connected through shallow subsurface hydrology qualify as adjacent waters (page 22208, bottom of the first column in the Federal Register notice).

Metropolitan does not support the use of groundwater to determine jurisdiction of surface features unless the Agencies can show with quantitative scientific evidence related to cases in the arid west that such a connection benefits the water quality of downstream jurisdictional features. In addition, as mentioned above, if it is the intent of the Agencies to provide the details of determining jurisdiction based on groundwater connection in practice in technical manuals and Regional Guidance Letters, then Metropolitan requests that these documents be circulated for public review and comment prior to their implementation and use and, ideally, before the proposed rule is finalized. (p. 11)

Agency Response: See summary response.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

- 3.670 Abandon the use of groundwater connectivity to establish CWA jurisdiction. Congress never intended the CWA to regulate discharges to groundwater. As proposed, the agencies have not clearly defined when an isolated §328.3 (a)(G) water will have shallow subsurface connection that affects the chemical, physical or biological integrity of downstream §328.3 (a)(l) through (a)(3) waters. (p. 18)

Agency Response: See summary response. The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of “waters of the United States.”

ERO Resources Corporation (Doc. #14914)

- 3.671 More commonly in the arid West, the ground water in an ephemeral or intermittent drainage adds to the soil moisture in the immediate vicinity and/or evaporates or is transpired. The water is lost, but not to "deep ground water." The proposed rule needs to define "deep ground water." Throughout portions of the arid West, "deep ground water" means ground water that does not reach a river or stream or its associated alluvial aquifer and is referred to as nontributary ground water. It would be very unusual in the arid West for the surface flows of ephemeral or intermittent drainages to contribute significant volumes of water to deep ground water. (p. 9)

Agency Response: The term “deep ground water” is not used in the final rule. See summary response.

- 3.672 If the proposed rule includes ground water as a potential connection to a WUS, it should define "shallow subsurface hydrologic connection" and "deep ground water" and at least acknowledge what typically occurs with ephemeral or intermittent drainages in the arid West. (p. 9-10)

Agency Response: See above response.

- 3.673 The proposed rule does not explain how a SNA for wetland or open water that is not adjacent to or neighboring a WUS is demonstrated solely by shallow subsurface flow. How would it be demonstrated that the subsurface flow is continuous for possibly many miles to a WUS? Would the agencies presume a shallow subsurface connection that would be the responsibility of a permit applicant to rebut? Ground water studies can be time consuming and expensive with often ambiguous results. (p. 23)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate.

The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the summary response, the preamble to today’s rule and the TSD.

Nebraska Public Power District (Doc. #15126)

- 3.674 NPPD recommends the references to hydrologically connected groundwaters be eliminated from the proposed rule. (p. 8)

Agency Response: See summary response.

Illinois Fertilizer & Chemical Association (Doc. #15129)

- 3.675 Any mention of groundwater, subsurface connections, needs to be removed. The Clean Water Act in its text specifically precludes EPA from regulating groundwater except under the Safe Drinking Water Act parameters. (p. 2)

Agency Response: See summary response. The rule expressly indicates in paragraph (b) that groundwater, including groundwater drained through subsurface drainage systems is excluded from the definition of “waters of the United States.”

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

- 3.676 How will a subsurface hydrologic connection be determined? If proximity is a factor, will there be a bright line rule? It is possible that monitoring wells would need to be installed and monitored for an extended length of time to determine such hydrologic connections. PIOGA notes that the installation, maintenance and use of monitoring wells is expensive and causes additional land disturbances. It is also possible that PADEP may require a determination of subsurface flow before permitting the installation of a monitoring well, creating a "Catch-22" situation. (p. 17)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. However, the agencies do not anticipate that monitoring wells would be used to determine subsurface connections. See summary response – visual observation of soils and surface are the primary means of evaluating the significance of any subsurface waters. For further detail, clarification, and guidance, see responses to similar comments in this document, the preamble to today’s rule and the TSD.

American Wind Energy Association (Doc. #15208)

- 3.677 AWEA takes issue with the uncertainty that is created by this ambiguous guidance of what would be subject to CWA jurisdiction and requests that the Agencies further refine the final rule to include concrete guidance on the determination of jurisdictional waters caused by "shallow subsurface hydrologic connections," including depths below grade where the conditions would be viewed to exist, with neighboring jurisdictional waters. (p. 5)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the summary response, the preamble to today's rule and the TSD.

Washington County Water Conservancy District (Doc. #15536)

- 3.678 This proposal is not supported by the CWA, as interpreted by the Supreme Court. Shallow subsurface connections do not meet Justice Kennedy's "significant nexus" test or the plurality's "continuous surface connection" test. Even if it were lawful to establish jurisdiction over non-wetland adjacent waters by demonstrating a "significant nexus," the Agencies have not shown that, as a factual matter, a shallow subsurface connection can provide a significant nexus to jurisdictional waters.

Moreover, the Agencies' proposal contravenes Congress' and the Agencies' exclusion of groundwater from CWA jurisdiction. While the Proposed Rule excludes "groundwater" from its definition of "waters of the United States," it does not reconcile that exclusion with its inclusion of certain waters based on a "subsurface" (groundwater) connection. The WWG opposes this aspect of the Agencies' proposal, but if the Agencies insist on this approach, the Agencies should more clearly define the spatial boundaries between non-jurisdictional groundwater and the waters that the Agencies propose to treat as jurisdictional as the result of a shallow subsurface connection. (p. 19)

Agency Response: The agencies have provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity. The agencies' interpretation of the Supreme Court rulings in *Rapanos* is addressed in the responses to comments in the Legal Compendium, the preamble and the TSD.

As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant

nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the summary response, the preamble to today’s rule and the TSD.

Lower Colorado River Authority (Doc. #16332)

- 3.679 LCRA is also concerned and believes the ambiguity created by the reference in "neighboring" to shallow groundwater, i. e., "shallow subsurface hydrologic connection," could have far-reaching negative implications and dramatically increase the amount of waters considered jurisdictional, going well beyond the Agencies' CWA authority. As one example, LCRA is concerned that such "shallow subsurface" connections could include karst systems, especially karst pans. Karst systems are prevalent in Central Texas and within the LCRA service area, and such systems are often deep and not limited to shallow subsurface connections. LCRA believes that, if such systems are included as part of neighboring waters, the Proposed Rule will unjustifiably expand jurisdiction over many otherwise non-jurisdictional waters. For these reasons, LCRA strongly believes that the reference to subsurface hydrologic connections should be removed from the definition of "neighboring." At a minimum, LCRA requests that the Agencies clarify that such shallow subsurface hydrologic connections do not include karst systems or karst pans without a demonstration that any specific system is limited to a shallow subsurface hydrologic connection and that it creates a significant nexus to a traditional navigable water. (p. 8)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule.

- 3.680 LCRA requests that EPA and USAGE include this language from the preamble that shallow subsurface flows are excluded from jurisdictional waters in the language of the rule itself. LCRA respectfully suggests the following revision to proposed 33 CFR 328.3(b)(5)(vi): "Groundwater, including groundwater drained through subsurface drainage systems and any water flowing in a shallow subsurface layer, sometimes referred to as shallow subsurface flows." (p. 8)

Agency Response: See above response. See summary response.

South Metro Water Supply Authority, Colorado (Doc. #16481)

- 3.681 Who, i.e., the agencies or the project proponent, will determine if a subsurface connection exists, how will that determination be accomplished in practice, and what degree of connection is adequate to find that the waterbody of origin is jurisdictional; (p. 4)

Agency Response: See summary response. For further detail, clarification, and guidance on who will make the final determination, see responses to similar comments in the Implementation Compendium (Topic 12).

- 3.682 Are there any temporal metrics for determining if groundwater flow is adequate to make the jurisdictional connection (for example, if it takes ten years for the subsurface flow to go from the source to the TNW, is the source jurisdictional); (p. 5)

Agency Response: See summary response.

Southern Nevada Water Authority (Doc. #16507)

- 3.683 SNWA recommends additional description be provided in the Proposed Rule regarding how the scope and scale of shallow subsurface hydrologic connections would justify jurisdiction. Much of Nevada is underlain by groundwater flow systems, where groundwater flows from one hydrographic basin to another at depths of several meters to thousands of meters. The groundwater may be chemically similar, having originated from mountain snow melt. However, these regional groundwater flow systems do not provide sufficient justification to extend CWA jurisdiction into these adjacent basins. SNWA opposes the extension of CWA jurisdiction into adjacent hydrologic basins based only on groundwater flow systems. (p. 3)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

Texas Water Development Board (Doc. #16563)

- 3.684 While the proposed rule specifically excludes groundwater from "waters of the U.S.," the inclusion of subsurface hydrologic connections as a measure of adjacent waters raises concerns about how far-reaching the notion of a jurisdictional water may go. In short, EPA and the Corps cannot use groundwater that is outside the jurisdiction of the federal government to establish jurisdiction over otherwise isolated wetlands. (p. 6)

Agency Response: As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification and guidance, see responses to similar comments in this document, the summary response, the preamble to today's rule and the TSD.

- 3.685 EPA and the Corps should clearly acknowledge in the proposed rule that groundwater in

all its forms is not subject to CWA jurisdiction and delete the discussion of a nexus between surface and subsurface waters. (p. 8)

Agency Response: See above response.

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

3.686 Moreover, your attempts to distinguish shallow from deep subsurface connections appear only to confuse the issue. For example, you observe that shallow connections may be found “both within the ordinary root zone and below the ordinary root zone,” 79 Fed. Reg. 22208, but you do not say where shallow groundwater ends. And while it may be true, as you also observe, that a “combination of physical factors may reflect the presence of a shallow subsurface connection,” *id.*, that is also true of deeper subsurface connections. Finally, you attempt to distinguish shallow from deeper groundwater connections by noting “that the former exhibit a direct connection to the water found on the surface in wetlands and open waters.” *Id.* The implication is that deeper groundwater does not exhibit a “direct connection” to surface water, but this is true, if at all, only in an obvious sense, since groundwater percolating to the surface is perforce shallow near the surface. In summary, your attempts to distinguish shallow from deeper subsurface connections miss the functional importance of groundwater as a flow path at all levels affecting the chemical, physical, or biological integrity of traditionally jurisdictional waters. (p. 12)

Agency Response: See summary response.

American Rivers (Doc. #15372)

3.687 The proposed rule defines shallow subsurface hydrologic connection as, “lateral water flow through a shallow subsurface layer... may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present.”¹⁹⁰ The proposed rule distinguishes shallow subsurface connections from groundwater by stating, “shallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters.”¹⁹¹ It is unclear what a “direct connection” is, why shallow subsurface hydrologic connections have a direct connection and groundwater does not, and the general difference between a shallow subsurface layer and groundwater. We are concerned that in practice it will be hard to distinguish shallow subsurface hydrologic connections from groundwater connections, which in turn will hinder the identification of protected adjacent waters. The Agencies should define “direct connection” or redefine “shallow subsurface hydrologic connection” to better delineate it from groundwater connections. (p. 23)

Agency Response: See summary response.

¹⁹⁰ *Id.* At 22208

¹⁹¹ *Id.*

Center for Science in Public Participation (Doc. #15426)

- 3.688 I would also encourage EPA to NOT exclude shallow subsurface groundwater, which is entwined in “surface water-groundwater” connected systems, from the definition of waters that fall under the Clean Water Act. In these systems, groundwater mixes with surface water and cannot be considered distinctly separate. Additionally, waters and wetlands that contribute to hyporheic flow, even when there is no evident surface flow or geographical connection, may be vital to biological life, including salmon fry that use hyporheic subsurface flow to move between habitats (6). This habitat is a biologically significant nexus. (p. 2)

Agency Response: As discussed more fully above, the rule no longer uses a “shallow subsurface connection” to identify “adjacent” waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification and guidance, see responses to similar comments in this document, the summary response, the preamble to today’s rule and the TSD.

Waterkeeper Alliance et al. (Doc. #16413)

- 3.689 First, the agencies should confirm in its response to comments that nothing in this rule alters EPA’s longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. (p. 43)

Agency Response: See Exclusions Compendium (Topic 7)

Texas Wildlife Association (Doc. #12251)

- 3.690 [U]nder the proposed rule, waters and wetlands are regulable if they are “located within the riparian area or floodplain” of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have “a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” See 79 Fed. Reg. at 22,262-63. The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies’ “best professional judgment” to determine the appropriate area or flood interval. Id. at 22,208. The proposal also fails to provide the limits of “shallow subsurface hydrological connections” that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agencies. (p. 2)

Agency Response: As discussed more fully above, the rule no longer uses a “shallow subsurface connection” to identify “adjacent” waters. However, the agencies did consider such connections in setting the specific limits defining which

waters are considered “adjacent” and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not “adjacent” but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today’s rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the summary response, the preamble to today’s rule, the TSD, and other parts of this Compendium (Adjacency, Topic 3) concerning riparian areas and floodplains.

Red River Valley Association (Doc. #16432)

- 3.691 The Proposed Rule appears to suggest that a "sub-surface hydrologic connection" may be sufficient to establish a significant nexus between wetlands and jurisdictional waters. It is not possible to rely on groundwater to establish jurisdiction without regulating the groundwater itself, which the agencies seem to acknowledge being beyond their authority. For example, suppose an activity with a discharge directly affecting only an area of shallow groundwater that provides some discernible hydrologic connection between a small upstream water and a jurisdictional area downstream. Under the Proposed Rule, the upstream water also must be jurisdictional. Is it the agencies' position that it is without power to regulate the groundwater between the two putatively jurisdictional areas? If so, then the area constitutes a separation that is analogous to the isolation of the ponds at issue in SWANCC. If the agencies believe they can regulate that area directly under the CWA, then they should so state in a straightforward manner (and be prepared to defend that position in the courts). (p. 2)

Agency Response: See above response.

Audubon Society of Greater Denver (Doc. #16934)

- 3.692 The Rule should acknowledge groundwater connections/exchanges between what are now called “isolated” wetlands and downstream waters, as these can strongly influence the integrity of the latter. The determination of a nexus should consider not only surface water but also shallow subsurface flows and shallow/deep groundwater flowpaths. In other words, groundwater connections between isolated wetlands and traditional “waters of the US” should be a criterion that “a significant nexus” exists. (p. 2)

Agency Response: See summary response.

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

- 3.693 At what depth does water below the surface cease to be shallow subsurface and turn into groundwater? (p. 14)

Agency Response: See summary response.

O'NEIL LLP (Doc. #16559)

- 3.694 Although the Agencies acknowledge (for example, on page 22208, third column) that only "shallow subsurface connections" satisfy the conditions for adjacency, and that deeper connections do not, it is not clear in the Rule where the demarcation between these two types of connections occurs. Thresholds need to be established in the Rule so that the regulated public has certainty regarding how such conditions would be interpreted by the Corps in making determinations of its jurisdictional areas. (p. 5)

Agency Response: See summary response.

Oregon Cattlemen's Association (Doc. #5273.1)

- 3.695 Using these shallow subsurface connections to establish adjacency for the purposes of a jurisdictional determination is in direct conflict with the Court's explicit directive that "the [Agencies] must necessarily choose some point at which water ends." *Riverside Bayview*, 474 U.S. at 132. Because the Agencies cannot assert jurisdiction over these shallow subsurface connections, the Agencies should make the connection with those waters the point at which the regulated water ends. The agencies should not assert jurisdiction over waters once they enter the shallow (or any) subsurface area. (p. 5)

Agency Response: See summary response. Additionally, the agencies have provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity. The agencies' interpretation of the Supreme Court rulings in *Riverside Bayview* is addressed in the responses to comments in the Legal Compendium, the preamble and the TSD.

Santa Clara Valley Water District (Doc. #14776)

- 3.696 Adding to the uncertainty, the agencies propose to find that even waters located outside the ill-defined floodplain or riparian area may nonetheless be considered "adjacent" if there is a "shallow subsurface hydrologic connection" or "confined surface hydrologic connection." (Id. at 22263.) Many questions arise. How shallow? How significant must the connection be? How frequently must it be connected? Does the mere presence of groundwater below the water table of a landscape suffice to "connect" various waters within the landscape? Clarification is needed. (p. 5)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

Louisiana Cotton and Grain Association (Doc. #12752)

- 3.697 The proposed rule states that "confined surface connections consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches,"¹⁹² These drainage features are excluded under the proposed rule, yet they may be used to establish jurisdiction by

¹⁹² Id. at 22208

adjacency, which invokes a related question: will groundwater, which is also excluded under the proposed rule, be used as a tool, as the excluded drainage features listed above, to establish connectivity? If so, how will connectivity be established? Can a connection be established with groundwater without requiring a "hydrologic connection?" (p. 3)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule.

Duke Energy (Doc. #13029)

3.698 [T]he determination of what constitutes "shallow" and "reasonable proximity" will be left up to the regulator's discretion leading to inconsistent interpretations across the Corps Districts and uncertainty for the regulated community. (p. 37)

Agency Response: See summary response. As discussed more fully above, the rule no longer uses a "shallow subsurface connection" to identify "adjacent" waters. However, the agencies did consider such connections in setting the specific limits defining which waters are considered "adjacent" and thus jurisdictional by rule. In addition, in individual significant nexus determinations for waters that are not "adjacent" but are within 4000 feet of the high tide line or the OHWM of an (a)(1) – (5) water or within the 100-year floodplain of an (a)(1) – (3) water, whichever distance is greater, for the reasons discussed in the preamble and TSD, assessment of the effects of shallow subsurface connections on such downstream waters may be appropriate. The record for today's rule demonstrates that assessing such connections can be important, where applicable, in determining the presence of a significant nexus. For further detail, clarification, and guidance, see responses to similar comments in this document, the summary response, the preamble to today's rule and the TSD.

