

Clean Water Rule Comment Compendium
Topic 11: Costs/Benefits (Volume 1)

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

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

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

This compendium, as part of the Response to Comments Document, provides a compendium of the technical comments about costs and benefits 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 11. COSTS/BENEFITS (VOLUME 1)

Agency Summary Response

The U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army (Army) conducted an economic analysis (EA) to provide the public with information on how the costs and benefits of CWA programs may change as a result of a change in the number of positive jurisdictional determinations¹ under this rule.² The rule revises the definition of the term “waters of the United States.” This term identifies waters which are, and are not, subject to the Clean Water Act (CWA). The agencies have worked to develop this rule in light of the Act, science, Supreme Court decisions, public comments, and the agencies’ experience and technical expertise. It is important to note the purpose of the economic analysis is not to estimate the change in the numbers of waters subject to jurisdiction.

The scope of CWA jurisdiction under this rule is narrower than that under the existing regulations. *See* 40 CFR 122.2 (defining “waters of the United States”). *See* also the Technical Support Document, I.B. Compared to a baseline of existing regulations and historic practice, this rule results in a decrease in CWA jurisdiction because the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulations. However, compared to recent practice, this rule is projected to result in a slight increase in assertions of jurisdiction by providing clarity about which waters are covered by the Clean Water Act and resolving the uncertainty caused by the key Supreme Court cases that had led to caution in asserting jurisdiction. This baseline used for purposes of conducting the Economic Analysis reflects recent field practice following the 2008 Guidance (*see* EPA and Corps guidance *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, issued December 2, 2008).

The rule by itself imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule is a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, subject to the provisions of these programs. Each of these

¹ A “positive jurisdictional determination” is a decision to assert CWA jurisdiction over a particular water. The alternative is a “negative jurisdictional determination” which is a decision not to assert CWA jurisdiction over a particular water.

² *The final version of this rule is Final Clean Water Rule: Definition of “Waters of the United States” (Final Rule).*

programs may subsequently impose direct or indirect costs as a result of implementation of their specific provisions with resulting benefits. While all of the costs and benefits associated with this rule are indirect, for readability throughout the rest of this document these indirect costs and indirect benefits are identified simply as costs and benefits.

During the public comment period for the Proposed Rule, some commenters made reference to a review of the EA prepared by David Sunding of The Brattle Group.³ Response to comments similar to those in the Sunding review can be read in the summary responses to the compendium sections on Scope of Change of Jurisdiction (11.2), Section 404 (11.3), and Other CWA Programs (11.4).

Commenters expressed concern regarding waters they believed would be newly jurisdictional under the rule, along with associated costs. Additional information on costs can be found in the summary responses to Topics 11.3, 11.3.1, and 11.4. See also the Preamble and responses to other Compendium Topics on the types of waters that are included or excluded under this rule. Commenters suggest that the agencies failed to adequately account for costs to private parties, local governments and, specifically, regulatory bodies. The agencies estimated costs to both public and private entities, including costs of permit application, administration, and compliance that would result from the subsequent implementation of CWA programs. To estimate how the costs and benefits of CWA programs may change as a result of a change in the number of positive jurisdictional determinations⁴ under this rule, the EPA reviewed a sample of negative jurisdictional determinations (JDs) (i.e., determinations of no jurisdiction) completed by the Corps in over two fiscal years to assess how the JD would change if the final rule had been in place. The agencies updated the economic analysis of the proposed rule, which relied upon data from FY09 and FY10, by reviewing more recent data from FY13 and FY14. This not only ensures that the most current data are used, but also responds to concerns raised in public comments that the FY09 and FY10 dataset used in the economic analysis for the proposed rule represented a period of decreased economic activity.

Commenters stated the rule would require companies to incur permitting, mitigation, and other costs across a broad range of programs under the Clean Water Act, with one commenter noting these costs would be borne over several of the commenter's lines of business, including fertilizer sales, farms and ranches, manufacturing and food processing, and mining. This, in turn, may result in the delay or cancellation of some private or public projects. While the agencies were not always able to determine lines of business that would be affected by changes in jurisdiction under the rule, the agencies' economic analysis addressed the categories of costs the commenter refers to under specific CWA programs and provides estimates of their magnitude. The agencies' estimates of costs are inherently biased upward in that they assume that Section 404 program applicants would obtain permits on receiving a positive jurisdictional determination and

³ *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States, prepared for the Waters Advocacy Coalition and available at http://www.brattle.com/system/publications/pdfs/000/005/014/original/WOTUS-Economic-Report_Sunding_WAC_0514.pdf?1401975706 (last accessed 5/4/2015).*

⁴ A "positive jurisdictional determination" is a decision to assert CWA jurisdiction over a particular water. The alternative is a "negative jurisdictional determination" which is a decision not to assert CWA jurisdiction over a particular water. It is important to note that the purpose of the economic analysis is not to estimate the change in the numbers of waters subject to jurisdiction.

incur mitigation or other costs as a result. While some applicants might choose instead to delay or cancel projects, presumably they would only do so if the costs of delay or cancellation were less than those of mitigation or other compliance.

Some commenters stated that the benefit-cost analysis is not useful because the benefits and costs presented are too uncertain. These waters that will be newly determined jurisdictional under the rule have yet to be covered by CWA programs and regulated as applicable. Where discharges or dredge and fill activities will occur, to what degree, under what prevailing economic circumstances is inherently unknown. The economic analysis for the rule recognizes this inherent uncertainty and has relied upon the most recent available data on permitted activities. This relies on the reasonable assumption that the additional increment of jurisdictional waters under the rule will be impacted by activities similar to recent practice and so is best approximated by already permitted activity.