American Rivers (Doc. #15372)

3.699 Under the draft rule, confined surface connections are defined as, "permanent, intermittent or ephemeral surface connections through directional flow paths, such as (but not limited to) swales, gullies, rills, and ditches."¹⁹³ A directional flow path is defined as, "where water flows repeatedly from the wetland or open water to the nearby jurisdictional water that at times contains water originating in the wetland or open water as opposed to just directly from precipitation."¹⁹⁴ The confined surface connection is able to support periodic flows between the adjacent water and the jurisdictional water.¹⁹⁵ These confined surface waters can physically, chemically, and biologically effect downstream waterways by linking adjacent waters to jurisdictional waters and thus allowing their benefits or detriments to reach downstream waters.¹⁹⁶ Thus, confined

¹⁹³ Id. At 22241

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id.

surface connections as defined in the proposed rule meet the significant nexus standard. However, the draft rule states that those shallow surface connections are not themselves jurisdictional. We believe that if these surface connections are substantial enough to chemically, physically, or biologically affect downstream waterways than they should be protected under the CWA and subject to significant nexus determinations. (p. 23)

Agency Response: See summary response and Exclusions Compendium (Topic 7).

3.6. OTHERS

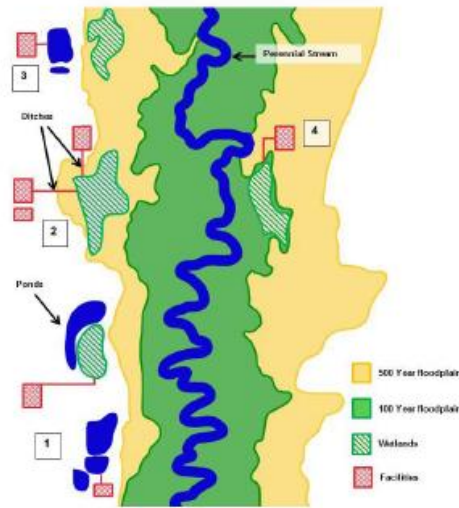
O'Neil LLP (Doc. #14651)

- 3.700 The Proposed Rule's "significant nexus" test is largely based on new proposed definitions for floodplain and for riparian area. If a water is in one of these two areas, it is considered "adjacent" and therefore jurisdictional under the Proposed Rule. The Agencies must recirculate a revised proposed rule for further public comment which actually explains how the term "adjacent" will be applied to areas within the "floodplain" and "riparian areas." (p. 2)

Agency Response: The proposed rule defined “floodplain” as 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 water flows.” The proposed rule also provided a definition of “riparian area” as an “area boarding a water where surface or subsurface hydrology directly influence the ecological processes of the plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchanges of energy and materials between those ecosystems.” As part of the public review process, the agencies held more than 400 public discussions on the proposal, and the proposal was open for comment for 206 days. The agencies received more than 1 million comments on the proposal. As part of the proposal, the agencies specifically requested comments on the definition for “adjacent waters,” and approaches to define it in the field. The agencies further considered the comments in drafting the final rule and modified the rule to remove the reference to “riparian area” and to further clarify the waters in floodplains that are waters of the US under the final rule in response to comments such as this one. For further discussion of legal procedural requirements, see the Legal Compendium (Topic 10).

U.S. Chamber of Commerce (Doc. #14115)

3.701



1. Stormwater from two facilities is conveyed by ditches and shallow subsurface flow to a wetland adjacent to a pond and another pond, both of which are located outside the 500-year floodplain. Other ponds are nearby. Are the wetlands and ponds “adjacent waters”? Are they “other waters” when considered cumulatively? Are the ditches WOTUS? Are the two facilities in the stream’s “watershed”?

2. Stormwater from three facilities is conveyed through ditches to a wetland located in the 500-year floodplain. Is the wetland an “adjacent water”? Are the ditches jurisdictional?

3. A business uses water from a pond for suppressing dust and for process water. The pond is located outside the 500-year floodplain in a depression that was created as a borrow pit when the nearby highway was constructed. The pond is located very near to wetlands that are within the 500-year floodplain. Are the pond and/or the wetlands jurisdictional?

4. Stormwater from a facility is conveyed via a ditch and shallow subsurface flow running from the 500-year floodplain to a wetland located near a navigable water in the 100-year floodplain. Are the wetland and/or ditch “adjacent waters” or otherwise jurisdictional? Is the wetland in the riparian area? (p. 32)

Agency Response: Issues pertaining to site-specific delineations are outside the scope of today’s rulemaking.

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

3.702 The agency’s approach to adjacent waters, which would regulate all waters adjacent to any tributary with an OHWM, is directly contradictory to Justice Kennedy’s concurring opinion in *Rapanos*: Under the proposal, all adjacent (bordering, contiguous, or neighboring) waters, including wetlands, are automatically regulated if they are adjacent to TNWs, interstate waters, or tributaries to those waters. See proposed 33 C.F.R.

328.3(a)(6). As discussed above, a tributary is anything possessing an OHWM that “contributes flow,” directly or indirectly, to a TNW or interstate water. Thus, under the proposal, wetlands or any other type of water that are adjacent to a tributary that possesses an OHWM and is “part of a tributary system that drains to” a TNW (see 79 Fed. Reg. at 22202), no matter how distant or small the tributary is, will be automatically considered jurisdictional.

This is directly contradictory to Justice Kennedy’s concurring opinion in *Rapanos*. Considering adjacent wetlands, which are included in the “adjacent waters” category proposed by the agencies, Justice Kennedy specifically rejected the notion that wetlands adjacent to any tributary with an OHWM would be jurisdictional. See 547 U.S. 781-82 (the relevant language is quoted above in section A.2 of these comments). Justice Kennedy concluded his analysis by stating as follows: “in many cases, wetlands adjacent to tributaries covered by this standard [i.e., anything possessing an OHWM] might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.” *Id.* at 782. If wetlands adjacent to any tributary within an OHWM cannot automatically be considered jurisdictional, then it is unclear how other types of waters, which may perform lesser ecological functions, could be considered automatically jurisdictional merely by virtue of being adjacent to a tributary possessing an OHWM (especially if that tributary is an ephemeral wash). Therefore, the entire legal basis for the agency’s attempt to regulate all waters adjacent to any tributary is suspect.

Recommendation: The agencies should not automatically regulate all waters that are adjacent to tributaries (particularly if the tributary in question is an ephemeral wash). If adjacent waters are to be addressed collectively, this should only be done for certain types of waters that are adjacent to TNWs (as discussed below). (p. 31-32)

Agency Response: The agencies disagree with the commenter’s point that asserting jurisdiction over adjacent waters is inconsistent with the *SWANCC* and *Rapanos* US Supreme Court decisions and have not taken recommended action. See the preamble to today’s rule and the TSD. Note that the rule excludes many ephemeral features. See *Ditches Compendium* (Topic 6) and *Exclusions Compendium* (Topic 7).

Tennessee Department of Environment and Conservation (Doc. #15135)

3.703 [T]he state agencies recommend that wetlands connecting upstream and downstream portions of a tributary should be considered jurisdictional as adjacent waters rather than as tributaries as the agencies propose. The agencies recognize that the inclusion of wetlands as tributaries in this context may confuse the definition of tributary and we agree.¹⁹⁷ Given the difficulties and inconsistency already existing in the field, the state agencies recommend that the agencies include wetlands in this context as adjacent waters, recognizing that they are inextricably linked with the tributary, but do not possess a bed, banks or an ordinary high water mark. (p. 23)

Agency Response: The agencies agree with the commenter’s view that in-channel waters, including wetlands, could be adjacent waters, and the final rule reflects so.

¹⁹⁷ 79 Fed. Reg. 22188, 22203 (April 21, 2014).

Ohio Department of Natural Resources, et al. (Doc. #15421)

- 3.704 Clarify the following statement (FR, page 22196): “Where the wetland or open water is not connected to the river network through surface or shallow subsurface water, the type and degree of connectivity varies geographically, topographically, and ecologically, such that the significance of the connection is difficult to generalize across the entire group of waters.” (p. 20)

Agency Response: This paragraph is discussing the importance of landscape position and proximity with respect to the physical, chemical, and biological functions that may occur when a wetland is not located within a floodplain or riparian area as defined in the proposed rule and not hydrologically connected to a downstream traditional navigable water, interstate water, or the territorial seas. For this case, the paragraph is noting that when determining a significant nexus for wetlands that are not hydrologically connected, the proximity and topography of the landscape are important drivers in assessing the wetland’s relationship with the downstream waters. The agencies believe that certain waters without a direct hydrologic connection nevertheless can have a significant nexus to jurisdictional waters and that is supported by both the science and the Supreme Court’s rulings. As Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water’s function in relationship to these (a)(1) through (a)(3) waters. These functional relationships include retention of floodwaters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water, or the territorial seas. See Preamble discussion of “other waters” and TSD Section IX.

New Mexico Cattle Growers Association et al. (Doc. #19595)

- 3.705 Specific comment was requested concerning whether in-channel “wetlands” should be included with tributaries or adjacent waters. Logically, they seem better positioned in the realm of adjacent waters. Placing them in the category of tributaries runs contrary to that definition’s requirements for a bed, banks and an ordinary high water mark. (p. 13)

Agency Response: The agencies agree with the commenter’s view that in-channel waters, including wetlands, could be adjacent waters, and the final rule reflects so.

National Wildlife Federation (Doc. #15020)

- 3.706 We support the agencies’ proposal to delete from the existing “adjacent wetlands” provision the parenthetical phrase “other than waters that are themselves wetlands.” 79 Fed. Reg. at 22209. The application of this phrase has always been unclear and confusing in practice and, as the agencies note, has at times been applied to exclude from CWA jurisdiction wetlands that were in fact adjacent to tributaries. *Id.* The proposed definition of adjacent waters provides a much clearer and scientifically sound basis for determining jurisdiction based on adjacency to tributaries. (p. 53)

Agency Response: The agencies have made this change in the rule.

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

- 3.707 Specific comment was requested concerning whether in-channel “wetlands” should be

included with tributaries or adjacent waters. Logically, they seem better positioned in the realm of adjacent waters. Placing them in the category of tributaries runs contrary to that definition's requirements for a bed, banks and an ordinary high water mark. (p. 16)

Agency Response: The agencies agree with the commenter's view that in-channel waters, including wetlands, could be adjacent waters, and the final rule reflects so.

Wyoming Outdoor Council (Doc. #16528.1)

- 3.708 On page 22203 of the Federal Register notice the agencies ask for comment on whether some wetlands should be treated as tributaries or as adjacent waters. The concern is the wetlands may not have a bed or bank and an ordinary high water mark, as other tributaries would. We see this concern as of relatively little import and would encourage the agencies to maintain the provision where wetlands can be tributaries. The proposed language defining tributary takes care of this issue by providing that wetlands, lakes, and ponds can still be tributaries "if they contribute flow, either directly or through another water to a water identified in paragraph (a)(1) through (3) of this section." This also would comport with the normal definition of tributary, which means "making additions of yielding supplies; contributory." (p. 12)

Agency Response: For the reasons discussed in the preamble and Adjacency Compendium (Topic 3), wetlands are included in the definition of adjacent waters in the final rule.

New Mexico Mining Association (Doc. #8644)

- 3.709 We also support the consideration of whether resident species move between waters and wetlands as a factor in establishing adjacency between streams and adjacent wetlands. This analysis helps to ascertain the closeness of the relationship between these resources. (p. 16)

Agency Response: The agencies agree with the commenter. Consequently, the final rule reflects the agencies' application of the "significant nexus" analysis in order to define "tributary" and "adjacent" waters.. The factors considered when making the class determination for "adjacent waters" are provided in paragraph (c)(5) of the rule, which specifically include the use of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of the rule. Additional information can be found in the preamble to today's rule and the TSD.

Clearwater Watershed District; et al. (Doc. #9560.1)

- 3.710 We recommend that the agencies amend the definition of "wetlands" to include acceptance of wetland delineations conducted by the Department of Agriculture. We further encourage the U.S. EPA and the Department of the Army to enter into a Memorandum of Agreement with the Department of Agriculture and the Department of the Interior concerning delineation of wetlands for purposes of the Clean Water Act and the Food Security Act. (p. 6)

Agency Response: Issues pertaining to the use of other federal agency protocols

for delineating wetlands are outside the scope of today’s rulemaking. However, the agencies will continue to work with our regulatory partners on timely development of necessary training and guidance, including the process for documentation of jurisdictional waters, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule. See Implementation Compendium (Topic 12).

Regulatory Environmental Group for Missouri (Doc. #16337.1)

- 3.711 The Proposed Definition of “Adjacent” Exclusion of the Separation Created by U.S. Army Corps Flood Levee is Not Scientifically Supported and Therefore Needs to be Revised

The proposed rule proposes to modify the existing definition of the term “adjacent” by adding several words, but it retains the remaining text of the term’s current definition. Specifically, the proposed definition of adjacent provides that a water or wetland separated from jurisdictional water by a flood levee is an adjacent water and therefore a Waters of the U.S. Per this definition, the size, design, permeability, material of construction, etc. of a flood levee has no effect on the determination. That for determination purposes, one is to simply assume that the dividing structure is simply not there. For example, a small pond separated from the Missouri River, a known Waters of the U.S., by a well maintained U.S. Army Corps of Engineers 500-year flood levee, would be designated a Waters of the U.S. under EPA’s proposed new definition of “adjacent.” The scientific justification presented in the proposed rule does not support EPA’s position that there is always a significant nexus when a flood levee separates a water or wetland from a jurisdictional water. First, EPA incorrectly combines the scientific justification of flood levees with the discussion of dams. Although there are some similarities between flood levees and dams, there are too many unique differences to rely on the same science. For instance, flood levees and dams retain water vastly different durations where a levee typically holds water for a few weeks every few years and a dam commonly stores water year round. Another major difference between a flood levee and a dam is the structural footprint of each. Levee systems are built parallel to a body of water and often run for hundreds of miles whereas dams have a limited footprint across a river system and therefore typically are less than a thousand feet wide.

Second, the scientific reports referenced in the proposed rule incorrectly assumes that even when a U.S. Army Corps flood levee is present, there is always a bidirectional hydrological exchange between the water/wetland behind the levee and jurisdictional river it is protected from. Where the proposed rule does discuss unidirectional flow regarding levees, it does so very briefly and incorrectly states the direction of flow is from the water/wetland to the jurisdictional water. These floodplain flow assumptions are simply not present when a water/wetland is separated from a Waters of the U.S. by an U.S. Army Corps flood levee. Instead, when a flood levee is present the direction of hydrological exchange is always unidirectional and the direction of flow is always from the water to the floodplain. It is hydrologically impossible for water in a water/wetland on the landward side of a flood levee to overcome the hydrostatic head during periods of high water. The assumption that water passes both direction through a flood levee greatly undermines the scientific analysis used by EPA to claim that there is always a significant

nexus between a water/wetland separated by a U.S. Army Corps flood levee from a jurisdictional waters.

Third, there are several inaccuracies in the scientific justification presented in the proposed rule to support EPA's claim that wetlands separate from a water body by a flood levee maintain an ecological connection with the water body. Specifically, the proposed rule cites a report entitled "A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valle, Prepared for the U.S. Army Corps of Engineers, ERDC/EL TR-02-4 (2002)" (herein after "Yazoo Basin Report") that an ecological connection is present.¹⁹⁸ The first mistake pertains to the proposed rule's cited reference to the statement "An extensive levee system was built along the river system to prevent flooding of the Mississippi River, resulting in drastic effects to the hydrology of the basin." The proposed rule cites that the statement came from page 47 of the Yazoo Basin Report. This page number is incorrect as page 47 does not support the cited statement. Another inaccuracy is EPA's reliance on the Yazoo Basin Report to support an ecological and hydrological connection when in fact the Yazoo Basin Report provides scientific evidence that is the opposite of EPA's use of the document. In particular, the Yazoo Basin Report states that "No assessment models were developed for the Isolated Fringe and Connected Fringe subclasses. This is because these subclasses are subjected to little impact in the Yazoo Basin."¹⁹⁹ The Yazoo Basin Report excludes two wetland subclasses from analysis because they have an insignificant impact on detention of floodwater, detention of precipitation, cycle of nutrients, export of organic carbon, removal of elements and compounds, maintenance of plant communities, and do not provide fish or wildlife habitat. Such an insignificant impact is proof that not all wetlands separated from a water body by a flood levee have a significant nexus with the water body.

Finally, even if somehow during a flood event seepage beneath a flood levee results in a flow nexus from a water/wetland to a river separated by a U.S. Army Corps flood levee, the flow from the water/wetland would be so insignificant that the nexus would never rise to the level of being a "significant nexus." This is because during floods there is a lot more water in the river and it is therefore nearly impossible for incidental seepage to have any impact on the chemical, physical, or biological integrity of the river. Take the Missouri River for example, during the 1995 flood the Missouri River' flow was an astonishing 136,400,000,000 gallons per day in Kansas City, Missouri.²⁰⁰ So if a water/wetland behind a flood levee somehow generated a flow through the flood levee to the river of 20,000 gallons per day, the quantity of water each day would be a mere 0.00001% of the river's flow. Clearly such a small amount of water could not be deemed significant. It is also important to remember that during flood conditions, rivers in the Midwest are full of excess sediment and all mater of debris consisting of vegetation, foliage, branches, trees, etc. As illustrated in this example, it is nearly impossible for

¹⁹⁸ 79 FR Page 22245 (April 21, 2014)

¹⁹⁹ A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valle, Prepared for the U.S. Army Corps of Engineers, ERDC/EL TR-02-4 (2002), p. 47

²⁰⁰ U.S.G.S. gauge 06893000 Missouri River at Kansas City, Missouri on May 18, 1995

incidental seepage to have any impact on the chemical, physical, or biological integrity of the river during a flood event.

The scientific justification in the proposed rule does not support the new proposed definition of “adjacent” that in all cases, a water or wetlands, separated from a water body by a flood levee, maintains a significant nexus connection with the water body. To redress the shortcomings identified of the proposed definition of “adjacent,” the EPA should modify the definition to specifically exclude U.S. Army Corp flood levees from the definition of adjacent. That a water/wetland separated from a jurisdictional water by a U.S. Army Corp flood levee is not an “adjacent” water/wetland and therefore not itself a Waters of the U.S. (p. 6-9)

Agency Response: The agencies disagree with the commenter that all US Army Corps levees should be excluded from the definition of adjacent. The rule simply provides that the construction of a levee or similar structure does not prevent waters on either side from having a significant connection, and therefore remaining “adjacent.” Neither the size of the levee or its length relative to the main water body necessarily cuts off the important connections between the water bodies. The preamble to the rule and the TSD Section VIII.A.ii discusses in more detail levees and similar features such as dikes, berms, and the like and why these features do not break the important connections that the adjacent waters have on downstream traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with other adjacent waters.

The commenter has misinterpreted the cited statement in the Yazoo Basin Report. The Yazoo Basin Report describes a study done by the Army Corps of Engineers to determine the potential impacts of a proposed levee project on the Yazoo River’s wetland ecosystems. The report states that, “The first task is characterization of the wetland ecosystem and the surrounding landscape, describing *the proposed project and its potential impacts, and identifying the wetland areas to be assessed.*” (Italics added). The cited statement on page 47 of this report is: “Note that no assessment models were developed for the Isolated Fringe and Connected Fringe subclasses. This is because these subclasses *are subjected to little impact in the Yazoo Basin.*” (Italics added). This statement means that Isolated Fringe and Connected Fringe subclasses were excluded from the study because these two wetland subclasses were not subject to potential impacts of the proposed project.

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

- 3.712 The Rule proposes changing the category “adjacent wetlands” to “adjacent waters” so that water bodies such as ponds adjacent to jurisdictional waters are WOUS by Rule. The unintended consequence of this strategy will create duplicative and conflicting federal authority over stormwater management facilities. For example, Section 402 of the CWA currently regulates the City of Chesapeake’s stormwater management facilities under the NPDES permit program (MS4). If EPA expands regulatory oversight of the CWA into *adjacent waters* to include, but limited to stormwater management ponds, the City of Chesapeake will be required to comply with duplicative and conflicting regulatory programs: The City’s MS4 permit requires that they maintain their stormwater drainage facilities and retrofit facilities to meet new TMDL allocations;

however, the Corps will also require permits, in addition to avoidance/minimization measures and compensatory mitigation for work within these regulated features. These duplicative and antagonistic programs may require more documentation, time and resources, while reducing clarity and predictability for the regulated community. (p. 4)

Agency Response: See summary response.

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

- 3.713 Although the agencies did not solicit comments on their general approach to adjacent waters, we offer the following: The agencies approach would remedy the problem that arose in the drafting of the current post-Rapanos guidance. Under that guidance, which the proposed rule would replace, similarly situated wetlands for the purposes of cumulative impact analysis are only considered together to the extent that they are adjacent to the same “reach” of a stream. This aggregation approach is perhaps the most damaging element of the post-Rapanos guidance. Moreover, the choice to unnecessarily limit the consideration of the cumulative effect that wetlands have on water quality when evaluating whether a “significant nexus” is present was inconsistent with the opinion from which the test is drawn. Justice Kennedy, in spelling out how the “significant nexus” standard should work in practice, clearly intended for the agencies to have the ability to continue to protect wetlands when they collectively affect water quality, and to apply that protection to all similar water bodies across a region. (p. 14)

Agency Response: As discussed in the preamble and the TSD, the final rule reflects the agencies analysis of significant nexus under the Rapanos case law as applied to wetlands.

- 3.714 The proposed rule, however, is far more faithful to the elements of Justice Kennedy’s opinion. In particular, the proposed rule concludes that an inclusive geographic scope is appropriate for the aggregation analysis. Under the proposed rule, the logical and scientifically valid “region” for determining whether similarly situated waters have a significant nexus is the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry. In addition, once the jurisdictional status for a particular water within a watershed has been established, field staff would apply significant nexus analysis for that water to any subsequent determinations if they establish (and document) that the water at issue is the same type and in the same watershed as the jurisdictional water. (p. 16)

Agency Response: As discussed in the preamble, the final rule reflects the agencies analysis of significant nexus under the Rapanos case law.

Riverside County Flood Control and Water Conservation District (Doc. #14581)

- 3.715 The District recommends that the Proposed Rule not expand the term neighboring to cover the floodplain as currently defined because the definition of floodplain is too general. The District’s experience with geomorphology indicates that the last 11,000 years can be lumped together under “present climatic conditions”. Any definition that takes into account sediment that has been deposited over some geologic period, like during the last 11,000 years, can lead to jurisdictional determinations that are too expansive. It is particularly inappropriate to apply that definition to the ancient surfaces

found on alluvial fans in the southeastern Californian desert. While the typical alluvial fan's surface has had sediment deposited on it over the last 11,000 years, vast areas of the fan would not have seen flows in decades. In short, "present climatic conditions" is too expansive.

Alternative engineering approaches to define the floodplain would also be inappropriate. For example, a possible approach would be to map floodplains caused by storms that exceed some arbitrarily defined recurrence probability, like the 2-year event or the 10-year event. Since urban areas and MS4 facilities that should not be regulated could fall within the calculated floodplain boundaries, the method would result in an expansion of waters.

An engineering approach would also run into trouble in the desert where alluvial fans are quite common. The accepted methodology for mapping alluvial fan floodplains assumes that floodwaters have an equal probability in the future to flow across any part of the fan surface. While fine for floodproofing new development this method simply is not appropriate for determining where flows have been recently and thus determining CWA jurisdiction. Users of this method may determine that large tracts of land which have not seen runoff in decades would be jurisdictional. It is for all these reasons that we would support a definition of floodplain that would only take into account overbank flows that occur with high-frequency and leave surface markers that can be identified in the field. Moreover, the definition should exclude overbank flows that would inundate urban areas and MS4 facilities. (p. 5-6)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. More detail on the appropriate use of these maps and other resources is in the preamble to today’s rule and the TSD. Further, the final rule expressly excludes stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling from regulation as waters of the United States.

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

- 3.716 The proposed rule should provide guidance for how floodplains will be used in jurisdictional determinations. Public safety should always remain the top priority even if the agencies take jurisdiction in the floodplain. Provisions should be included to allow

for maintenance activities within the floodplain to ensure public safety. The floodplain boundary is generally defined as 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 water flows. While the proposed rule states that location in a floodplain of Waters of the US will cause a waterbody to be jurisdictional by rule, the proposed rule fails to define the floodplain boundary. The boundary needs a more specific definition, along with guidance on how flood plains are used in jurisdictional determinations, and if FEMA-mapped flood plains are applicable. Riparian areas are also broadly defined, with no limiting scope to the size or characteristics that may define an area. Because floodplain and riparian zones are insufficiently defined, they leave room for interpretation and potential citizen CWA lawsuits related to County-owned or maintained water bodies in floodplains or riparian zones.

Without a specific definition of floodplain jurisdiction, it will be difficult to manage these areas. Depending on whether 50-year, 100-year, or 500-year boundaries are used, the area of a floodplain could change drastically. Questions and concerns will arise when issues regarding maintenance and oversight of these areas are under consideration. Areas must be appropriately defined by floodplain to dictate which permits and regulations are applicable to a specific area, as the area could range from a few feet to several miles based on the floodplain size. Safety in these areas should be a top priority, which could be compromised by slow permitting processes and confusion regarding jurisdiction. (p. 6)

Agency Response: As discussed elsewhere, the agencies have revised the definition of adjacent to provide more clarity, consistency and certainty. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is clearly out of date or in error, the agencies will rely on other available tools to identify the 100-year floodplain, including other Federal, State, or local floodplain maps, NRCS Soil Surveys (Flooding Frequency Classes), tidal gage data, stream flow data and site-specific surveys or modeling. More detail on the appropriate use of these maps and other resources is in the preamble to today's rule and the TSD. Finally, this rule is a definitional rule and thereby does not alter existing federal agency CWA regulatory permit programs. Issues pertaining to maintenance are outside the scope of today's rulemaking.

Portland Cement Association (Doc. #13271)

- 3.717 Floodplains should not be determined in a way that requires a geologist and hydrologist. Another fundamental problem with the existing case-by-case significant nexus test is its heavy emphasis on specifically-applied scientific analysis. Determining whether a particular water is physically, chemically or biologically connected to a downstream water requires the expertise of a hydrologist and a biologist (and possibly also a chemist). Consulting with and hiring such experts is expensive and time consuming and can lead to a "battle of the experts" where the different sides obtain different scientific conclusions. This results in an unnecessary use of resources (both time and money) and should be

avoided wherever possible. Instead of doing so, the proposed rule increases the need for scientific input by adopting a definition of floodplain requiring an examination of whether an area was “formed by sediment deposition” and is inundated during periods of “moderate to high flows.” Thus, this test requires the input of both a geologist and a hydrologist, making an already onerous analysis even more so.

For these and the reasons described above, the Agencies should not adopt the definition of floodplain” presented in the proposed rule. (p. 17).)

Agency Response: The agencies agree that the rule should be a self-implementing as possible; under the final rule a geologist and a hydrologist should not be required to determine the floodplain. The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.”

Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD. When determining the jurisdictional limits under the CWA for adjacent waters, the agencies will primarily rely on published Federal Emergency Management Agency (FEMA) Flood Zone Maps to identify the location and extent of the 100-year floodplain. More detail on the appropriate use of these maps and other resources is in the preamble to today’s rule and the TSD.

- 3.718 Riparian area should not be determined in a way that requires a biologist and a hydrologist.

Even if the definition of riparian area somehow provided a distinction between covered areas and those not covered, the Agencies still should not adopt it. As with the definition of “floodplain,” in defining “riparian area,” the Agencies have proposed a definition which exacerbates, rather than eases, the problem of scientific complexity. Adding to the need to retain a geologist and hydrologist to understand if an area is in a floodplain, the Agencies have adopted a definition of “riparian area” which requires the opinion of a biologist and a hydrologist (and possibly a different hydrologist than that used to identify the floodplain, as the floodplain hydrologist will have to understand the frequency of flood events and the riparian hydrologist may need to opine on subsurface influence.). Thus, this definition simply adds to the problems caused by the time and expense currently required to comply with the rule and heightens the litigation risk and potential battles among experts. (p. 18-19)

Agency Response: See prior response. In addition, the rule does not use the term “riparian area” to define adjacent waters.

- 3.719 Subsurface hydrology is an insufficient basis for jurisdiction.

Under the proposed rule, “neighboring” would be defined to include any water “with a shallow subsurface hydrologic connection or confined surface hydrologic connection” to the core waters, their impoundments and their tributaries. “Subsurface hydrology” is an invalid basis for jurisdiction and is a vague term requiring the utilization of specialized

experts. For all these reasons, the Agencies should not adopt this portion of the rule.

The CWA specifically reserved to the states authority over their own waters,²⁰¹ including groundwater. The Agencies specifically exclude groundwater from the scope of federal jurisdiction.²⁰² However, for the first time, the Agencies attempt to identify certain groundwater as capable of creating jurisdiction between two otherwise unconnected waterbodies. The Agencies refer to this “shallow” groundwater as “shallow subsurface hydrology”²⁰³

The distinction between shallow and deeper groundwater as a basis for jurisdiction is without legal basis and is simply a construct to allow the Agencies to extend jurisdiction over additional surface waters. Moreover, such connections are completely opaque to laypersons and even to experts without extensive scientific analysis.²⁰⁴ The distinction the Agencies attempt to draw between shallow and “deeper” groundwater would also require extensive case-by-case analysis.²⁰⁵

As with the remainder of the “always jurisdictional” test, in attempting to assert a jurisdictional connection based on “shallow” groundwater, the Agencies have proposed a convoluted test which would require case-by-case analysis and scientific expertise. Even more so that the other aspects of this test, it would require extensive, expensive and time-consuming analysis, resulting in further unnecessary expenditures of time and money. The Agencies should reject this portion of the proposed rule and, instead of attempting to assert jurisdiction over every conceivable waterbody, propose a test that is transparent and efficient. (p. 19-20)

- 3.720 The adjacent waters test is essentially just a restatement of the significant nexus test. (p. 20)

Agency Response: The agencies disagree with the commenter that the adjacent waters test is essentially just a restatement of the significant nexus test for reasons discussed elsewhere in this document.

²⁰¹ 33 U.S.C. § 1251.

²⁰² 79 Fed. Reg. 22193 and 22218 (“The agencies have never interpreted “waters of the United States” to include groundwater and the proposed rule explicitly excludes groundwater. . . .”)

²⁰³ The Agencies acknowledge that shallow subsurface hydrology is groundwater in describing the distinction between such water and other, “deeper” groundwater. (“The distance between water bodies may be sufficiently great that even the presence of an apparent hydrologic connection may not support an adjacency determination. The greater the distance, the less likelihood that there is an actual shallow subsurface or confined surface hydrologic connection, because of the greater potential for the water to infiltrate the soil to deeper groundwater. . . .”) 79 Fed. Reg. 22211 (emphasis added).

²⁰⁴ In identifying the factors which may indicate the presence of shallow groundwater, the agencies cite to “a combination of factors,” including (but not limited to) stream hydrograph (for example, when the hydrograph indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower than in the shallow subsurface.” 79 Fed. Reg. 22208.

²⁰⁵ The Agencies assert that “[s]hallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters. Water does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection and the flow between the adjacent water and the jurisdictional water may move in one or both directions.” 79 Fed. Reg. 22208.

See response to comments concerning subsurface connections, elsewhere in this Compendium. See summary response.

Sean Parnell, Governor, State of Alaska (Doc. #19465)

- 3.721 The CWA does not provide federal jurisdiction over groundwater, which is under the state's exclusive jurisdiction. However, the language in the proposed rule suggests that a wetland within the riparian area may be deemed "adjacent" and jurisdictional where there is "surface or subsurface hydrology" (emphasis added) that directly influences the ecology in the area. The preamble suggests that tributaries and other waters may be connected by "shallow subsurface hydrologic connections" but neither the preamble nor the proposed rule defines what is intended by using these terms and there is inconsistency on whether the modifier "shallow" is applied or even what "shallow" means. The incorporation of "shallow subsurface" hydrology would be significantly problematic for implementation in Alaska due to suprapermafrost water. This is the seasonal snow melt water within the soil above the frozen layer of permafrost soil. The application of the latter term (shallow subsurface hydrologic connection) may involve consideration of groundwater, tributary or alluvial groundwater, waters that are stored in the bed and banks of streams, or even soil moisture, once again expanding federal jurisdictional reach without legal basis or limit. Any rule should expressly exclude permafrost lands from CWA jurisdiction, due to permafrost's unique conditions. Further, the federal agencies should not use shallow subsurface waters – i.e., groundwaters – as a means to assert CWA jurisdiction over waters and wetlands that are upgradient of groundwaters and navigable waters. (p. 24)

Agency Response: See previous response.

Western Urban Water Coalition (Doc. #15178.1)

- 3.722 Other sections of the proposed rule use shallow subsurface hydrologic connections to a jurisdictional water to indicate jurisdiction. The use of ground water to demonstrate a connection to a WUS has challenges in practice, including that it is not easy to clearly demonstrate or refute. If the proposed rule includes ground water as a potential connection to a WUS, it should define "shallow subsurface hydrologic connection" and "deep ground water" and at least acknowledge what typically occurs with ephemeral or intermittent drainages in the arid West. The following definitions are suggested.

Define "shallow ground water" as water within the saturated zone within unconsolidated surficial deposits, including alluvium and colluvium. For a stream, shallow subsurface ground water is subsurface water that is within the alluvium of the channel or within alluvium or colluvium that contributes ground water to the stream channel from the sides of the channel. A "shallow subsurface ground water connection" has continuous flow of shallow ground water from the water or wetland for which jurisdictional status is being determined to a WUS. The depth to ground water must be demonstrated to be shallow enough to support vegetation typically associated with shallow ground water levels in the region, including phreatophytes, throughout the entire distance from the water or wetland at question to the WUS. Demonstration of a shallow ground water connection includes one or both of the following:

- Presence of healthy riparian and/or wetland vegetation typically associated with

shallow ground water in the region

- Ground water level measurements from monitoring wells located between the water or wetland at question and the stream channel that demonstrate a shallow subsurface ground water connection.

Define “deep ground water” as water within consolidated subsurface deposits (bedrock) that generally underlies unconsolidated deposits, and that can be a source of water to streams where bedrock crops out at the surface of a stream channel and/or banks. Streams may lose water to deep ground water underlying the channel alluvium by infiltration, although due to the typically low permeability of bedrock (and small fracture/fault widths), the volume is likely quite small. (p. 12)

Agency Response: See response to comments addressing Subsurface Connections elsewhere in this Compendium.