With the limited amount of data and modeling capability, there remains considerable uncertainty surrounding our estimates. To address this, the agencies looked to OMB circular A-4 for guidance and decided to undertake scenario analysis that describes how determinations might be affected.⁵ In one scenario, the agencies combined a series of “high end” assumptions, including that twice as many jurisdictional determinations will be made for “other waters” as indicated in recent Corps data. In a second scenario, the agencies assume the number of “other waters” determinations will be the same as indicated in the recent Corps data – “low end” scenario. Finally, in a third scenario, the agencies followed an approach similar to that used in the economic analysis accompanying the proposal. Compared to the recent practice baseline, the analysis suggests the new rule will result in an increase in the number of positive jurisdictional determinations and an associated increase in both costs and benefits that derive from the subsequent implementation of CWA programs. However, a more definitive assessment would only be possible if additional data across a wide range of programs becomes available. The assumptions that were made, along with other changes that were incorporated into the analysis, are discussed in the Economic Analysis accompanying the Final Rule.

A number of comments on the Economic Analysis addressed the provisions of the rule and asserted the rule would result in more waters being considered jurisdictional. The preamble and Technical Support document provide a detailed explanation of the terms and bases of the final rule. In addition, in the final rule the agencies have provided clarified information regarding features that are not considered “waters of the United States”, even where those features would otherwise meet the criteria for jurisdiction under paragraphs (a)(4) through (a)(8). Collectively referred to as “exclusions”, this portion of the rule reflects the agencies’ long-standing practice and technical judgment that certain waters and features are not subject to the CWA. The exclusions are an important aspect of the agencies’ policy goal of providing clarity and certainty. Just as the categorical assertions of jurisdiction over tributaries and adjacent waters, as defined, simplify the jurisdiction issue, the categorical exclusions will likewise simplify the

⁵ Circular A-4 provides that: “In some cases the level of scientific uncertainty may be so large that the [agency] can only present discrete alternative scenarios without assessing the relative likelihood of each scenario quantitatively.” Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4, Regulatory Analysis (2003), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

process, and they reflect the agencies' determinations of the lines of jurisdiction based on science, the case law and the agencies' experience and expertise.

In the final rule all existing exclusions from the definition of “waters of the United States” are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time. Prior converted cropland and waste treatment systems have been excluded from the definition of “waters of the United States” definition since 1992 and 1979 respectively, and only ministerial changes are made. These two exclusions remain substantively and operationally unchanged. The agencies add exclusions for waters and features previously identified as generally exempt in preamble language from Federal Register notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. Artificial lakes and ponds subject to this exclusion are created in dry land to hold or store water for uses where isolation from downstream waters for the duration of the associated activity is essential. Conveyances created in dry land that are physically connected to and are a part of these artificial lakes and ponds created in dry land are also excluded from jurisdiction under this provision. These artificial features work together as a system, and it is appropriate to treat them as one functional unit. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. Waters and features that are excluded under paragraph (b) of the final rule cannot be determined to be jurisdictional under paragraphs (a)(4) through (a)(8).

Additionally, Congress has exempted (certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of “waters of the United States” to make it clear that this rule does not add any additional permitting requirements on agriculture. The rule also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1); CWA section 402(l)(2); CWA section 502(14); 40 CFR 122.3(f); 40 CFR 122.2.

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

Specific Comments

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

11.1.1 (...) 62. Additionally, EPA has claimed the rule "would not infringe on private property rights" and would not act as "a barrier to economic development." Please explain this claim when, according to EPA's own economic analysis of the rule, landowners and development companies would be most heavily hit by the costs associated with the rule. (p. 17)

Agency Response: The final rule does not determine private property rights. Even where a water is determined to be jurisdictional, there is a permitting program to allow landowners to pursue projects on their private property in accordance with applicable laws and regulations. The analysis quantifies the potential costs of these permits.

Mark Longietti, Pennsylvania State Representative (Doc. #4047)

11.1.2 According to the Delaware Township Supervisors, if the change is approved, townships may not be able to perform routine maintenance on road ditches and may not be able to quickly resolve potential safety issues without having to first obtain a federal permit for such work. Further, the cost for permits, engineering and legal fees would have a significant impact on township taxpayer. (p. 1)

Agency Response: The final rule includes an exclusions for certain ditches. See the preamble and Compendium 6 for more information. In addition, the rule does not affect existing permitting exemptions under section 404(f)..

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

11.1.3 New permitting requirements and regulatory compliance costs will be added to already stringent state and local water laws. The expansive reach of the proposed rule will have the effect of making many areas of the country "off limits" to construction and development because of the expense associated with obtaining new permits or installing the required mitigation measures on newly regulated "waters of United States." (p. 2)

Agency Response: This rule does not affect any existing requirements or permitting programs, rather clarifies in what circumstances those requirements and program may apply. The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis.