Water Advocacy Coalition (Doc. #17921.1)

- 3.723 Confined surface connections: The preamble states that, for purposes of this rule, confined surface connections “consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches.” 79 Fed. Reg. at 22,208. Such erosional features are categorically excluded under the rule, but the agencies treat them as connections that can establish adjacency. This use of non-jurisdictional connections to establish jurisdiction has no limiting principle. If these features are beyond the scope of CWA jurisdiction, why can they be used to establish jurisdiction? (p. 63)

Agency Response: See prior response.

- 3.724 The proposed rule’s assertion of jurisdiction over all waters with “shallow subsurface hydrologic connections” to jurisdictional waters is problematic for several reasons. First, it is a radical departure from current methods of jurisdictional determination. Every other type of jurisdictional determination can be performed primarily with visual observation (e.g., OHWM, wetlands vegetation, etc.). While there may be problems and lack of clarity and inconsistency in some of the specifics of these traditional indicators, there is simply no way to determine the flow direction, depth, and other characteristics of subsurface water without costly, time-consuming, and invasive subsurface investigation. The notion that “best professional judgment” can somehow see below the surface and interpret groundwater depth and flow from the surface defies logic.

Second, there is no scientific standard to separate what is “shallow subsurface” versus “groundwater.” As explained above, the proposed rule does not define or explain “shallow subsurface hydrologic connection.” According to the USGS, the definition of groundwater includes shallow subsurface flow, and this flow can be complex. Yet the proposed rule allows for shallow flow to be used to determine jurisdiction while categorically excluding other groundwater. If groundwater is categorically excluded but shallow subsurface connections can render a feature a jurisdictional “adjacent water,” what is the limit? The “best professional judgment” of agency personnel making judgments from surface observations would be expected to vary widely, given the vague definitions. While maps of regional groundwater conditions are available, these cannot begin to determine the level of connection between small marginal waters and nearby

jurisdictional waters. The regulatory requirement of groundwater wells at sites of potential groundwater impairment (gas stations, etc.) attests to this fact. The agencies should clarify that groundwater connections cannot be used to establish jurisdiction. The agencies should likewise exclude use of “shallow subsurface” connections to establish jurisdiction or should clearly define what is meant by “shallow subsurface” flow that will be used to establish jurisdiction and how it is to be identified in the field.

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

The use of floodplains, riparian areas, and subsurface flow to establish jurisdiction will be problematic for industry. It will be particularly devastating, for example, for the extraction of aggregates resources. Nearly all sand and gravel deposits are located within floodplains and/or headwater areas that are not currently regulated to the extensive degree they would be under the proposed rule. In many areas of the U.S., excavating sand and gravel in an upland area leads to groundwater. The proximity of sand and gravel deposits to rivers and streams generally indicates higher groundwater levels. If shallow groundwater connections establish adjacency, then how does the regulated community determine where shallow groundwater ends and deeper groundwater begins? Virtually all alluvial groundwater could be “judged” to connect to streams and rivers. In a real world example, an aggregates producer estimates about \$200,000 of wetlands mitigation would be required under the current regulations, based on the cost of current mitigation banks and extensive experience with permitting other similar sites. Because the site is located within a floodplain and includes “similarly situated waters” that would likely be jurisdictional based on subsurface connections under the proposed rule, they estimate that new cost for mitigation would jump to \$2.75 million dollars.

For all these reasons, the agencies must reconsider the proposed rule’s assertion of jurisdiction over all waters with “shallow subsurface hydrologic connections” to jurisdictional waters and clearly distinguish between shallow subsurface flow and groundwater. (p. 63-65)

Agency Response: See response to comments on Subsurface Connections elsewhere in this Compendium.

New Mexico Mining Association (Doc. #8644)

- 3.725 The definition of "neighboring" should be amended such that a water outside of the riparian area and floodplain is not made jurisdictional by a speculative or distant shallow subsurface hydrologic connection. A water that is neither in the riparian zone or floodplain of a water identified in (a)(1) through (a)(5) should not be deemed jurisdictional merely by the presence of a shallow subsurface hydrologic connection.

Because the proposed rule permits a shallow subsurface hydrologic connection to support jurisdiction, it is highly ambiguous and increases questions rather than providing clarity. For instance, how significant of a shallow subsurface connection is necessary to sustain an adjacency determination? If a shallow subsurface connection contributes 0.01% of the flow to a traditional navigable water, is that sufficient? Conversely, if the shallow subsurface connection is afforded by perched water that is not reasonably continuous, is that type of connection sufficient? Must the subsurface connection be readily measurable? Can a subsurface connection sustain an adjacency determination for an otherwise isolated water body that is a half-mile away? Would the regulated entity carry the burden of proving or disproving the existence of such a connection? How would such a shallow subsurface connection be proved?

The current definition of "neighboring" leaves the door open for distant isolated bodies of water to be deemed jurisdictional because of insignificant subsurface hydrologic connections. This open ended language does not further the agencies' stated goal of promulgating a rule that is clear and understandable. Further, the proposed rule's assertion of jurisdiction over tenuous subsurface connections is akin to the 'any hydrologic connection' standard rejected by the United States Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006).

A clearer approach would be to eliminate this shallow subsurface hydrologic connection language altogether from the definition of "neighboring." A water would be deemed adjacent if it is located within the riparian area or floodplain of a water identified in (a)(1) through (a)(5). When compared to the speculative and cumbersome process of determining potentially far-reaching subsurface connections, this approach, while still requiring use of the agencies' best professional judgment, would be much more straightforward, clear, and understandable. (p. 1-2)

Agency Response: See summary response.

- 3.726 Alternatively, if the agencies insist on permitting a shallow subsurface hydrologic connection to form the sole basis of jurisdiction over "neighboring" waters, then the following clarifications and limitations should be incorporated into the final rule:

A shallow subsurface connection, as that phrase is used within the definition of "neighboring", cannot support a determination of adjacency over a water body that is outside of the riparian area or floodplain of a water identified in (a)(1) through (a)(5), unless the agencies can demonstrate, through reliable scientific principles and methods, the existence of a proven, permanent, and significant connection.

The agencies should establish a maximum distance, based on scientific data, beyond which a water body cannot be considered "adjacent." For example, adoption of a one-half mile limitation would provide greater clarity and would exclude from regulation those

waters that are less likely to have a significant connection to a traditional navigable water. A water body would not be deemed to be adjacent if the distance between it and the closest water identified in (a)(1) through (a)(5) was greater than one -half mile.

These amendments would add clarity to the rule and would ensure that jurisdiction was not supported by speculative, temporary, or insubstantial shallow subsurface hydrologic connections. (p. 2-3)

Agency Response: See above response.

Nebraska Cattlemen (Doc. #13018.1)

- 3.727 EPA has failed to adequately distinguish “shallow subsurface flow” or “shallow subsurface connection” from groundwater. According to the proposed rule the existence of “shallow subsurface flow” or “shallow subsurface connection” makes a water jurisdictional by rule under the CWA. (Proposed rule at 22207). The legal definition of “neighboring, for purposes of the term “adjacent,” includes waters located within the riparian or flood plain of...waters with a shallow subsurface hydrologic connection.” Id. Utilizing this type of hydrological connection to determine which waters are jurisdictional by rule provides absolutely no clarity and is entirely unsuitable because when read plainly it includes puddles, wetlands, ditches or damp depressions in pastures in fields that have some undefined subsurface hydrologic connection that may all be now jurisdictional waters under the CWA.

Furthermore, the statutory definition of “waters of the United States” does not include groundwater and EPA itself recognizes that “groundwater, including groundwater drained through subsurface drainage systems” are not “waters of the United States.” (Proposed rule at 22273-22274). Based on the Congressional intent to regulate only surface water through the CWA, EPA should not use “shallow subsurface flow” or “shallow subsurface connection” as a legal basis for determining jurisdiction. (p. 2)

Agency Response: See response to comments on Subsurface Connections elsewhere in this Compendium.

- 3.728 Nebraska Cattlemen is also concerned about the potential for groundwater sources to be treated as “waters of the United States”. As discussed, the statutory definition of “waters of the United States” does not include groundwater and EPA itself recognizes that “groundwater, including groundwater drained through subsurface drainage systems” are not “waters of the United States.” (proposed rule at 22273-22274).

However, the definition of “adjacent” and “neighboring” would include “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection” to jurisdictional water. (Proposed rule at 22207). There are many areas in Nebraska where there is a hydrologic connection of surface and ground water. In fact, there are entire river basins where this phenomenon exists. Are all riparian and floodplain areas with a hydrologic connection of ground and surface water now going to be subject to CWA jurisdiction? What are the limits of this language? The impact of this interpretation is critical for Nebraska agriculture. If the answers to the questions above are in the affirmative, then a whole new layer of types of water and types of CWA permits needed come into play.

The CWA was not meant to cover groundwater and it should be excluded from jurisdictional coverage. No reasonable person can find a difference between groundwater and “shallow subsurface” flow and as a result EPA has no jurisdiction over this water feature either. Similarly, this should not be a consideration for significant nexus determination under the “other waters” category. (p. 16)

Agency Response: See prior response.

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

- 3.729 The proposed rule provides that waters can be “adjacent,” and therefore jurisdictional, if they have a shallow subsurface hydrologic connection to jurisdictional waters. The term shallow, however, is not defined leaving to agency discretion and subjectivity how the rule will be administered. Indeed, the Science Advisory Board (SAB) Panel stated that “the preamble of the proposed rule did not provide a clear understanding of what are considered to be ‘shallow’ subsurface connections.”

The distinction between shallow subsurface flow versus groundwater is vague and would be difficult to implement. One reviewer could decide that groundwater from a tributary has a shallow subsurface connection because it occasionally reaches the 12 inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system of a similar stream could find that the subsurface water was deep groundwater although it occasionally inundates that root zone. In the first instance adjacency over a large area could be established whereas in the latter circumstances it would not. Such subjectivity and inconsistency is untenable.

Finally, the agencies assert that, for this rule, confined surface connections “consist of permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches.”²⁰⁶ Although erosional features are excluded the agencies appear to consider them connections that can establish adjacency. Using non-jurisdictional connections to establish jurisdiction renders the rule limitless. Features or considerations beyond CWA jurisdiction should not be used to establish jurisdiction elsewhere. (p. 7-8)

Agency Response: See response to comments on Subsurface Connections elsewhere in this Compendium

Kansas Agriculture Alliance (Doc. #14424)

- 3.730 The very use of the term “shallow subsurface hydrologic connection” is not permitted by the CWA.²⁰⁷ While the agencies have announced to the public that it is not regulating groundwater, the inclusion of the term “shallow subsurface hydrologic connection” is in fact regulation of groundwater. It seems the agencies are attempting to parse words and purport to only regulate the conveyance of surface water through subterranean areas. This simply defies logic. Merriam Webster Dictionary defines groundwater as: “Water that occurs below the surface of the Earth, where it occupies spaces in soils or geologic strata.”²⁰⁸ Thus, as soon as surface water recedes below the surface of the Earth it

²⁰⁶ 79 Fed. Reg. at 22,208

²⁰⁷ 79 Fed. Reg. at 2263.

²⁰⁸ 79 Fed. Reg. at 2263.

becomes groundwater. The agencies are, in fact, regulating groundwater in defiance of the CWA. The CWA only allows regulation of surface water. Therefore, the agencies must establish at least some type of surface connection to a TNW and cannot rely on any subsurface hydrologic connection. (p. 5)

Agency Response: See prior response.

The Mosaic Company (Doc. #14640)

- 3.731 Although it is not defined in the regulatory text, the preamble states that a shallow subsurface hydrologic connection is "lateral water flow through a shallow subsurface layer, such as can be found in steeply sloping areas with shallow soils and soils with a restrictive horizon that prevents vertical water flow, or in karst systems" (79 Fed. Reg. at 22,242). At issue here is that the proposed rule does not define the specific circumstances that would be evaluated to determine if a subsurface connection exists and has the ability to affect traditional navigable water. Appendix B of the preamble provides peer-reviewed literature describing the conditions under which a subsurface connection is usually found, such as an aquiclude near the surface that favors lateral flow through the soil (79 Fed. Reg. at 22,242). However, the proposed rule does not provide specific metrics or guidance on what conditions must be necessary to constitute a subsurface connection, such as soil type, slope, flow rate, permeability, or distance between waters sufficient to determine connectivity, much less when the hydrologic connection results in a significant nexus. Instead, reliance on professional judgment and the concept of "reasonable proximity" is proposed to determine the presence of a subsurface connection and therefore jurisdiction (79 Fed. Reg. at 22,207-22,208). The use of professional judgment and "reasonable proximity" is insufficient to provide clarity to stakeholders when determining if a given water or wetland is neighboring, and therefore adjacent and jurisdictional by rule. (p. 22-23)

Agency Response: See response to comments on Subsurface Connection elsewhere in this Compendium.

Beet Sugar Development Foundation (Doc. #15368)

- 3.732 BSDF recommends that the agencies not include "shallow subsurface connections" within the definition of neighboring.²⁰⁹ This condition adds too much uncertainty to the regulated community, likely expands CWA jurisdiction beyond current Supreme Court guidance, and potentially subjects groundwater to regulation. The agencies contend that "[s]hallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters."²¹⁰ But this distinction provides little clarity for either the regulated community or the agencies. The agencies appear to be concluding that jurisdiction will attach to all "shallow subsurface connections" with no instruction regarding what will classify a connection as "shallow" and with no requirement that the agency make any factual finding regarding the impact

²⁰⁹ See id. at 22208 (requesting comment on reasonable options for providing clarity for jurisdiction over adjacent waters).

²¹⁰ Id.

the subsurface water source has on the chemical, biological, or ecological integrity of “waters of the United States.” Without defined parameters on the depth, the distance, or the significance of the subsurface connection, it is impossible to distinguish between jurisdictional and non-jurisdictional waters. (p. 16-17)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Because waters that occur beyond the adjacency distance limits may have a significant nexus, the rule also establishes areas in which a case-specific significant nexus determination must be made. See the responses to comments regarding “significant nexus” and “other waters,” as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a case-specific significant nexus determination must be made and responses to comments regarding what types of connections are appropriate to consider in making such determinations. The preamble to today’s rule, the response to comments on Subsurface Connections elsewhere in this Compendium, and the TSD also provide additional information on “shallow subsurface connection.”

Montana Stockgrowers Association (Doc. #16937)

- 3.733 While the EPA claims this rule does not regulate groundwater (and the CWA itself specifically states it does not” the new rule proposal includes language about “shallow subsurface hydrologic connection” between two bodies of water. That phrase is not defined and leaves confusion about the role of groundwater, whether it is regulated under this proposal, or if it can be used to establish a connection between two bodies of water with no surface connection for the sake of regulation. It is hard for a reasonable person to see how “groundwater” is different from “shallow subsurface” flow, and the agencies have failed to distinguish the two. It is also unclear how a landowner working on a project would know whether they are obstructing “shallow subsurface” flow or ground water. Based on the intent of Congress to regulate only surface water via the CWA, it follows that the agencies should not use shallow subsurface flow, shallow subsurface hydrologic connections or the like to serve as the basis for determining jurisdiction. We recommend the agencies remove from the rule consideration of groundwater as the source of any connection, as there is too much confusion regarding whether it is part of the regulated water. Additionally, landowners have no logical way to know whether these connections exist, unfairly placing them in potential situations of a regulatory enforcement action without any knowledge. (p. 8-9)

Agency Response: See prior response.

Association of American Railroads (Doc. #15018.1)

- 3.734 The proposed rule's assertion of jurisdiction over all waters with "shallow subsurface hydrologic connections" to jurisdictional waters is a radical departure from current methods of jurisdictional determination. Every other type of jurisdictional determination starts with and can be performed primarily with visual observation (e.g., OHWM, wetlands vegetation, etc.). There is simply no way to determine the flow direction, depth and other characteristics of subsurface water without costly, time-consuming, and invasive subsurface investigation. Additionally, there is no scientific standard to separate what is "shallow subsurface" versus "groundwater." According to the USGS, the definition of groundwater includes shallow subsurface flow, and this flow can be complex. The Agencies should clarify that groundwater connections cannot be used to establish jurisdiction and should clearly define what is meant by "shallow subsurface" flow that will be used to establish jurisdiction. Finally, determining the extent of subsurface connections will be difficult and will likely lead to improper assumptions that there is always a connection. Determination of connection involving subsurface flow would be particularly problematic in floodplain areas, where subsurface flow, direction and other characteristics can vary greatly based on season, rainfall, and other factors. For all these reasons, the Agencies must reconsider the proposed rule's assertion of jurisdiction over all waters with "shallow subsurface hydrologic connections" to jurisdictional waters and clearly distinguish between shallow subsurface flow and groundwater. (p. 11-12)

Agency Response: See prior response.

Arizona Public Service Company (Doc. #15162)

- 3.735 The last portion of the definition also raises new questions. By relying on a shallow subsurface hydrologic connection, the Agencies are straying into areas previously reserved for the states. While the Agencies have stated that groundwater is exempt from the definition of WOTUS, the proposed definition includes waters that are connected by groundwater, not just surface water. It is not clear how groundwater that provides the physical, chemical, or biological connection to make waters jurisdictional is not pulled under CWA authority. APS recommends that the proposed rule be withdrawn so that the Agencies can work with states and tribes to ensure the rights of all are preserved and there is clarity in a re-proposed rule. (p. 9)

Agency Response: The rule was revised based on comments, such as these, requesting clarity and other changes to the proposal. See response to comments on Subsurface Connections elsewhere in this Compendium.

NRG Energy, Inc. (Doc. #13995)

- 3.736 This expanded definition conflicts with EPA's statements in the proposed rule that groundwater is not jurisdictional. (Id. at 22193, 22199, 22218). Moreover, it appears this is rationalized by the explanation that "If the wetland or open water has a surface or shallow subsurface water connection to the river network, it affects the condition of downstream waters," thereby making such surface and subsurface waters (even if only temporary in nature) subject to CWA jurisdiction. However, the preamble conflicts with those quoted statements and notes "that nothing under the proposed rule would cause the

shallow subsurface connections themselves to become jurisdictional" (Id. at 22210), but under the proposed Definition, a ditch that groundwater drains into would become jurisdictional, resulting in de facto inclusion of the groundwater source. NRG requests that the Agencies' repeated statements in the rule that groundwater is excluded from regulation as WOTUS be further emphasized and explained to ensure that the groundwater exclusion is clearly spelled out and any current ambiguity in the proposed rule regarding this matter is fully resolved to prevent contradictory interpretation. This is especially important in light of the Definition's overreaching presumption that all groundwater is a conduit for inclusion of additional, previously excluded waters (p. 3)

Agency Response: See prior response.

National Wildlife Federation (Doc. #15020)

- 3.737 We support the agencies' proposed definition of "neighboring" to include waters located outside of the floodplain or riparian area of a tributary that are connected with such a tributary by a "shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." See 33 CFR 328.3(c)(2); 79 Fed. Reg. at 22207-22208.

Confined surface connections are "permanent, intermittent or ephemeral surface connections through directional flowpaths, such as (but not limited to) swales, gullies, rills, and ditches." 79 Fed. Reg. at 22208. Shallow subsurface hydrologic connections are described as "lateral water flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the vertical flow of water, or in karst systems, especially karst pans." Id.

The agencies explain that both confined surface and shallow subsurface connections are "forms of direct hydrologic connections between adjacent waters and (a)(1) through (a)(5) waters," and propose that [w]aters, including wetlands, determined to have a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (a)(5) water would also be a "waters of the United States" by rule as adjacent waters falling within the definition of "neighboring." Id. at 22207.

Recognition of these hydrological connections between wetlands and other waters and "bordering, contiguous, or neighboring" jurisdictional waters is warranted by the scientific literature and resource management experience, as well as "the Act's text, structure, and purpose," and Justice Kennedy's concurring opinion in *Rapanos*.²¹¹

²¹¹ See, e.g., 79 Fed. Reg. at 22241-43; Connectivity Report at 1-7 to 1-14 (The scientific evidence also demonstrates that shallow groundwater connections serve as hydrologic connections between surface waters and should be considered in assessing connectivity and effects on downstream waters.). See also, *Rapanos*, supra, 547 U.S. 759, 776 (J. Kennedy concurring opinion; *Northern Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 997-1001 (9th Cir. 2007) (constant ground water flow between river and pond makes pond jurisdictional under 33 C.F.R. § 328.3(b)); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Id. 2001) ("[T]he interpretive history of the CWA only supports the unremarkable proposition with which all courts agree – that the CWA does not regulate 'isolated/nontributary' groundwater which has no effect on surface water. It does not suggest that Congress intended to exclude from regulation discharges into hydrologically connected groundwater which adversely affect surface water. For these reasons, the Court finds that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States.")

Also important is the clarification that the shallow subsurface connections are distinct from deeper groundwater connections in that “the former exhibit a direct connection to the water found on the surface in wetlands and open waters and “[w]hile they may provide the connection establishing jurisdiction, these shallow subsurface flows are not ‘waters of the U.S.’” 79 Fed. Reg. at 22208. Again, this is a scientifically sound principle in relation to the purposes of the CWA.²¹² (p. 49)

Agency Response: The final rule reflects that subsurface connections can be important to the significant nexus analysis. See response to comments on Subsurface Connections elsewhere in this Compendium.

3.7. ADJACENT WATERS SUPPLEMENT

G. E. Michael (Doc. #1597)

3.738 Riparian Area

The proposed language states that these areas "are transitions areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems". No uplands located in "riparian areas" can ever be "waters of the United States". There is more of a philosophical approach here that appears to go to great lengths to put into the rules some spiritual connection (energy exchange). Perhaps it is for expanding future jurisdiction by showing a connection and therefore a significant nexus, but riparian areas are generally outside of waters, because they start at the ordinary high water mark and go upland. It is also more likely to be inside private property boundary than traditional navigable waters or it would be governed by some land management agency.

The new proposed definition should be scraped and not included with the definition proposal of waters of the United States. (p. 10)

(emphasis added) (citations omitted).

²¹² See, *Healdsburg*, 496 F.3d at 1000 (citing to underground hydrologic connections as a basis for establishing a significance nexus between two bodies under Justice Kennedy’s standard); *United States v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997) (finding that wetlands that were at least one half mile from navigable waters were jurisdictional due to a hydrologic connection that “was primarily through groundwater, but also occurred through surface water during storms”); *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983) (finding that wetlands with rare surface water connections, but demonstrated ecological and subsurface hydrological connections, were jurisdictional); see also, *Idaho Rural Council v. Bosma*, supra, note 164; *Quivira v. EPA*, 765 F.2d 126 (10th Cir. 1985) (arroyo with continuous groundwater connection and occasional surface water connection to downstream jurisdictional waters protected under the Act); *Washington Wilderness Coalition v. Hecla*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (“[S]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit.”); *Sierra Club v. Colorado Refining Company*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (where the Judge stated that, “I conclude that the Clean Water Act’s preclusion of the discharge of any pollutant into ‘navigable waters’ includes such discharge which reaches ‘navigable waters’ through groundwater.”) (emphasis added) (citations omitted); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D.Ca. 1988), vacated and remanded on other grounds, *M.E.S.S. v. Perry*, 47 F.3d 325 (9th Cir. 1995), cert. denied, 516 U.S. 807 (1995) (where the Court found that discharges to groundwater could be regulated under the Act if “discharges from the waste pits have an effect on surface waters of the United States” and it could be established that the groundwater was “naturally connected to surface waters that constitute ‘navigable waters’ under the Clean Water Act”).

Agency Response: See essay above.

3.739 Flood Plain

Many of the citizens in United States have sealed in flood plains. They have been governed by State law and local government for their private property, construction, fill and land use. This is just too far reaching, even if there is some hydrologic connection. To consider it possibly "adjacent" based on best professional judgment adds more confusion and litigation from owners of property. The boundary line for jurisdiction has always been the ordinary high water mark, or as in the CWA, a co-operating attitude that does not give EPA control to the primary responsibility within the States jurisdiction.

A more rapid inundating of water does reveal possible gravel deposits. These are mined for mineral material needed for civilization to continue improving the infrastructures within the local areas. It is another area for mission creep and EPA should stop wing to take control over everything that is near the traditional navigable waters and long past the ordinary high water mark. (p. 10)

Agency Response: The agencies disagree that the boundary line for jurisdiction has always been the ordinary high water mark (OHWM). Actually, the OHWM has been used to identify the vertical limits for a tributary – an (a)(5) water under the 1977 regulation. Further, since 1977, the agencies have asserted jurisdiction over adjacent wetlands under paragraph (a)(7) and intrastate, non-navigable, isolated waters under paragraph (a)(3). That said, the agencies have revised the definition of “adjacent” as discussed above. Additionally, the final rule expressly excludes water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water from regulation as waters of the United States.

3.740 Neighboring

This term is probably far more reaching to expand EPA’s jurisdiction than the above two definitions. The reason is it includes waters located in riparian areas or flood plains with hydrological connection to jurisdictional waters and water geographically proximate and waters outside the floodplain or riparian zones if they are reasonably proximate.

It is more like a joke I have seen used of the Forest Service personnel once, it is a description of a small immature child: If it is within view it is mine; if I had it and laid it down and you picked it up, it is still mine; if I wanted it and was only in proximity to it, it is mine; even though you own it and came with it, it is mine. There are more, it had about ten or so quips that seem to fit here concerning “neighboring” waters that in EPA’s best professional judgement, are in some proximity to jurisdictional waters or near something that is adjacent to jurisdictional waters.

It does not seem appropriate to include a definition for neighboring waters with waters of the United States and the definition should also be scrapped. (p. 10 – 11)

Agency Response: The agencies disagree that “neighboring” should be dropped from the definition of adjacent waters. Consequently, the agencies have revised the definition of “adjacent,” in particular the definition of “neighboring” as discussed above.

Medina County Commissioners (Doc. #2718)

- 3.741 We question the practical benefit of expanding the federal jurisdiction for water quality regulatory purposes to areas experiencing localized flooding. The newly defined term "flood plain" within the proposed rule is used to identify waters and wetlands that would be adjacent to "waters 'of the U.S." in order to establish federal jurisdiction. The proposed rule definition ostensibly relies heavily on "moderate to high water flows" rather than the Federal Emergency Management Agency's (FEMA) flood plain definitional terms such as 100 year or 500 year floodplains. The proposed rule could create significant confusion among federal and state agencies, as well as consumers, in the implementation of the recently enacted Homeowner Flood Insurance Affordability Act of 2014. (p. 1)

Agency Response: See essay above.

L. Banks (Doc. #5554.2)

- 3.742 I am also concerned over the potential interpretation which EPA may elect to make using the words "adjacent waters" in lieu of the term "adjacent wetlands". I believe this could allow jurisdiction to extend right up to the water furrows feeding into the headwaters of the field ditches on our farms and would potentially place also under jurisdiction those lands which feed water into the ditches. I have no problems with the EPA and the Corps continuing to protect adjacent wetlands as they have in the past. However, adjacency should not be a criteria since many of the alluvial streams in the South have top banks that are higher than lands farther back in the fields and the adjacent lands will not meet present-day wetlands criteria. The criteria for wetlands should continue to have to meet all three aspects consisting of hydric soils, hydric type vegetation and flood inundation for the 14 consecutive days during the crop season of March through November on an average of one year in two. Quite often the hydrology criteria is not adhered to when defining wetlands under present rules. I don't know what criteria could or would be developed for "adjacent waters" because it was not clearly defined in the new rule. I believe it likely will be interpreted to end up as a land use regulatory rule since by EPA's own statements in the public meeting-to control water in the streams, we will have to control what is flowing off the land. (p. 1)

Agency Response: For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter's assertion that by changing "adjacent wetlands" to "adjacent waters," they have expanded the scope of the definition of "waters of the United States."

The definition of "wetland" that is provided in today's rule is the same as that in the present rule and presented in the 1987 Corps of Engineers Wetlands Delineation Manual and the accompanying Regional Supplements. Further, this definition has been used in field practice since 1987. Further, this definition is outside the scope of today's rulemaking. The agencies note, however, that to determine if a wetland is a federal wetland as defined in the rule and to delineate its boundaries, the agencies plan to continue to use the 1987 Corps of Engineers Wetlands Delineation Manual and the Regional Supplements. Changes to this procedure are also outside of the scope of today's rulemaking.

Alaska State Legislature, Alaska Senate Leadership (Doc. #7494.1)

3.743 We recommend:

Water making up the "shallow subsurface connection" has to occur within the rooting zone of the wetland vegetation.

This definition properly distinguishes between "groundwater" and a "shallow subsurface connection." Clarifying these terms eliminates a degree of regulatory uncertainty. (p. 4)

Agency Response: For adjacent, the agencies have revised the definition in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Because waters that occur beyond the adjacency distance limits may have a significant nexus, the rule also establishes areas in which a case-specific significant nexus determination must be made. See the responses to comments regarding “significant nexus” and “other waters,” as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a case-specific significant nexus determination must be made and responses to comments regarding what types of connections are appropriate to consider in making such determinations. See also the responses to comments on Subsurface Connections in the Adjacency Compendium, for additional information on “shallow subsurface connection.”

City of Pittsfield (Doc. #7629)

3.744 At a minimum, the rule should include the following provisions that are priority concerns for local governments:

Any proposal to regulate waters within a floodplain, riparian, or any other general area must include a specific definition, including the specific boundaries, of the floodplain, riparian, or other area subject to the rule. (p. 1)

Agency Response: See essay above.

Andy Tilton (Doc. #9604)

3.745 Please do not adopt the “clarifications” as presently outlined. There are more questions raised and unanswered with this clarification than are answered. The use of the word ‘floodplain’ is not tied to a particular rainfall event. If it is a mean-annual event, then there may not be much expansion of jurisdiction. Thousands of acres of upland area will require USACE permitting that currently does not if the 100-year-storm event is used to determine the extent of the floodplain. This impact is from a small portion of Southwest Florida. (p. 1)

Agency Response: See essay above.

Pike Peak Area Council of Governments (Doc. #9732)

- 3.746 There is also confusion regarding what would and would not be considered a water of the US, as a consequence of the "significant nexus" test. This is due to the new proposed definitions of "neighboring," "floodplain," and "riparian area." It appears that in certain circumstances, a specific area may or may not be considered a water of the US, depending on whether an aggregate analysis of waters in the region or a discrete analysis of the particular water in question is conducted. This adds ambiguity, and makes future local planning difficult, including the establishment of budgets and the prioritization of environmental mitigation activities. (p. 2)

Agency Response: See essay above.

O'Bannon Cook (Doc. #9878)

- 3.747 Overreach

Under the proposed rule, "adjacent" waters would—by rule—be subject to federal Clean Water Act jurisdiction. The federal agencies retain the regulatory definition of "adjacent" as meaning "bordering, contiguous or neighboring." However, the federal agencies are now proposing for the first time a regulatory definition of "neighboring" as meaning "waters located within a riparian area or floodplain of [a jurisdictional water] ... or waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water." The proposed rule also proposes a sweeping definition of the term "tributary" that would include even dry ditches.

Under these proposed definitions, it is difficult to envision any lands not potentially within the ambit of federal jurisdiction. This broad and overreaching definition will subject landowners to the threat of assertions of federal jurisdiction over their property simply because a lone federal bureaucrat deems them to be. This definition exceeds statutory authorization. (p. 2)

Agency Response: See essay above.. Under the final rule a ditch can only be subject to jurisdiction where it meets the definition of a tributary and is not excluded under paragraph (b). The final rule expressly excludes ephemeral ditches that meet the definition of tributary where that ditch is not a relocated tributary or excavated in a tributary.

Florida Department of Agriculture and Consumer Services (Doc. #10260)

- 3.748 According to the Proposed Rule:

“[t]he term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.”

The agencies further clarify in Section III.G. of the Proposed Rule that for waters within the riparian area “A shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the

vertical flow of water, or in karst systems, especially karst pans.” Section III.G. also states that “A shallow subsurface connection also exists, for example, when the adjacent water and neighboring (a)(1) through (5) water are in contact with the same shallow aquifer.” Only waters outside of the riparian area would be evaluated solely upon a “confined surface hydrologic connection” to be considered jurisdictional under the Proposed Rule.

Based on the example given in the Proposed Rule of a shallow subsurface hydrologic connection, as described above, we conducted a review of the following Geographic Information System (GIS) databases to determine the approximate area in Florida that would meet the proposed definition of “riparian area”:

- 1) Soils with a restrictive layer that impede the vertical flow of water (based on Natural Resources Conservation Service [NRCS] State Soil Geographic Database [STATSGO2] General Soil Map of the United States [2006], to include the following Soil Orders for Florida: Spodosol [spodic horizon] and Alfisol [argillic horizon]).
- 2) Karst systems (based on Closed Topographic Depression [2004] GIS data available from the Florida Department of Environmental Protection [FDEP]).
- 3) The extent of the Surficial Aquifer System (based on the U.S. Geological Survey [USGS] Principal Aquifers of Florida [2003] GIS data layer).

The results of this analysis are depicted on Figure 1.2.2.1-1. Based on these GIS data layers, approximately 55% of the land area in Florida could be considered a “riparian area” under the proposed definition, due to the presence of either a confining layer in the soil, a karst area, or the presence of a shallow aquifer. For reference purposes, the proposed riparian area was overlaid onto the USGS NHD data in Figure 1.2.2.1-1. Pursuant to the Proposed Rule, any waters located within these areas that do not meet any of the specified exemptions, would be considered to be jurisdictional categorically by rule. (p. 15-16)

Agency Response: See essay above.

Anonymous (Doc. #11378)

- 3.749 The second item of clarification is regarding the definition of Floodplain in paragraphs (c)(4). The inundation period is unclear. What is the return period of moderate to high flows? Would this be the 5-year and 10-year event, the 25-year and 50-year event, or is the high flow the 100-year event? As indicated in the Reissuance of Nationwide Permits, February 21, 2012 most areas within 100-year floodplains are not subject to Clean Water Act jurisdiction, because a large proportion of the area within 100-year floodplains consists of uplands. Further definition of the Floodplain would greatly clarify the rule. (p. 1)

Agency Response: See essay above.

K. Boyk (Doc. #11433)

- 3.750 In particular, I support the new definition of neighboring. This definition will help include such features as oxbow lakes, as well as wetlands and other waters located within and adjacent to floodplains, as waters of the United States. In addition, I support

including streams that have a bed, bank, and Ordinary High Water Mark in the definition of waters of the United States. All of these provisions will help protect important wetlands and other waters in the arid state of Montana. (p. 1)

The one area where I would like the rules clarified is in the definition of floodplain. The definition of floodplain under the Clean Water Act should be an ecological definition of floodplain and not one defined by individual EPA/Corps staff. At a minimum, the definition needs to include the 100-year floodplain. However, I would prefer that the definition also include any mapped 500-year floodplain and Channel Migration Zones, or similar mapper features. It makes sense to protect wetlands and other waters within ecological floodplains, because they are rare, and they play an important role in protecting clean water by filtering out sediments, chemicals, and other material that would otherwise enter our waters. In Montana, 54% of our citizens rely on clean surface water as drinking watermaking protection of our surface water particularly important. (p. 1)

Agency Response: The agencies agree with the commenter regarding the benefits of increased clarity regarding the new definitions for changing from adjacent “wetlands” to “adjacent waters” and the definition of “tributary.” The agencies further defined a specific floodplain event as requested. See essay above.