Michigan State Senator (Doc. #4769)

11.1.4 Underestimation of Costs: The Federal government has greatly underestimated the costs of the proposed rule – both in permitting compliance costs and project delay costs. For example, permitting compliance costs will siphon finite resources that would better be used to advance conservation best practices and infrastructure in Iowa's countryside. Permitting delays would also increase the costs of conservation and economic development projects. We are extremely concerned that these increased costs will hinder the advancement of water quality projects and responsible economic

development projects. Compliance costs would be borne by both private sector and public sector entities and the customers and citizens served. Additional costs would impact public transportation projects, renewable energy projects, electricity distribution, disaster recovery projects, mitigation projects, and so on. Every day those projects are delayed has real costs that are currently unaccounted for by the Federal government. There would also be additional enforcement costs that current staffing levels at both the Federal and State levels are not positioned to meet. The rule as proposed would essentially be an unfunded mandate on State agencies tasked with CWA enforcement. Such enforcement costs would drain significant finite resources that could better be utilized to actually deliver water quality best practices and projects. Until all the true costs are better accounted for, this rule is not ready for final deliberation and should be withdrawn. Furthermore, the consensus among stakeholders is that the Federal government has significantly underestimated the percentage of land that will be impacted by the rule and expanded Federal jurisdiction. More accurate estimates of this rule conducted by third-party stakeholders demonstrate increased direct and indirect costs. By its own admission, the Federal government's proposed regulations expand the scope of its jurisdiction by approximately 3 percent and likely by much more than that – through our analysis we estimate that the Iowa stream miles subject to jurisdiction would increase from the current status of approximately 26,000 miles to an estimated 72,000 miles, an increase of approximately 46,000 miles or an increase of 176%. This scope difference alone would vastly increase the costs of the proposed regulation. (p. 2-3)

Agency Response: The agencies believe that the final rule will help clarify jurisdiction and when a CWA permit is needed. This clarity will reduce the need for costly and time-consuming jurisdictional determinations. The commenter is correct that in some circumstances permit will be required for waters where they previously were not. The agencies have estimated these costs through the economic analysis. While the commenter asserts that these costs are an underestimate, and provides an analysis of jurisdictional increases in Iowa, the agencies are unable to verify if this analysis represents and accurate interpretation of rule policies. The agencies believe that their economic analysis represents a reasonable estimate of the costs associated with an increase in CWA permitting and the associated benefits.

Johnson County and Eastern Sheridan County, Wyoming (Doc. #6191)

11.1.5 In Wyoming, farming and ranching consists of a substantial number of small businesses, many of them family businesses. The scope of the proposed rule will be so devastating to these businesses. Any agency findings purporting to the contrary are incorrect. (p. 1)

Agency Response: The agencies believe that the economic analysis represents a reasonable estimation of the costs and benefits associated with this rule.

Alaska State Legislature, Alaska Senate Leadership (Doc. #7494)

11.1.6 Increased jurisdiction means that costs will certainly rise for Alaskans. Additional expenses will occur because of CWA Section 404 permitting, permitting for

development/construction activities, additional requirements for oil discharge and facilities needing to develop spill prevention, control and countermeasure plans.

Information gaps and uncertainty lead many in the Senate to question whether the agencies alleged “calculated benefits” outweigh the burden imposed to our constituents. (p. 3)

Agency Response: The agencies have attempted to accurately quantify the additional costs the commenter has identified. See Summary Response to Topics 11.3 and 11.4 on benefits to CWA programs.

Illinois House of Representatives (Doc. #7978)

11.1.7 Your analysis stating the rule would subject an additional three percent of U.S. waters and wetlands to CWA jurisdiction and that the rule would create an economic benefit of at least \$100 million annually. This calculation is seriously flawed. Expanding CWA jurisdiction would subject communities, property owners, farmers, and businesses to stringent new permitting requirements and use restrictions. The process of obtaining permits and approvals under the CWA is very costly and time-consuming. Historically, obtaining a permit to develop on jurisdictional area can take longer than a year and cost hundreds of thousands of dollars. (p. 2-3)

Agency Response: We anticipate the new rule will result in an increase in the number of positive jurisdictional determinations relative to the 2008 Guidance and have quantified the costs associated with this increase. However, this rule is narrower in scope than existing jurisdiction and historical practices. See section I.B of the Technical Support Document.

Georgia Department of Agriculture (Doc. #12351)

11.1.8 The EPA and the Corps anticipate that the losses suffered by the government and regulated entities will be between \$162 million to \$279 million per year under the new rule. They determine these financial costs will be associated with activities such as administering additional permits and modifying business operations to meet new standards. The reporting agencies go on to estimate the benefits of this rule change to be between \$3 18 million to \$514 million per year. These benefits, however, are represented by "values of ecosystem services" and "reduced uncertainty concerning where CWA jurisdiction applies." While the costs will be very real, GDA believes this assessment of benefits to be extremely vague and severely inflated. (p. 3)

Agency Response: See the Economic Analysis accompanying the Final Rule, as well as Summary Responses to Topics 11.3.1, 11.3.2, and 11.4 on how the Agencies address benefits.

New Mexico Department of Agriculture (Doc. #13024)

11.1.9 The Agencies prepared a report entitled, "Economic Analysis of Proposed Revised Definition of *Waters of US* (Economic Analysis)." The Economic Analysis describes the costs and benefits of the proposed rule; however, the Agencies make several economic benefit claims that are based on data that is not available to the public. The

benefit claims are based on the previous *Waters of the US*, definition, which are not the same as those in the proposed rule.