Jack Kerns (Doc. #11860)

- 3.751 In addition, a wetlands “neighboring” a tributary and not physically connected will face a similar issue. Challengers to this type of assertion of jurisdiction will be able to convincingly show that downstream water quality will be unaffected because the wetlands are not even connected to the tributary the flows to a downstream TNW, regardless of whether the tributary is continuous or intermittent. The Rapanos plurality decision stated, in footnote 10, that Riverside Bayview Homes did not hold that neighboring wetlands came within Corps jurisdiction, and the plurality opinion also stated that only “abutting (adjacent)” wetlands were jurisdictional waters. 126 S.Ct. 2208 at 2226. Recommend reconsidering these basis of jurisdiction in a rulemaking context rather than legislation. (p. 1)

Agency Response: The agencies agree with the commenter that the definition of waters of the United States, consistent with the Supreme Court opinions, should be clarified by a rulemaking and believe that they have done so. Additional explanations of how the rule is consistent with the court opinions can be found in the TSD and the Legal Compendium.

Vicki Watson (Doc. #12081)

- 3.752 I support CWA protection for oxbow lakes and for wetlands and other waters within and adjacent to floodplains. Hence I support the new definition of “neighboring” that defines these water features as “waters of the United States.” (p. 1)

Agency Response: The agencies agree with the commenter and the final rule includes these features.

- 3.753 One aspect of the proposed rules that should be revised is the definition of ‘floodplain’. I would argue that the definition of floodplain under the Clean Water Act should be an

ecological and consistent definition of floodplain - and should not be left up to the discretion of an individual EPA/Corps staff. At a minimum, the floodplain definition should include the 100-year floodplain. However, if the 500-year floodplain and/or Channel Migration Zones have been mapped for a particular stream, then these areas should be added to the floodplain definition also. (p. 1)

Agency Response: See essay above.

Tamara Choat (Doc. #13701)

3.754 If the proposed rule cannot be dropped, the following concerns and recommendations should be addressed.

(...) 3. Remove the provision that would make isolated wetlands, ponds and other open waters per se jurisdictional if they are located within a riparian area or floodplain. (p. 1)

Agency Response: See essay above and the preamble for more discussion of how the agency revised the final rule to address concerns over the definition of adjacency in the proposal.

V. Watson (Doc. #13776)

3.755 One aspect of the proposed rules that should be revised is the definition of ‘floodplain’. I would argue that the definition of floodplain under the Clean Water Act should be an ecological and consistent definition of floodplain - and should not be left up to the discretion of an individual EPA/Corps staff. At a minimum, the floodplain definition should include the 100-year floodplain. However, if the 500-year floodplain and/or Channel Migration Zones have been mapped for a particular stream, then these areas should be added to the floodplain definition also.

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: See essay above.

Anonymous (Doc. #13841)

3.756 (...) coordination with FEMA mapping and flood zone designations would be helpful to answer questions such as: is a flood zone considered a wetland? (p. 1)

Agency Response: See essay above.

Pacific Legal Foundation (Doc. #14081)

3.757 Adjacent Waters

Here too, the agencies propose an unprecedented expansion of federal authority under the Clean Water Act. The proposed rule would replace the limited term “adjacent wetlands” with the unlimited term “adjacent waters” and authorize federal regulation of “adjacent waters” by rule. 79 Fed. Reg. at 22207. According to the proposed rule, the Corps and

EPA would regulate not only wetlands abutting traditional navigable waters, as the Supreme Court authorized in *Riverside Bayview*, but any water that is “adjacent” to any other covered water, which the Supreme Court has not authorized. In further disregard for judicial precedent, the proposed rule defines the term “adjacent” to mean “neighboring” which in turn covers “riparian areas,” “floodplains,” and other areas such as water bodies connected by “confined surface” waters or a “shallow subsurface hydrological connection” to other covered waters. *Id.* Even “man-made dikes or barriers, natural river berms, beach dunes and the like” do not cut off federal jurisdiction. *Id.* Therefore, for the first time, the Corps and EPA expressly assert jurisdiction over dry land and shallow groundwater. No court has ever authorized such broad federal jurisdiction under the Clean Water Act and no provision of the Act itself supports such a broad interpretation of agency authority.

The reference to floodplains is particularly odious. The proposed rule leaves it to the agency to decide the requisite frequency of flooding, whether it be 10, 20 or 100 years. And since the floodplain may only contain water during an actual flood, it appears the agencies will assert regulatory authority over the floodplain even when dry, much as they regulate “wetland” areas that are dry but for a few days a year. This alone is the largest land grab in the history of the Nation, encompassing tens of thousands of miles of usually dry land and extending from the lower Mississippi Delta to the smallest streams. The Corps and EPA have already excised the word “navigable” from the term “navigable waters.” They now propose excising the word “waters” from the term as well. This flies in the face of federal law. See *SWANCC*, 531 U.S. at 172 (holding the word “navigable” has to mean something); and, *Rapanos*, 547 U.S. at 716 (holding the Clean Water Act “authorizes federal jurisdiction only over ‘waters.’”).

Additionally, the term “neighboring” is ambiguous and so broad as to eliminate any certainty as to the scope of jurisdictional waters under the adjacency standard. Although the Corps and EPA claim the term “neighboring” has always been subject to “an element of reasonable proximity,” *id.* at 2207, the obvious purpose of such ambiguity is to afford public officials the greatest discretion in determining “waters of the United States” so as to avoid any facial challenge to federal authority. The proposed rule itself witnesses a total disregard for reasonable limits on federal power. The term “neighboring” cannot be seen, therefore, as providing any meaningful constraint on federal enforcement so much as providing free reign to overzealous bureaucrats to regulate what they see fit to regulate.

But this goes too far. Redefining adjacency in this way is a gross distortion of the term’s plain meaning and has no legal basis. In fact, it directly conflicts with the Supreme Court’s decision in *SWANCC*. In that case, the Court held that isolated, nonnavigable, intrastate water bodies were not adjacent and could not be regulated. That decision was based on the observation that such water bodies had no hydrological connection with any “traditional navigable water” and that the regulation of such water bodies would impinge on state powers and raise constitutional questions.

Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in a significant impingement of the States’ traditional and primary power over land and water use. See, e.g., *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 130 L.Ed.2d 245, 115 S.

Ct. 394 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose 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). We thus read the [Clean Water Act] as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.

SWANCC, 531 U.S. at 174.

The term "adjacent" is over broad and should be limited to its ordinary meaning (i.e. abutting). (p. 8-9)

Agency Response: The agencies disagree with the commenter's point that adjacent waters will result in an overall increase in jurisdiction, because the waters that are now covered under this provision were previously covered under the (a)(3) provision of the 1977 regulation. Further, the scientific and legal basis for regulating non-wetland waters as adjacent are explained in the preamble and TSD. The agencies also disagree with the commenter's point that the agencies are asserting jurisdiction over dry land and shallow groundwater; the agencies can only and will only assert jurisdiction over "waters of the United States," where they are not excluded under paragraph (b). In addition, as discussed elsewhere, the agencies have revised the definition of adjacent to provide more clarity, consistency and certainty. The agencies also determined the rule to be consistent with the intent of the CWA, the congressional spirit, and the SWANCC and Rapanos Supreme Court decisions.

The commenter also asserts that "this alone is the largest land grab in the history of the Nation..." The agencies disagree with the commenter's premise, as today's rule is a definitional rule that identifies what waters are and are not subject to the CWA, and therefore does not place any requirements on entities unless they are proposing to pollute or impair such waters. Today's regulation regarding this definition is narrower than the previous (1977) regulation, and thus fewer waters are subject to the CWA than under current regulation. Compared to recent practice -- in which the agencies administered CWA programs in light of 2001 and 2006 Supreme Court decisions -- a conservative estimate of the potential increase in the number of jurisdictional determinations for waters that would now be considered jurisdictional over recent practice is approximately 2.84 – 4.65 percent.

Alliance Coal, LLC (Doc. #14577)

- 3.758 Second, on-site waters in the mining industry could constitute "adjacent" jurisdictional waters because the Agencies have broadly defined the term "neighboring" (as used in the definition of "adjacent") such that every water feature located within the riparian area or floodplain of a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment or tributary could be deemed a "water of the United States ." ²¹³ Furthermore, any water feature that has a "shallow subsurface hydrological connection

²¹³ *Id.* at 22 ,263.

or confined surface hydrologic connection to such jurisdictional water" would also itself be per se jurisdictional.²¹⁴ Given that application of these definitions is left to the "best professional judgment" of agency staff, 10 and that therefore agency staff are free to choose, among other things, which flood interval to use in applying the definition of "neighboring" and "floodplain," many on-site waters that bear little or no connection to downstream "waters of the United States" are likely to be captured. Likewise, insubstantial subsurface hydrologic connections between water features on mine sites and remote, downstream waters of the United States could give rise to claims of Clean Water Act jurisdiction, whether by agency personnel or citizen plaintiffs. (p. 3)

Agency Response: See essay above.

California Association of Winegrape Growers (Doc. #14593)

3.759 Specific examples of improper expansion of jurisdiction include:

- Applies a broadened view of Justice Kennedy's significant nexus standard not only to wetlands but also to all waters including tributaries and isolated waters; (p. 5)

Agency Response: Contrary to the commenter's assertions, consistent with SWANCC and *Rapanos*, the agencies have narrowed the definition of "waters of the United States" compared to the longstanding, existing rule definition. More detail and the bases for this conclusion can be found in the preamble and TSD.

Maine Department of Environmental Protection (Doc. #14624)

3.760 Per se jurisdictional determinations eliminate the requirement that there be a physical or scientific connection or nexus to traditional navigable waters.

One of the results of the proposed definition is the elimination of the requirement that a nexus be established when determining whether "other waters" are jurisdictional. Under the 2008 guidance, waters were jurisdictional if they were "traditionally navigable waters," wetlands adjacent to TNWs, or other waters that had an established nexus to TNWs. This test ensured that there was a direct and scientific connection between TNWs and water subject to federal regulation. This assurance of a scientific connection has been eliminated in the proposed rule.

Under the proposed rule, ephemeral or intermittent streams would be per se jurisdictional, even without a determination that there is a connection to TNWs. Under the proposed rule, waters which may lack relative permanence but are "adjacent" to TNWs would be per se jurisdictional, without a determination that they have a physical or scientific connection to jurisdictional waters. DEP requests that case-specific determinations be conducted to ensure a physical and scientific basis for each jurisdictional determination. (p. 4 – 5)

Agency Response: The agencies disagree with the commenter. For both "tributaries" and "adjacent waters" the agencies performed individual assessments for each category and determined based on a review of the science, the agencies'

²¹⁴ *Id.*

expertise and experience, the intent of the CWA, and the law, that each category, as defined, alone or in combination with other covered respective waters, in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” as a class and there is no need for any additional analysis.

However, the agencies also determined that waters that occur beyond the adjacency distance limits may have a significant nexus, and the rule in this case establishes areas in which a case-specific significant nexus determination must be made. See the responses to comments regarding “significant nexus” and “other waters,” as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a case-specific significant nexus determination must be made and responses to comments regarding what types of connections are appropriate to consider in making such determinations.

The Mosaic Company (Doc. #14640)

- 3.761 Paragraph (a)(6) would include all “waters” instead of all “wetlands” as written in previous regulation (79 Fed. Reg. at 22,206). This revision is explained that prior to SWANCC, adjacent non-wetland waters were often jurisdictional under the “other Waters” category (79 Fed. Reg. at 22,207). The SWANCC decision, however, rejected that practice and held that regulation of such isolated waters and wetlands was beyond the scope of the agencies’ authority under the Act. Consequently, the inclusion of adjacent non-wetland waters results in an expansion of jurisdiction. (p. 28)

Agency Response: For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.”

Contrary to the commenter’s assertions, the agencies determination is consistent with SWANCC and *Rapanos*. More detail and the bases for this conclusion can be found in the preamble and TSD.

- 3.762 The proposed definitions of significant nexus in the “Other Waters” category will result in more waters found as jurisdictional than under current practice. The definitions of “either alone or in combination with other similarly situated waters in the region” provides a catch all for any water that is not included in paragraphs (a)(1) through (a)(6) of the proposed rule. This section refers to hydrologically isolated waters and allows for them to be assessed for jurisdictional purposes in aggregate instead of individually. See comment 4.c. The SWANCC decision, however, rejected that practice and held that regulation of such isolated waters was beyond the scope of the agencies’ authority under the Act. Consequently, the inclusion of adjacent non-wetland waters results in an expansion of jurisdiction. (p. 28)

Agency Response: Contrary to the commenter’s assertions, today’s rule is consistent with SWANCC and *Rapanos* decisions. More detail and the bases for this conclusion can be found in the preamble and TSD. For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope

of the definition of “waters of the United States.”

Clean Water Action (Doc. #15015)

3.763 Adjacent Waters and Wetlands

Comment request: While the agencies’ best professional judgment has always been a factor in determining whether a particular wetland is “adjacent” under the existing definition, the agencies recognize that this may result in some uncertainty as to whether particular water connected through confined surface or shallow subsurface hydrology is an “adjacent” water. The agencies therefore request comment on whether there are other reasonable options for providing clarity for jurisdiction over waters with these types of connections.²¹⁵

We strongly support the agencies’ decision to categorically include all adjacent waters and wetlands as “waters of the U.S.” As summarized in EPA’s draft Connectivity Report, waters and wetlands adjacent to streams and rivers clearly have a strong influence on the physical, chemical and biological integrity of those water bodies. Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost.

Further, we agree with the SAB panel’s assessment that “adjacency” of wetlands and waters not be limited by geographical proximity to a navigable water or by a hydrological surface connection to a navigable water.²¹⁶ We also agree with the SAB’s recommendation that adjacency determinations should be based on functional relationships, not geographic distance, as distance by itself is not a good indicator of connectivity.²¹⁷ The definition of “adjacency” is critically important because how wetlands and waters are determined to be adjacent to categorically jurisdictional waters will delineate where the category of “other waters” begin. (p. 5 - 6)

Agency Response: See essay above.

- 3.764 **Comment request:** When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone). The agency’s request comment on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water.²¹⁸

We urge the agencies to consider evidence of biological and chemical connectivity when evaluating adjacency and not to rely solely on whether or not a wetland or water is within a floodplain of a navigable water for it to be considered adjacent. While flooding is one measure that should be considered to determine if a particular water is adjacent to

²¹⁵ 79 Fed. Reg. at 22208 (April 21, 2014)

²¹⁶ SAB Review Memo at 3.

²¹⁷ *Id.*

²¹⁸ 79 Fed. Reg. at 22209 (April 21, 2014).

another, it should not be the sole determining factor. If the agencies decide to use a flood plain analysis to determine whether or not a wetland or water is adjacent to a jurisdictional river or stream, they should use a 100-year flood plain metric. The existence of a biological or chemical connectivity between a wetland or water and jurisdictional stream or river should also be considered when determining adjacency. For instance, certain amphibian species migrate to and from vernal pools or other wetlands to jurisdictional rivers. And certain wetlands function as chemical “sinks,” capturing nutrients or other contaminants before these pollutants can be transported to downgradient streams or wetlands. (p. 6 – 7)

Agency Response: See essay above. Because waters that occur beyond the adjacency distance limits may have a significant nexus, the rule also establishes areas in which a case-specific significant nexus determination must be made. See the responses to comments regarding “significant nexus” and “other waters,” as well as the preamble and TSD, for the agencies’ bases for designating the waters for which a case-specific significant nexus determination must be made and responses to comments regarding what types of connections are appropriate to consider in making such determinations.

The Heritage Foundation (Doc. #15055)

3.765 Definition of “Adjacent” is Inconsistent with Supreme Court Precedent

Justice Kennedy’s concurrence in *Rapanos* only held that wetlands can be categorically jurisdictional when adjacent to navigable-in-fact waters. Once again, the agencies acknowledge in the proposed rule that they are seeking to go beyond Justice Kennedy’s concurrence in *Rapanos* and expand their regulation of waters:

While the issue was not before the Supreme Court, it is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy’s opinion makes clear that a significant nexus is the touchstone for CWA jurisdiction. Justice Kennedy also stated that the agencies could through regulation or adjudication identify categories of waters that “are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.”²¹⁹

Therefore, the agencies have proposed to cover adjacent waters, not just adjacent wetlands. They are asserting that “adjacent” waters are categorically jurisdictional in the rule based on a report that had not been finalized or even reviewed yet by the Scientific Advisory Board.

The sheer scope of the “adjacent” definition exceeds anything Justice Kennedy envisioned in his concurrence. As discussed above, he did not envision the regulation of all tributaries. Further, as he wrote, “**in some instances**, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a “navigable water” under the Act”²²⁰ [Emphasis added]. The agencies are reading the case as if he gave the green light for virtually every instance.

²¹⁹ *Federal Register*, Vol. 79, No. 76 (April 24, 2014), p. 22209

²²⁰ *Rapanos v. U.S.*, 547 U.S. 715, 767.

Under the proposed regulations, "The term **adjacent** means bordering, contiguous or neighboring. 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 are "adjacent waters."²²¹

The term neighboring, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.²²²

If there were a “water” in a riparian area or floodplain, it would be categorically jurisdictional. The size and scope of these areas have not been clarified in the proposed rule.