Also, using 2009-2010 as the baseline, economic study year could be unrepresentative of a long-term economic comparison due to the overall national economic downturn during that time.⁶ Similarly, drawing major conclusions from information in one year is not reflective of long-term implications this rulemaking may have. The Agencies have claimed **the** proposed rule does not affect areas that were previously excluded from jurisdiction, that the proposed rule does not regulate new types of waters.⁷ If this is the case, why are there several new definitions and an Agency estimated 2.7 percent increase in acreage?⁸

The Brattle Group, an independent economic, regulatory, and financial consulting firm, prepared a report for the Waters Advocacy Coalition entitled, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the US* (Brattle Group Report).⁹ The Waters Advocacy Coalition "is an inter-industry coalition representing the nation's construction, real estate, mining, agriculture, forestry, manufacturing, energy sectors, and wildlife conservation interests."¹⁰ The Brattle Group Report is a very detailed analysis of the Agencies' Economic Analysis and identifies numerous errors including "flawed methodology for" estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definition changes..."¹¹ The report suggests that the Agencies "should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA."¹²

Due to the analytical errors described above and the issues identified in the "Benefits," "Costs," and "Barriers to Entry" sections below, NMDA requests a more accurate and complete analysis of the economic implications of this proposed rulemaking. (p. 19)

Agency Response: See Summary Responses to Topics 11.2, 11.3.2 and 11.4 on jurisdictional determinations and benefits.

11.1.10 EPA's claims that benefits resulting from this proposed rule outweigh the costs are not entirely relevant. Agriculture and industry bear the huge majority of costs, whereas the

⁶ U.S. Environmental Protection Agency & U.S. Army Corps of Engineers. "Economic Analysis of Proposed Revised Definition of Waters of the U.S." March 2014 . Available at : <http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act>.

⁷ U.S. Environmental Protection Agency. "Fact Sheet: How the Proposed Waters of the U.S. Rule Benefits Agriculture." Available at: <http://www2.epa.gov/waters/fact-sheet-how-proposed-waters-us-rule-benefits-agriculture>

⁸ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers , "Economic Analysis of Proposed Revised Definition of Waters of the U.S. ," March 2014 . http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

⁹ The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the U.S." May 15, 20 14. Available at: <http://www.brattle.com/news-and-knowledge/publications/archives/2014>.

¹⁰ U.S. Chamber of Commerce. "Waters Advocacy Coalition (WAC) Letter on Definition of Waters of the U.S." June 10, 2014. <https://www.uschamber.com/letter/waters-advocacy-coalition-wac-letter-definition-waters-us>.

¹¹ The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the U.S." May 15, 20 14. Available at: <http://www.brattle.com/news-and-knowledge/publications/archives/2014>.

¹² The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the U.S." May 15, 20 14. Available at: <http://www.brattle.com/news-and-knowledge/publications/archives/2014>.

benefits listed by EPA are mostly nonhuman and environmental.¹³ These environmental benefits, termed *ecosystem services*, are purported to improve water quantity even though the primary concern of the CWA is water quality. One of NMDA's concerns is that the conflation between water quality and quantity in this regard has led to an overestimation of the benefits and that costs to the agricultural community have been minimized.

The *ecosystem services* taken from the Economic Analysis include: flood storage and conveyance, support for commercial fisheries, water input and land productivity for agriculture and commercial & industrial production, municipal and water supply, recreation & aesthetics, sediment and contaminant filtering, nutrient cycling, groundwater recharge, shoreline stabilization and erosion prevention, biodiversity, wildlife habitat (emphasis added)." NMDA requests an explanation of the benefits listed above, especially those related to water quantity benefits. (p. 20)

Agency Response: See the Economic Analysis accompanying the Final Rule, as well as Summary Responses to Topics 11.3 and 11.4 on how the Agencies address benefits.

- 11.1.11 NMDA requests that additional analysis be completed to determine the true impacts of increased permitting to small businesses -particularly for the agriculture industries. In the meantime, USDA's 2012 Census of Agriculture provides economic analyses *that* show a significant amount of agricultural producers can be categorized as small businesses thus likely to experience the impact of regulatory burden. The 2012 Census of Agriculture classifies approximately 75 percent of agricultural operations nationwide as being less than \$50,000 in the "classification of farms by the sum of market value of agricultural products sold and federal farm program payments. In New Mexico, the percentage of less than \$50,000 producers is significantly higher, at nearly 88 percent; therefore, producers in New Mexico could be more economically vulnerable to market fluctuations caused by regulatory burden. NPDES and other permitting costs may have a negative economic impact on small businesses. Therefore, EPA's findings under RFA are not only incorrect but they also contradict with supporting documents.

To this same point, the United States Small Business Administration recently wrote a comment letter to the Agencies requesting them to "withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking." (p. 23)

Agency Response: See Summary Response on Topic 11.1 RFA/SBREFA.

Gila River Indian Community (Doc. #13619)

- 11.1.12 The Community's proximity to the expanding Phoenix metropolitan area and the 1-10 Highway creates significant potential for economic development. The Community has developed this part of the Reservation into a powerful economic engine that will serve the Community's needs for generations to come. Despite this success, we must always assess new economic development opportunities across the entire Reservation to best

¹³ U.S. Environmental Protection Agency. "Ditch the Myth," September 26, 20 14.
<http://www2.epa.gov/uswaters/ditch-the-myth>.

support and provide services for Community members. Our projects could very likely impact waterways and washes that are not jurisdictional today, but could become jurisdictional under the expansive reach of the Proposed Rule. The Agencies' expansion of jurisdiction will require permits to develop projects where they were not previously required, adding significant costs and time burdens to such projects, as well as grounds for legal challenge by Project opponents. (p. 3)

Agency Response: The agencies have estimated the overall costs associated with a potential increase in positive jurisdictional determinations. Also see summary response 11.3.1.

11.1.13 The Proposed Rule would also negatively impact the Community by stifling municipal development and construction on the Reservation. For example, the Community's Tribal Council recently approved the construction of several hundred homes for homeless or displaced Community members. These plans could be delayed to the extent that this construction impacts newly-jurisdictional waters under the Proposed Rule. The construction of so many homes on a Reservation with three major rivers and numerous tributaries and wetlands is very likely to have such an impact. Along with the construction of new homes, comes the need to extend municipal infrastructure, such as sewers, storm drains, and power to the homes. The Proposed Rule could very well add federal approvals and require additional administrative resources to facilitate these typical development activities by governments like the Community that could better use such funds for citizen and member benefits. (p. 6)

Agency Response: The agencies have estimated the overall costs associated with a potential increase in CWA permits.

New York State Association of Counties (Doc. #14062)

11.1.14 Counties in the State are already fiscally constrained by a newly enacted property tax cap. This new regulatory burden will add countless costs for counties--from legal consultants, to engineers, to environmental programs specialists--all in an effort to understand the new regulations and comply with them. Right now in New York, counties are cutting back, reducing the number of programs and services they offer, laying off employees, and generally doing more with less. The last thing counties in New York need is a new, complicated regulatory burden that will cost staff time and countless dollars to ensure compliance. Furthermore, permitting procedures for county public works projects add a time burden and financial strain to our resources. (p. 2)

Agency Response: The agencies have estimated the overall costs associated with a potential increase in CWA permits.

State of Wyoming (Doc. #14584)

11.1.15 The Agencies also fail to address the cost to individuals, landowners, businesses and states whose water and property rights will be affected and diminished if the proposed rule is finalized and implemented. The loss of rights is a significant "cost," which should alone doom this proposal. (p. 7)

Agency Response: The rule is narrower in scope than current regulations and historical practice. See Summary Responses under Topic 11, including 11.3, and Technical Support Document I.B.

Western Governor’s Association (Doc. #14645)

11.1.16 **Economic Impacts:** The Western Governors are also concerned about the potential for the proposed jurisdictional rule to impact state economies. Some analyses indicate that the agencies may have underestimated the economic impact of the proposed rule.¹⁴ Water is crucial to Western economies; because of this, we ask that you critically and completely examine the potential for the proposed rule to impact state and local economies. (p. 3)

Agency Response: In several cases the agencies have estimated the costs to states associated with an increase in positive jurisdictional determinations. For example, the agencies have estimated the potential increased costs associated with an increase in 401 certifications, driven by an increase in 404 permits. For 402 permitting programs, in some cases the agencies have estimated an increase in program implementation costs. However, it is worth noting that several of the 402 programs are implemented via general permits

San Carlos Apache Tribe (Doc. #15067)

11.1.17 *Economic Impact upon the Tribe*

There are a number of differences between existing regulations and the proposed rule that may result in higher costs for the Tribe, while also increasing the burden on EPA and USACE staff. The proposed change to the definition of “waters of the United States” will impact other CWA programs such as the Water Quality Standards (the “WQS”) program and the National Pollution Discharge Elimination System (the “NPDES”) program, potentially adding regulatory requirements over a larger number of water bodies than are currently regulated. This may have the unintended consequence of actually increasing the risk to currently regulated waterways due to the added burden on EPA and USACE which are finding it difficult to effectively enforce, and/or facilitate compliance with existing requirements related to the CWA.

The proposed rule will impact virtually every economic venture undertaken by the Tribe on the Reservation. Every development project, business venture or public works project will be affected. The cost in time and treasure dealing with the unfunded governmental mandates that would result under the proposed rule will place an economic burden upon the Tribe. The San Carlos Apache Reservation is wracked by poverty. The proposed rule will inhibit the Tribe’s efforts at reducing that poverty. Any additional financial burden as arising from unfunded federal mandates is simply intolerable to the Tribe. (p. 6)

¹⁴ See, for example: (1) Letter from the Office of Advocacy of the U.S. Small Business Administration to EPA Administrator Gina McCarthy and Army Corps of Engineers Maj. Gen. John Peabody, Definition of “Waters of the United States” Under the Clean Water Act, October 1, 2014; and, (2) Sunding, David. Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States. Brattle Group. May 15, 2014. Prepared for the Waters Advocacy Coalition.

Agency Response: The agencies have estimated the overall costs associated with a potential increase in CWA permits.

State Senator, Michigan, District 6, et al. (Doc. #15146)

11.1.18 As local and state decision makers, we believe broad federal protections are critical to protecting our local waters. Michigan has lost 50% of its wetlands, and 17% of the remaining wetlands along with 26,000 lakes and ponds could be considered “isolated” waters no longer protected under the Clean Water Act. Wetlands destruction continues in Michigan despite the many benefits these wetlands provide – improving water quality, providing wildlife habitat, flood control, groundwater recharge and recreational opportunities. We support the draft rule’s proposal to restore Clean Water Act protection to all tributaries of navigable waterways. Failure to do so would jeopardize water quality in our larger river sheds and estuaries. It would also put at risk the millions of dollars and thousands of jobs generated by water related tourism activities and other businesses that are dependent on clean water supplies. Michigan is ranked number 2 out of all states as a non-resident fishing destination, with annual non-resident expenditures of more than \$326 million. This economic activity is largely dependent on clean and healthy aquatic habitat. (p. 1)

Agency Response: The agencies appreciate that the commenter recognizes the importance of environmental health and the associated economic activity generated from healthy ecosystems.