Further, adjacent waters under the proposed rule can be considered categorically jurisdictional based on a hydrologic connection. Justice Kennedy rejected a hydrological connectivity approach to establish jurisdiction, “mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.”²²³

As the Congressional Research Service explained, “Each of the foregoing views – the plurality’s and Justice Kennedy’s – rejects the hitherto prevailing view that any hydrological connection to a traditionally navigable water, no matter how distant, is sufficient for coverage.”²²⁴ (p. 5 - 6)

Agency Response: Contrary to the commenter’s assertions, the rule is not based on a “mere” hydrologic connection between waters. More detail on how the rule is consistent with case law can be found in the preamble and TSD. For the reasons discussed in Section 1 of the TSD, the agencies disagree with the commenter’s assertion that by changing “adjacent wetlands” to “adjacent waters,” they have expanded the scope of the definition of “waters of the United States.”

The agencies disagree with the commenter’s assertion that changing “adjacent wetlands” to “adjacent waters” was not reviewed by the Science Advisory Board. In fact, the Science Advisory Board was supportive of this change, see TSD.

The agencies also performed a significant nexus evaluation for the class, and determined that the class had a significant physical, chemical, or biological nexus with the downstream traditional navigable waters, interstate waters, or the territorial seas based on the nine relevant factors presented in paragraph (c)(5) of today’s rule.

Sinclair Oil Corporation (Doc. #15142)

3.766 Similarly, the broad and sweeping definition of adjacent waters in the proposed rule

²²¹ *Federal Register*, Vol. 79, No. 76 (April 24, 2014), p. 22263

²²² *Federal Register*, Vol. 79, No. 76 (April 24, 2014), p. 22263

²²³ *Rapanos v. U.S.*, 547 U.S. 715, 784.

²²⁴ Robert Meltz and Claudia Copeland, "The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond," Congressional Research Service Report for Congress, September 3, 2014, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf>.

allows waters to be deemed jurisdictional merely because they are located within the ill-defined boundaries of the "riparian area" or "floodplain" of a tributary. 79 Fed. Reg. 22,205. The extent of the geographic area that could fall within "riparian area" is almost unlimited, because the "riparian area" is defined to include anything that "influence[s] the exchange of energy and materials between [the terrestrial and aquatic ecosystems]." Id. at 22,263. Similarly, the geographic area that could be considered the "floodplain," under the proposed rule, extends as far as evidence of "sediment deposition from [floodwaters] under current climatic conditions" can be identified.

These definitions allow categorical jurisdictional determinations to include waters located hundreds of miles from the nearest traditional navigable water, interstate water, or territorial sea, with which the rule presumes the "tributary" or "adjacent water" has a significant nexus. As a result, relying solely on the definition of "tributary" and "adjacent waters" provides a legally insufficient substitute for a case-specific evaluation of whether a particular water actually possesses a significant nexus to a navigable water.

Since the proposed rule would include as *per se* "waters of the United States" waters for which Justice Kennedy has already determined no significant nexus exists, the proposed rule's treatment of tributaries and adjacent waters is unsupported and in error. Simply put, any way they are analyzed, the categorical definitions contained in the proposed rule allow the definition of "waters of the United States" to be extended far beyond the limits set by the Court in *SWANCC* and recognized by both the plurality and Justice Kennedy in *Rapanos*. (p. 8)

Agency Response: See essay above and prior response.

Landmark Legal Foundation (Doc. #15364)

- 3.767 EPA and the Corps will also have authority to regulate non-navigable, non-adjacent wetlands. "Riparian areas" for example, are not, under the broadest possible interpretation, waterways. "[T]ransitional areas between aquatic and terrestrial ecosystems" are not navigable and have not connection to the statutory limitations. They are, therefore, excluded from classification as "waters of the United States"

The Agencies' use the term "neighboring" to assert jurisdiction to regulate waters located within the riparian area or floodplain of (traditional waterways). 77 Fed. Reg. at 22,207. This construction gives EPA and the Corps authority to regulate well beyond its jurisdiction over navigable waterways. (p. 10)

Agency Response: See the Compendium and the TSD for a discussion of how this rule is consistent with the statute and case law.

National Association of Manufacturers (Doc. #15410)

- 3.768 The key terms of "floodplain" and "riparian area" (used to establishing "adjacent" waters that are jurisdictional) are simply not defined in a way that can be understood prior to agency enforcement of the terms. (p. 12)

Agency Response: See essay above.

Countrymark Cooperative Holding Corporation, LLC; Countrymark Refining and Logistics,

LLC (Doc. #15656)

3.769 ~~All waters, including W~~wetlands, adjacent to a water identified in paragraphs (s)(I) through

(5) of this section; and

(7) On a case-specific basis, other waters, including wetlands and waters above the headwaters" that provide sufficient flow to that those waters alone, or in combination with other similarly situated waters, located in the same region, have a significant nexus to a water identified in paragraphs (s)(I) through (3) of this section to carry pollutants to such a water at levels that could degrade the quality of such waters²²⁵ (p. 14)

(u) Definitions -

(1) Adjacent. The term adjacent means bordering, contiguous or neighboring. ~~Waters, including W~~wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent ~~wetlands~~Waters." This term is used to define the landward limit of a water of the United States and includes wetlands that are inseparably bound up with a

(2) Neighboring. ~~The term neighboring, for purposes of the term "adjacent" in this section, means includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section such that the wetlands directly connect to such waters, or would be directly connected but for man made dikes or barriers, natural river berms, beach dunes and similar obstructions.~~²²⁶ ~~or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.~~

(3) Riparian area. ~~The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between these ecosystems.~~

(4) Floodplain. ~~The terms 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 water flows. (p. 15-16)~~

Agency Response: The Agency did not adopt the commenters' approach as it would, as demonstrated in the preamble and TSD, exclude many waters that have a "significant nexus" to traditionally navigable waters, interstate waters and the territorial seas.

City of Jackson, Mississippi (Doc. #15766)

3.770 The proposed rule also states that a wetland may be considered "neighboring" and thus "adjacent" if the ditch connects a wetland to a tributary. Id. When combined with the automatic jurisdictional grant for the previously-described tributaries, it becomes unclear

²²⁵ This is the approach taken in the Corps' 1975 regulations. This could include ephemeral water - but that water has to reach a WOTUS. But it cannot include any water that is expressly excluded.

²²⁶ 42 Fed. Reg. at 37,129. (July 19, 1977)

how currently exempt ditches would be distinguishable from jurisdictional ditches. Thus, rather than clarifying, the proposed rule will, at best, add to the confusion and uncertainty surrounding the meaning of "waters of the United States." particularly in regards to streets, gutters, roadside arid drainage ditches, and flood channels, as well as stormwater infrastructure. Worse, it could lead to the unnecessary and unjustified regulation of many more ditches and stormwater structures. (p. 2)

Agency Response: Under the final rule, a ditch can only be subject to jurisdiction where it meets the definition of a tributary and is not excluded under the revised paragraph (b). For example, the final rule expressly excludes ephemeral ditches that meet the definition of tributary where that ditch is not a relocated tributary or excavated in a tributary.

B. Blouse (Doc. #16240)

3.771 The EPA states that the New Rule does not broaden their jurisdiction because all specified bodies of water have been protected before. However, by including waters on the protected list that are adjacent to navigable bodies without eliminating the significant nexus clause, the EPA appears to be expanding its power. This contributes substantially to the opposition that the New Rule faces. If the EPA is to gain support for their rule, they must clearly dictate which bodies of water fall under the reach of the Clean Water Act. Thus, it is necessary that they remove the case-specific guidelines in the nexus clause. This could be done by implementing numerical restrictions rather than qualitative assessments on nexus waters. For example, if a body of water is linked to a navigable body of water for a certain number of days in a year, or if the body of water transfers a specific amount of a pollutant to a navigable body, it could then be considered property of the United States. By implementing quantitative guidelines, the EPA's power would be clearly defined and opponents would have less concern about potential overreach. (p. 1)

Agency Response: The agencies have retained only in specified circumstances the current practice of case specific significant nexus determinations. The agencies have also provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity. The agencies' interpretation of the Supreme Court rulings in *SWANNC* and *Rapanos* is also addressed in the Technical Support Document (TSD). The purpose of the final rule is to establish jurisdiction of the agencies over surface waters for purposes of Clean Water Act regulation (for example, permit requirements), not for determining what is property of the US.

San Bernadino County, California (Doc. #16489)

3.772 ADJACENT WATERS (TYPE II OTHER WATERS), BERMS AND BARRIERS IN THE UNBANIZED ENVIRONMENT :

The proposed Rule states that "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 are 'adjacent waters'." ²²⁷ The DPW is concerned that by branding all such waters

²²⁷ Federal Register, at 22207(G).

separated by berms, dikes, and other man-made-dikes as "adjacent waters" the proposed regulations suggest that such resources are subject to CWA jurisdiction.

Nationwide, flood control infrastructure and systems are critical components of urban growth and development. Over the last 100 years or more, flood control facilities have fundamentally changed the hydro-geomorphic landscape of many watersheds.

Flood control facilities include channels and basins specifically designed and constructed to convey the 50 to 100-year storm event flows to downstream navigable waters, or to territorial seas. Frequently, in the arid Southwest these same facilities often also serve, out of necessity, as groundwater recharge facilities. In addition to these aforementioned facilities, remnant channels, recharge basins, etc. may also be located proximately to flood control systems but are completely isolated hydrologically from the conveyance channels and, therefore, should not have a "significant chemical, physical or biological" nexus to jurisdictional waters. However, the language of the proposed Rule might be interpreted to establish jurisdiction over some of these features. Groundwater recharge basins, for example, receive diverted "flood waters" and therefore serve a flood prevention function affecting downstream navigable waters. Currently such recharge basins are not generally considered themselves jurisdictional because they do not discharge or return surface flow to downstream jurisdictional waters. However, a broad interpretation under the proposed statute might result in these facilities being determined as "jurisdictional" because they do actually prevent flood waters from reaching downstream.

With respect to "adjacent waters" (Type II other waters), the DPW is concerned that the scientific data and proposed jurisdictional analysis and rules evaluate watershed systems from a dominantly pristine, natural perspective and fail to consider the significant structural changes to the watershed "landscape" that have resulted from decades of urban and flood control infrastructure development. (p. 9-10)

Agency Response: Because "bordering" and "contiguous" waters are not separated by the features described by the commenter, whether the waters at issue are "waters of the U.S." would be governed by the definition of "neighboring." The agencies have revised the definition of "adjacent," in particular the definition of "neighboring," in response to comments like this one seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today's rule as well as in the TSD.

The final rule also expressly excludes water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; stormwater control features constructed to convey, treat, or store stormwater that are created in dry

land; and wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling from regulation as waters of the United States. All of the exclusions are listed in paragraph (b) of today’s rule.

Red Cliff Band of Lake Superior Chippewa (Doc. #16572)

- 3.773 The Red Cliff Band of Lake Superior Chippewas supports clarifications to which the EPA regards as a “water of the United States” – more specifically, 1) all tributaries of waters described in subsections 1 – 4 of Section (s) of the rule, and 2) wetlands and waters adjacent to those waters and their tributaries. Tribal technical staff appreciates the additional definitions provided in the proposed rules to increase its clarity. However, it is still unclear why the hydrologic connection referred to in the definition of “neighboring” should be restricted only to shallow subsurface connections. Groundwater and surface water are interconnected. Groundwater becomes surface water when it seeps or flows out into a wetland, spring, river, or pond, and therefore worth considering integrating into the definition of hydrologic connection.

The ceded territory utilized by Red Cliff Band of Lake Superior Chippewas in Minnesota, Michigan and Wisconsin, where tribal members exercise their treaty rights, are water rich areas. Not all of the waters the upper Great Lakes and Mississippi River basins flow directly to traditionally navigable water, interstate water, or the territorial seas. The most common type of lake in the state of Wisconsin, a state of many thousands of lakes, is a seepage lake, which has no outlet. These lakes collectively (in size, in number, and in hydrologic connection to groundwater and ultimately to surface waters) are likely to play an important role in the chemical, physical and biological integrity of downstream waters as well as tribal membership use of the waterbody.

As Vice-Chairman of the Red Cliff Band of Lake Superior Chippewas, I support efforts that continue to protect on and off-reservation tribal natural resources and treaty rights. Federal agencies must continue to uphold trust obligations to protect these reserved rights. This includes the obligation to consult when jurisdictional determinations are made in the ceded territories described above, as tribes have specific cultural and historical knowledge and uses in regards to waterbodies that would aid in the determination of significant nexus. (p. 1 – 2)

Agency Response: See essay above and response to comments on Subsurface Connections in the Adjacency Compendium. The issue of tribal consultation on specific significant nexus analyses, while important, is beyond the scope of this rule.

D. Gillham (Doc. #16906)

- 3.774 4. Adjacent:

A. The Agencies should recognize that types, magnitudes, and timing of connections vary. Significant nexus should be clearly defined and reasonably applied.

B. The biological connection needs better definition. The only connection between two bodies of water could be migrating waterfowl; no reason for a 404 permit.

C. Groundwater may indicate connectivity, but not regulated. This is a source of ambiguity and a potential open door for future regulation of groundwater. (p. 2)

Agency Response: See prior response.

Arizona Rock Products Association (Doc. #17055)

3.775 The "Floodplain" Definition is Vague and Overly Broad.

The definition of floodplain should be refined to clarify that "floodplain" for purposes of the Clean Water Act does not mean the floodplain as that term is used by the Federal Emergency Management Agency. Rather, the term "floodplain," for purposes of the waters of the U.S definition, must be limited to areas which have a significant nexus. Accordingly, it should be limited to the area immediately adjacent to a traditionally navigable water or interstate water with a constant and significant hydrological connection with the traditionally navigable water or interstate water. Evidence of a consistent hydrological connection should be reflected by the fact the floodplain has such conditions that under normal circumstances support a prevalence of vegetation typically adapted for life in saturated soil conditions and thus such vegetation is consistent with the vegetation supported by the wetlands or riparian areas between the floodplain and the traditionally navigable water or interstate water. (p. 5)

Agency Response: See essay above.

Atlantic Legal Foundation (Doc. #17361)

3.776 A prime example of the proposed rule's increased ambiguity is how the category of "adjacent wetlands" for per se jurisdiction will be replaced with the term "adjacent waters." It will define "adjacent waters" as "wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas." (emphasis added).²²⁸ The highlighted terms are malleable and will accord the agencies greater discretion while providing little clarity for property owners. Similarly, the proposed rule will expand the modifier "adjacent," originally codified as meaning "bordering, contiguous, or neighboring."²²⁹ The proposed rule will broaden this definition by interpreting "neighboring" to include waters with a shallow subsurface hydrologic connection to a traditionally navigable water, within "reasonable proximity."²³⁰ It will be difficult and costly for property owners to ascertain whether an isolated water body on their land contains a shallow subsurface hydrologic connection to a jurisdictional water, much less whether it is within "reasonable proximity." (p. 3)

Agency Response: The agencies disagree with the commenter's point that adjacent waters is overly broad, because the waters that are now covered under this provision were previously covered under the (a)(3) provision of the 1977 regulation. The scientific and legal basis for regulating non-wetland waters as adjacent are explained in the preamble and TSD. In addition, as discussed elsewhere, the agencies have revised the definition of adjacent to provide more clarity, consistency

²²⁸ *Id* at 22207.

²²⁹ 33 C.F.R. § 328.3(c) (1993).

²³⁰ See Definition, *supra* note 1, at 22207.

and certainty. See essay above.

A. Cilimburg (Doc. #17667)

- 3.777 In particular, I strongly support the new definition of “neighboring.” This definition will help include such crucial features as oxbow lakes, as well as wetlands and other waters located within and adjacent to floodplains, as “Waters of the United States.” [...]

I also think the EPA should improve the definition of floodplain. Under the Clean Water Act, there should be an ecological definition of floodplain—and not one defined by individual EPA/Corps staff. At minimum, the definition needs to include the 100-year floodplain. Going less than the 100-year floodplain makes no scientific sense. Using a smaller 10- or 20-year floodplain would be disastrous because these floodplains have not been mapped, so relying on them would mean that decisions about floodplains would be left up to individual EPA/Corps staff—which is subjective and can change in different states and offices. In Montana, only 5% of our 100-year floodplains have been mapped (and 10 or 20-year floodplains have NOT been mapped). More and more land managers, planners and scientists are turning to more sound hydrologically-sound definition that includes any mapped 500-year floodplain, Channel Migration Zones, or similar mapped features. These should be included in the definition. We need to protect wetlands and “other waters” within ecological floodplains; they are rare, and they play an important role in protecting clean water by filtering out sediments, chemicals, and other material that would otherwise enter our waters. 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: See essay above.

K. Wheatley (Doc. #18452)

- 3.778 This firm represents Tsakopoulos Investments (Tsakopoulos), a land development company located in Sacramento, California. We have reviewed the Corps/EPA proposed rule defining the scope of waters protected by the Clean Water Act. While Tsakopoulos supports the agencies’ goal of increasing predictability and consistency in application of the CWA, we are concerned that certain aspects of the proposed rule will, in fact, be unworkable or, at the very least, extremely difficult to implement. Specifically, we have concerns with the Corps’ proposed approach for establishing “adjacency” of a water feature to a traditionally navigable water body, as discussed below.