Select Federal Natural Resource Management Committee, Wyoming State Legislature (Doc. #15411)

11.1.19 Additionally, the Committee requests the following documents¹⁵ from EPA:

1. The analysis of the direct and indirect costs or savings the proposed rule may potentially have across the state of Wyoming, including the economic studies produced for each of the 23 counties and all rivers, streams and/or tributaries in the state, as required by the Unfunded Mandates Act.
2. The regulatory impact, cost benefit analysis describing all alternatives, including No Action, for any Major Federal Action under consideration in each Wyoming county affected by the proposed rule, including the net benefit of each alternative, along with a discussion of how such analyses were coordinated with local and state governments, as required by Executive Orders 12291 and 12866.
3. The impact analysis performed by EPA on individual industries, ranching and agriculture in each Wyoming county potentially affected by the proposed rule, including a demonstration that the least net cost alternative to local governments has been selected, as required by the Regulatory Flexibility Act and Executive Order 12291.

¹⁵ These documents mirror the documents requested by Larry Powell, Chairman of the Kansas Senate Committee on Natural Resources and Dennis E. Hedke, Chairman of the Kansas House of Representatives Committee on Energy & Environment.

4. The portions of the Environmental Impact Statement performed by EPA in compliance with the National Environmental Policy Act that are relevant and specific to the Wyoming counties potentially affected by the proposed rule. (p. 2)

Agency Response: See Summary Responses for Topic 13.2.4 (UMRA), Topic 13.3 (NEPA), and Topic 11.1 (RFA/SBREFA).

Association of State Drinking Water Administrators (Doc. #15530)

11.1.20 Consideration of Implementation Costs: To the extent that states will have new regulatory obligations, we recommend that EPA and the Corps include estimates of both state administrative costs and state direct implementation costs – in recognition of the significant and wide-range of activities necessary to implement any new requirements. Uncertainties about the effects of the proposed rule still exist among states, largely due to differences in regional, geographic, and climatic differences around the country. Cost impacts may differ from state to state, depending on their respective legislative and administrative processes. We also request that EPA and the Corps seek to secure federal funding for the states to cover the incremental costs (above and beyond current state obligations) associated with the proposed rule, and consider the availability of funding support in planning for new obligations. (p. 2)

Agency Response: See Summary Responses to Topics 11.3.1 and 11.4 on costs. In addition, as this is a definitional rule, costs are indirect in nature.

Alabama Department of Environmental Management (Doc. #15720)

11.1.21 (...) The proposed rule would impose significant costs on developers, landowners, and permit applicants without any corresponding benefit to the environment. They could be required to mitigate losses of wetlands and streams and to obtain Section 404 dredge-and-fill permits, Section 401 Water Quality Certification, and Section 402 NPDES permits under the proposed rule. (p. 1)

Agency Response: There is a potential for increased positive jurisdictional determinations relative to recent practice under Sections 401, 402, and 404 of the Clean Water Act and the agencies have estimated these costs via the economic analysis accompanying this rulemaking. There would also be corresponding benefits to the environment. See Summary Responses to Topic 11.3 and 11.4.

11.1.22 States and local governments would also incur costs under the proposal as they invest in the requisite infrastructure to implement any State counterpart to these rules. The proposed rules are projected to significantly increase ADEM's administrative burden and costs, and extend review timeframes for projects proposed in Alabama with minimal, if any, environmental gain. (p. 1)

Agency Response: This rule is narrower in scope than existing regulations and historical practice. It is also definitional in nature, and does not create any new regulatory program. See Summary Responses to Topic 11 and Topic 13.2.

Indiana Department of Environmental Management (Doc. #16440)

11.1.23 The Agencies also failed to consult with states on the financial impact of the Proposed Rule. The economic analysis for the Proposed Rule presumes no new economic burden on State agencies. In issuing a new rule proposal, the Agencies must include any additional costs that the States will incur to carry out their water quality programs and permitting programs as a result of the rule. (p. 3)

Agency Response: EPA did conduct significant outreach to the states, see section 12 of the final rule EA for additional information. This rule is narrower in scope than existing regulations and historical practice. It is also definitional in nature, and does not create any new regulatory program. See Summary Responses to Topic 11 and Topic 13.2.5.

Forrest County, Mississippi (Doc. #0927)

11.1.24 We find ourselves at a breaking point. Our citizens are attempting to financially recover from the latest recession, our business community is hurting, and additional taxes are not an option. Just how much more should our constituents have to work and be burdened with having to pay additional local ad valorem taxes in order to pay for the permits we will have to obtain to operate inside ditches that we've been maintaining since there was a County (over a hundred years ago)?" Those permits will require the County hiring or contracting for additional engineering or similar professionals to apply for them and assure compliance with them. (p. 2)

Agency Response: See Summary Response to Topic 6 on ditches.

Skamania County Board of Commissioners (Doc. #2469)

11.1.25 Agency's cost-benefit analysis assumptions and methodologies are flawed. As previously mentioned, while the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may be flawed. Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agency has indicated that 2.7 percent of new waters will be considered jurisdictional under the Section 404 program. However, the data used to compute costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The economic analysis does not acknowledge or recognize that, under the proposal, additional waters, currently not jurisdictional [and thus, no permits have been submitted), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs or benefits. (p. 3)

Agency Response: See Summary Response to Topic 11.2 on addressing the FY2009-2010 timeframe.

Nye County Board of County Commissioners (Doc. #3255)

11.1.26 The proposed definition change could place additional restrictions on development or use of multiple-use lands currently managed by the Federal government by requiring

additional permits. Again, these restrictions and permit requirements place additional financial burden on the County or other prospective users. (p. 2)

Agency Response: See Summary Responses to this section and Topic 11.3.1 (Costs)

Lincoln County Conservation District, Washington (Doc. #4236.2)

11.1.27 Most landowners don't have the money to pay for projects with the added costs of engineering designs and implementing practices required by the permits. The District only has very limited grant funding available to assist these landowners, and it would not take very many engineering designs and projects implemented in the field to use up any and all available funding from the state or from the federal government either in any given year. Some of the potential results with too many permits, too many regulatory hurdles, and too many project expenses is that in many cases, nothing will be done to improve condition of small streams for the benefit of the landowners and the aquatic wildlife, or in other cases, some landowners will be tempted all too much just to take the risk and jump in to do the work that they perceive is needed all by themselves along their reach of stream. Neither of these results is acceptable, promoted or followed by the District, but these results are more and more likely to occur with increased regulatory permit overload and project expenses. Landowner and farmers need streamlined procedures to allow work needed in and along small streams that will be reasonably feasible and can be done in a timely manner, and that will still protect water quantity, quality and wildlife as much as reasonably possible. (p. 6)

Agency Response: We appreciate the commenter's efforts to implement conservation projects. The rulemaking does not address the permitting process itself or how to better streamline regulatory review.

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

11.1.28 Several studies and reports are associated with the proposed rule. Given our already stretched staff resources, it has been difficult to fully review and digest the proposed rule plus the associated documents. Nevertheless, the economic analysis clearly focuses on federal impacts. Even if not required, the economic impact to local jurisdictions and their ability to promote much-needed economic development is a critical consideration and should be, given greater attention. (p. 1)

Agency Response: See responses 11.1 and 11.3.1

White Pine County Board of County Commissioners, White Pine County, Nevada (Doc. #6936.1)

11.1.29 (...) Stated purpose, clarify.

*Decreases certainty which decreases incentive for investment which is bad for economy

*Will increase litigation at great expense to business and taxpayers. (p. 2)

Agency Response: The agencies intend for this rulemaking to offer greater certainty regarding Clean Water Act jurisdiction to the regulated community and

have made changes to rule policies between proposal and final rule based on public comment to help achieve this goal.

11.1.30 (...) Costly and time consuming permitting process.

*Increases cost to local government and businesses

*Gives big business competitive advantage over small business (p. 2)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis. The agencies conducted extensive outreach to small businesses.

11.1.31 With further clarity, we would like to bring the following issues to your attention:

- Stated purpose does opposite.
 - Decreases certainty which decreases incentive which is bad for economy
 - Will increase litigation at great expense to business and tax payers
- Costly and time consuming permitting process.
 - Increases cost to local government and businesses
 - Gives big business competitive advantage over small business
- Economic impact underestimated.
 - According to a review of the EPA's economic analysis by an economist and University of California – Berkeley faculty member, EPA relied on flawed methodology for estimating the extent of its jurisdiction under the proposed rule and fail to include several types of costs in its analysis resulting in an analysis that is not accurate in its estimate of the rules impact on affected communities and businesses and under-represents its expanded jurisdiction. (p. 3)

Agency Response: See Summary Response to Topics 11, 11.2, 11.3, and 11.4.

Hillview Levee and Drainage District (Doc. #6987.1)

11.1.32 The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject our district to increasingly complex and costly federal requirements under the proposed rule which impacts local stormwater and pesticide application programs, state water quality standards designations, green infrastructure, and water reuse. (p. 2)

Agency Response: See Summary Response to Topic 11.4 and the Economic Analysis for details on how the Agencies addressed other CWA programs.

Will County, Illinois (Doc. #7186)

11.1.33 An increase in the federal regulation of isolated wetlands could result in costs to the community. If additional wetlands are subject to the USACOE jurisdiction because the definition of "waters" has expanded the Federal reach, then it is possible that property owners could be subject to additional fees and time constraints when starting new construction projects or marking repairs because they would need to engage the local

USACOE district. Additionally, it is plausible that a particular area could be deemed protected and not available for development based on USACOE standards. (p. 1)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis.

Tuolumne County Board of Supervisors (Doc. #7524.1)

11.1.34 In addition to the expanded jurisdictional issues, the proposed rule will result in much higher costs in administering the rule and on those affected by the rule. Dr. Davis Sunding, an economist with the University of California-Berkley reports that the proposed rule used flawed methods to arrive at much lower economic costs. He also reports that the lack of transparency in the report makes it difficult to understand or replicate EPA's calculations, examine the agency's assumptions or understand the discrepancies in its results. (p. 2)

Agency Response: The agencies have responded to the concerns raised by Dr. Sunding in Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4.

Del Norte County, California (Doc. #8376)

11.1.35 While the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may be flawed. Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agencies have indicated that 2.7 percent of new waters will be considered jurisdictional under the Section 404 program. However, the data used to compute costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The economic analysis does not acknowledge or recognize that, under the proposal, additional waters, currently not jurisdictional (and thus, no permits have been submitted), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs and benefits. (p. 2)

Agency Response: See Summary Response to Topic 11.2 on the permit year adjustments and other jurisdictional considerations.

Aurora Water (Doc. #8409)

11.1.36 The Economic Analysis accompanying the proposed rule is flawed and does not reflect the true costs associated with the changes in the regulations.

The proposed rule may result in new, indirect costs to municipal utilities through additional fees that may be assessed by state and federal agencies required to carry out the proposed revisions of the regulation. These indirect costs could include application fees, additional environmental compliance costs, wetlands mitigation and possible project redesign and relocation expenses. Two of the planned reservoirs for Aurora Water's system are located in dry swales common to the arid west that do not currently fall into a jurisdictional determination. Depending on a new interpretation under the proposed rule, these locations may become jurisdictional, and Aurora Water (and its

customers) could be faced with additional permitting requirements and higher project costs.