In the existing version of the CWA, “adjacent” is defined as “bordering, contiguous or neighboring.” The proposed rule defines the term “neighboring” to include waters located in the riparian area or floodplain of any other jurisdictional water, or waters with a confined surface or shallow subsurface hydrologic connection to such a jurisdictional water. The terms “riparian area” and “floodplain” are not defined in the rule. Since there is no universally-accepted scientific classification for these terms, delineating the geographic limits of a “riparian area” and/or “floodplain” is likely to be a challenging and time-consuming exercise. In addition, allowing the use of a “shallow subsurface hydrologic connection” to establish “adjacency” between a water and another “traditionally” jurisdictional water is not practical. To prove (or disprove) the existence of this connection, applicants will likely have to engage in speculative and costly drilling.

Reliance on a surface connection is a more clear and workable approach. (p. 1)

Agency Response: See essay above.

S. Newell (Doc. #18547)

3.779 Please clarify what a floodplain is using 500 years as the base line. (p. 1)

Agency Response: Although the comment is not clear, the agencies believe the commenter is asking what a 500-year flood event would be as a base line. A 500-year flood event is a flood event that has a 0.2% probability of occurring in any given year. See essay response above for changes made to the rule with respect to the use of floodplains to determine jurisdiction.

Anonymous (Doc. #18770)

3.780 #1. Regulation of isolated wetlands should be completed though its own regulation instead of trying to define a way into regulating isolated wetlands. If they are important enough then they should warrant their own protections without trying to re-define or clarify our way into protecting them. (p. 1)

Agency Response: The rulemaking is designed to clarify a key term that establishes jurisdiction and thus provides critical protections under the regulatory programs of the Clean Water Act.. For response that are explained in detail in the preamble and TSD, the agencies have retained only in specified circumstances the current practice of case specific significant nexus determinations for the (a)(7) and (a)(8) categories of the rule. The agencies have also provided revised and expanded definitions within the rule and the preamble that they believe provide the desired clarity.

3.781 #4 Floodplain - As an alternative to the recommendation that the definition of floodplain as used within the term neighboring be revised. Using floodplains to determine neighboring areas does not work in a coastal and tidal environment, where floodplains are based upon flooding from storm surge events. At a minimum this should be clarified or removed for coastal regions as it does not apply. (p. 1)

Agency Response: See essay above. The final rule definition of “neighboring,” specifically addresses coastal areas.

R. McKinnon (Doc. #18845)

3.782 I support the new definition of “neighboring.” This definition will help include features such as oxbow lakes, as well as wetlands and other waters located within and adjacent to floodplains, as “waters of the US.” (p. 1)

Agency Response: The agencies agree with the commenter’s view that wetlands and other waters serve important functions and the final rule reflects so.

3.783 However, I would like to see the rules also clarify the definition of floodplain. This should be an ecological definition and not one defined by the EPA/corps staff. At a minimum the definition needs to include the 100-year floodplain. I would prefer that the definition also include any mapped 500-year floodplain and Channel Migration zones. It makes sense to protect wetlands and “other waters” within ecological floodplains

because they are rare and they play an important role in protecting clean water by filtering out sediments, chemicals and other material that would otherwise enter our waters. (p. 1)

Agency Response: See essay above.

J. Dillard (Doc. #18907)

3.784 You state:

Adjacent waters, including those located in riparian and floodplain areas, serve an important role in the integrity of traditional navigable waters, interstate waters, and the territorial seas because they also act as sinks for water, sediment, nutrients, and contaminants that could otherwise negatively impact traditional navigable waters, interstate waters, and the territorial seas.

Comments:

Not all adjacent waters act as sinks if they are concreted. Flood channel aspects need to be addressed in relationship to urban development in this regard. Paved areas create additional floodplain challenges. (p. 4)

Agency Response: It is not clear what the commenter's concern is. It appears that the commenter is thinking about concrete lined channels, which would potentially fall under the definition of tributaries. Certain stormwater control conveyances are excluded under the rule. Other issues pertaining to flood management are beyond the scope of this rule.

Kevin and Nicole Keegan (Doc. #19128)

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

- "All interstate waters, including interstate wetlands;"
 - Water could end up being in one state from another with no way of verifying whether it has come from the Great Lakes, the Mississippi River or coastal waters. (p. 2)

Agency Response: The final rule does not change the existing regulation's provision that defines "waters of the United States" to include "interstate waters, including interstate wetlands," and also included, for example, tributaries to interstate waters. The language of the CWA is clear that Congress intended the term "navigable waters" to include interstate waters, and the agencies' interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history. Additional information on the legal basis for asserting jurisdiction over interstate waters is available in the preamble to today's rule and the TSD.

J. R. Dorney (Doc. #19235)

3.786 The rule says that a "shallow groundwater connection" can be used to exert jurisdiction for a wetland which we believe is logical and supported by the scientific literature.

However, a more precise definition is needed in order to exclude longer, deeper connections. I suggest a more precise temporal limit of one year. In other words, if a shallow connection can be shown that will result in water moving from the wetland to a downstream connection in less than a year under normal rainfall conditions, then the wetland should be considered to have a significant nexus to the navigable water. This criterion could be met through hydrogeologic modeling. Having a definitive standard will assist in making this determination clearer. (p. 2)

Agency Response: See essay above, as well as the preamble to today’s rule and the TSD for more information on the tools to assess subsurface flow.

- 3.787 I believe that the definition of "floodplain" is too narrow since it is explicitly restricted to active (moderate to high flow) floodplains. Relict floodplains are very common in North Carolina as a reflection of past land use in the watershed. However even these apparently disconnected floodplains are connected at high flow regimes often related to tropical storms and hurricanes in the southeastern United States. A related problem with the proposed definition is how "high" does high flow need to be? I suggest that the term "geomorphic floodplain" is a more robust definition and more ecologically valid. I have had extensive experience using this definition in NC from our stream identification and stream functional assessment methods and have found that it is readily discernible by field agents and the public. (p. 2 – 3)

Agency Response: The agencies have revised the definition of “adjacent,” in particular the definition of “neighboring,” in response to comments seeking greater clarity, consistency, and certainty. The rule no longer includes a provision defining “neighboring” based on a surface or subsurface hydrologic connection or provides that all waters within “floodplains” and “riparian areas” are “adjacent.” Instead, the rule now provides specific distance limits for “neighboring” waters. In addition, where the definition continues to use the term “floodplain,” it specifies the “100-year” floodplain. The bases for these revisions to the proposed rule are discussed in the preamble to today’s rule as well as in the TSD.

Western States Water Council (Doc. #19349)

- 3.788 C. Groundwater

The Council understands that the draft rule would establish jurisdiction for waters that have a “shallow subsurface hydrologic connection” with jurisdictional waters. Congress did not intend for the regulatory reach of the CWA to apply to the management and protection of groundwater.

The Council understands that the preamble for the draft rule may include disclaimers that the rule is not intended to cause the shallow subsurface connections themselves to become jurisdictional, and that such connections would not be considered Waters of the United States (WOUS) in and of themselves. The Council supports the intent of such language. However, to fully clarify that groundwater is not subject to CWA jurisdiction, the text of the rule itself should expressly exclude groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters. (p. 3)

Agency Response: The final rule expressly excludes groundwater, including

groundwater drained through subsurface drainage systems, from regulation as waters of the United States. However, even though groundwater is expressly excluded, shallow subsurface hydrologic connections between surface waters remain relevant in determining significant nexus for surface waters since the science demonstrates that these connections can have important effects on downstream waters. See the Shallow Subsurface Essay for more information on this topic.

California Central Valley Flood Control Association (Doc. #19571)

- 3.789 Another unclear, but likely expansive area of new federal jurisdiction is floodplains. The proposal defines floodplains as, as “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 water flows.” Determination of whether a floodplain falls under the jurisdiction of the Federal government may be decided by the “best professional judgment and experience” of agency staff.²³¹

In other words, the determination of whether a water body lies within Corps or EPA jurisdiction will ultimately rest with the Corps or EPA. Because the scope of the floodplain also remains undefined, it is unclear what flood level is contemplated – 100-year storm, 500-year storm, Ark storm. The larger the storm, the more land covered by the regulations, because nearly all of the Central Valley has experienced flooding or at least standing water at some point in modern recorded history.

In this area of the regulation, you have asked commenters to offer an alternative standard that could be applied. In California, as in other areas, existing definitions such as those already used by FEMA and the National Flood Insurance Program have guided many State policies and local investments. For example, these definitions already are referenced within the Central Valley Flood Protection Board’s Title 23 rules, which guide permitting and other flood control matters in California’s Central Valley. Adoption of a different and apparently arbitrary definition of floodplain will cause confusion. It will almost certainly be implemented inconsistently, leading to arbitrary and capricious results. As shown by the FEMA experience, making an accurate determination takes substantial time and effort if done correctly. Staff will be overwhelmed by these determinations, and will necessarily be less responsive to other permitting requests, or these requests will be placed in limbo while determinations are being made.

Because of these potentially uneven and detrimental results, the Association recommends deletion of this new definition of floodplains altogether, due to the availability and common usage of existing Federal definitions, or codification of the floodplain definition used for the National Flood Insurance Program. (p. 5)

Agency Response: See essay above.

- 3.790 C. The creation of a "seepage nexus" between waters separated by a levee would immediately stymie land-side levee projects historically not under Federal jurisdiction.

Of particular concern for the Association and its members is the proposal to treat waters separated by a levee or other manmade barrier as "adjacent" waters, even if those waters otherwise lack any kind of nexus. Without allowing local districts the opportunity to

²³¹ 79 FR 22208

present evidence showing otherwise, the proposal would treat all waters on either side of a levee as "adjacent," even where no chemical or biological nexus exists. The science relied on by the proposal seems to be based on a few examples, such as the finding that some levee-toe water bodies "can" fix nitrogen. Even if true, this does not present enough evidence to create an irrefutable presumption of a significant and measurable nexus.

Many Central Valley levees, and nearly all Delta levees, have a "waterside" and a "landside," with the water side levee toe always submerged in the river. This design profile is somewhat unique to California Delta and Central Valley levees. Currently, most landside projects do not require permitting. However, many levees in the Delta have drainage ditches or irrigation ditches near them. Because of the simple presence of these ditches and conveyances, many, many more landside projects would become jurisdictional. Again, this would penalize Central Valley flood control agencies because of a simple design profile particular to Central Valley levees.

As a result of this determination, drainage ditches and irrigation ditches that have not historically been considered jurisdictional appear to be included in the definition of "adjacent" waterways. Thus, their construction, maintenance, and drainage activities would suddenly fall within the jurisdiction of the Clean Water Act and related permits. Even more worrisome, the apparent inability to rebut the levee presumption means that no amount of scientific, hydrological, or other evidence will suffice to show that a reclamation district, fanner, or local government does not discharge into an adjacent waterway when maintaining a drainage ditch. This would even include ditches alongside the newest "super fat" levees, which may be 50 feet or more across the crown. (p. 5 – 6)

Agency Response: The agencies disagree with the commenter regarding levees. The preamble to the rule and the TSD reference levees as similar features to dikes, berms, and the like and indicates that these features do not break the important connections that the adjacent waters have on downstream traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with other adjacent waters. The agencies would like to further clarify that only ditches that meet the definition of tributary and are not excluded in paragraph (b) would be jurisdictional under the CWA. Note that this rule does not change the exemptions for maintenance of drainage ditches nor for the construction and maintenance of irrigation ditches.

Empire District Electric Company (Doc. #20501)

- 3.791 Many substations include oil-filled equipment. If a substation has over 1320 gallons of oil and that oil could reach a water of the U. S. even if the tanks or equipment are completely emptied, under EPA's Spill Prevention Control and Countermeasure (SPCC) regulations, that substation requires a SPCC plan and secondary containment. In areas considered "adjacent" under the proposed rule, many of our substations would now likely be subject to these requirements. (p. 5)

Agency Response: See the preamble and the summary response for the agencies' clarification of which waters are adjacent under the final rule. Issues pertaining to the SPCC regulations are outside the scope of today's rulemaking.

Atascadero Mutual Water Company (Doc. #20508)

3.792 The broad terminology used to define “adjacent” allows for sweeping jurisdiction over every wet feature in a riparian area or floodplain. (p. 1)

Agency Response: The agencies disagree with the commenter's point that “adjacent waters” will result in an overall increase in jurisdiction, because the waters that are now covered under this provision were previously covered under the (a)(3) provision of the 1977 regulation. The scientific and legal basis for regulating non-wetland waters as adjacent are explained in the preamble and TSD. In addition, as discussed elsewhere, the agencies to provide more clarity, consistency, and certainty have revised the definition of adjacent such that there are specific distance limits for “neighboring” waters.

REFERENCES

Comments included above in this document discuss the Proposed Rule, and some include citations to various attachments and references, which are listed below. The agencies do not respond to the attachments or references themselves, rather the agencies have responded to the substantive comments themselves above, as well as in other locations in the administrative record for this rule (e.g., the preamble to the final rule, the TSD, the Legal Compendium). In doing so, the agencies have responded to the commenters’ reference or citation to the report or document listed below as it was used to support the commenters’ comment. Relevant comment attachments include the following:

310 CMR 10.58 (2) (a) 3.<http://www.mass.gov/eea/agencies/massdep/water/regulations/310-cmr-1000-wetlands-protection-act-regulations.html#2> (Doc. #19133)

82 OKLA. STAT. §1020.1(1) (Doc. #14773)

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DiCosmo, Bridget. 2014. *InsideEPA.com, Agencies’ Workgroup Eyes Changes to Key Delineation Guides* (Doc. #13029)

EPA, Rivers & Streams. updated Mar. 13, 2013. <http://water.epa.gov/type/rsl/>. (Doc. #15372)

FEMA 100-Year Flood Zone for Miami-Dade County, Florida. (Doc. #17921.1)

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Fugate, Craig FEMA r July 22, 2014. Insuring our Future: Building a Flood Insurance Program We Can Live With, Grow With and Prosper With, before the before Subcomm. on Homeland Security of the S. Comm. on Appropriations, 113th Cong. 7 (statement of FEMA Administrator Craig Fugate), available at http://www.appropriations.senate.gov/sites/default/files/hearings/FEMA%20%20HFIAA%20Hearing%20Stmt_FINAL.pdf. (Doc. #15372)

Great Northeast, Inc v. United States Army Corps of Engineers, 2010 U.S. Dist. LEXIS 89132, *26 (D. Alaska 20 10) (Doc. #16564)

Hall, Jonathan V., Frayer, W.E. and Willen, Bill O. 1994 Status of Alaska Wetlands (U.S. Fish and Wildlife Service). (Doc. #15038)

Hauer et al. 2002. A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetlands Functions of Riverine Floodplains in the Northern Rocky Mountains, ERDC/EL TR-02-21 at 11 available at <http://el.erdc.usace.army.mil/elpubs/pdf/trel02-7.pdf>. (Doc. #15020)

Hawaii Wildlife Federation v. County of Maui, 2014 WL 2451565 (D. Hi. May 30, 2014) (Doc. 14112)

Headwaters, Inc. v. Talent Irrigation Dist., 243 F. 3d 526 (9th Cir. 2001).) (Doc. #14280)

Healdsburg, 496 F.3d at 1000 (Doc. #15020)

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44, 130 L.Ed.2d 245, 115 S. Ct. 394 (1994) (Doc. #14081)

<http://cals.arizona.edu/extension/riparian/chapt1/table.html>. (Doc. 15018.1)

http://www2.census.gov/geo/maps/special/MississippiRiverArea/MSRiverFlood_RefMap_052411.pdf (Doc. #13271, p. 15)

<http://www.merriam-webster.com/dictionary/adjacent> (Doc. 12752)

<https://www.fema.gov/medialibrary/assets/documents/30021>. (Doc. #16369)

https://www.google.com/?gws_rd=ssl#q=define+neighboring. (Doc. #8674)

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Id. 2001) (Doc. #15020)

Leibowitz, S. G., and K.C. Vining, K. C. 2003. “Temporal connectivity in a prairie pothole complex,” *Wetlands* 23:13-25 (Doc. #12349)

M.E.S.S. v. Perry, 47 F.3d 325 (9th Cir. 1995), cert. denied, 516 U.S. 807 (1995) (Doc. #15020)

McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1196 (E.D.Ca. 1988) (Doc. #15020)

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Nebraska Association of Resources Districts, Exhibit C: Wetlands Identified by EPA Region 7 (Doc. #11855)

Northern Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 997-1001 (9th Cir. 2007) (constant ground water flow between river and pond makes pond jurisdictional under 33 C.F.R. § 328.3(b)); (Doc. #15020)

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Rodewald, Dr. Amanda, Chair, EPA SAB Panel for the Review of the EPA Water Body Connectivity Report, September 2, 2014. Memo to Dr. David Allen. (Doc. #15224)

SAB Panel Draft Recommendations on EPA's Connectivity Report (8-11-14 version), Page 16, Section 3.2.4 (Doc. #13029)

Sierra Club v. Colorado Refining Company, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (Doc. #15020)

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U.S. Army Corps of Engineers. 2001. Wetlands Regulatory Assistance Program, "Upper Yellowstone River Hydrogeomorphic Functional Assessment for Temporal and Synoptic Cumulative Impact Analyses," ERDC TN-WRAP-01-03. (Doc. #15020)

USGS Circular. 1998. 1139, Groundwater and Surface Water a Single Resource available at <http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf>. (Doc. #14134)

U.S.G.S. Gauge 06893000 Missouri River at Kansas City, Missouri on May 18, 1995 (Doc. #16337)

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United States v. Tilton, the Eleventh Circuit also found jurisdictional existed over wetlands that were separated from an adjacent river by an earthen berm at least thirty feet wide. 705 F.2d 429. (Doc. #15020)

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Supplemental References:

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44, 130 L.Ed.2d 245, 115 S. Ct. 394 (1994) (Doc. #14081, p. 9)