Recommendation: The economic analysis should be expanded to address these externalities to determine the true cost of this proposed rule if implemented. Special attention should be given to account for regional differences, such as those in the West. (p. 3)

Agency Response: **The agencies have estimated the costs and benefits associated with a change in jurisdictional assertion, including permit application costs, environmental compliance costs, and compensatory mitigation costs. A regional analysis was deemed outside the scope of this analysis.**

City of Portland, Maine (Doc. #8659)

11.1.37 If the implementation of this new concept of "neighboring" waterbody results in an expansion of EPA/Corps jurisdiction, we are concerned over the financial implications from a local level and to what degree this will limit or slow economic development in our City. (p. 3)

Agency Response: **The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits of that increase in the economic analysis.**

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

11.1.38 There is no assessment of economic impacts for anything other than the federal level. This is a serious oversight, especially since the vast majority of impacts will be experienced at the local level. (p. 1)

Agency Response: **The commenter is not correct that the economic analysis only quantifies impacts at the federal level. The economic analysis quantifies costs to states as well as costs to permittees, which may include local governments.**

Dayton Valley Conservation District (Doc. #10198)

11.1.39 Under the proposed new rule, seasonal and rain-dependent streams and ditches will be added to the Corps' oversight. We are concerned that this increase in oversight by the Corps will increase our costs to implement water quality projects because of an increase in the Corps' workload. (p. 1)

Agency Response: **See Summary Response to Topic 6 (Ditches), especially section 6.2 (Excluded Ditches), and Topic 14.1 (Site Specific). Also see section I.B of the Technical Support Document.**

Kendall County Board, Illinois (Doc. #10965)

11.1.40 We are concerned with the considerable financial burden of the additional regulatory processes necessary to maintain the existing county-owned ditches and to improve the roadway system from a rural section with open ditches to a closed storm sewer system. Kendall County is on the urban-rural fringe and has experienced very rapid population growth over the last decade, which necessitates the widening of roadways in limited

rights-of-way. Urban sections using curb and gutter with storm sewer is often the only financially feasible option for road widening. (p. 3)

Agency Response: See Summary Responses to Topics 6 (Ditches), especially section 6.2 (Excluded Ditches), 14.1 and 7.4.4

Mecklenburg County Government (Doc. #10946)

11.1.41 Mecklenburg County's comment: One of the benefits of the proposed rule change is expected to be reduced documentation requirements and the time it takes to make a jurisdictional determination. By including ephemeral streams into one of the categorical defined "waters of the United States" then additional stream field assessments will need to be performed, requiring additional man hours for determine whether or not a channel or channels running through a proposed site are jurisdictional ephemeral channels or non-jurisdictional gullies. The number of ephemeral channels can be great in headwater areas. With most streams that run through Mecklenburg County originating in the county it makes for the possibility of numerous ephemeral channels that will require additional field time to verify versus using a definition of a tributary being an intermittent or perennial stream. This will result in increased costs for the development community as well as increased County staff resources. (p. 1)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis. It is important to note that the rule is actually narrower in scope than the existing regulation and historical practice.

Sanpete County, Manti, Utah (Doc. #11978)

11.1.42 The inclusion of categories of ran-navigable water that were previously never regulated by EPA and the Corp under the CWA, such as waters in floodplains, riparian areas, and certain ditches, will broaden their jurisdictional authority and significantly increase the costs associated with each program. The proposed rule severely underestimates the impact of the definitional changes, excludes important costs, and uses a flawed benefits transfer methodology to estimate the benefits of expanding jurisdiction. (See Waters Advocacy Coalition, David Sunding, PhD, May 15, 2014). Sanpete County, as stated earlier, is primarily an agriculture community. The systemic exclusion of various costs and benefits ignores important impacts to permit applicants (hiring consultants to prepare permits, cost of permits, project delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation and failure of projects to make a profit). Property owners, particularly our farmers and ranchers and citizens in our rural area, count their land as their principal asset. Land is often used as collateral for loans and other capital purchases needed for business operations or capital improvements. We believe the economic analysis as provided in the rule lacks transparency and is inadequate regarding explanations of calculations, basic assumptions and analysis. (p. 2)

Agency Response: See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4 on how the Agencies addressed comments like those cited above.

11.1.43 If adequate guidance and assistance are not provided, the Economic Analysis for this rule must accurately assess the impact of these rules without adequate guidance.

Currently, the Economic Analysis for (his rule states, "Any incremental costs for routine maintenance of waterways (such as drainage ditches that might newly meet the definition of tributary as proposed in this rule) incurred by local, state, or federal authorities would likely be minimal because of the general permits that the Corps issues to reduce the regulatory requirements for these minor activities." Simply, this is not true. The Association has identified multiple additional costs incurred by the likely increase in landside levee permitting. Additionally, there are likely to be economic, public safety, and public health costs associated with the proposal that have not been recognized or explored in the analysis.

The Association also begs that perspective be applied to considerations of cost. An increase of project costs by \$1 million may seem minor, in the scheme of public works projects. However, recall that flood control agencies may have maintenance budgets of \$50,000 or less. Flood control agencies must borrow the money for special projects from commercial banks. An additional \$1 million could mean the difference between loan approval and loan denial.

It is not clear from the rule package as proposed that the Corps will be issuing new general permits or a Regulatory Guidance Letters for local governments working on public safety projects. The economic impacts analysis states that coverage by general permits is "routine"; however, that has not been the experience of the local agencies that operate and maintain California's flood control efforts. Particularly for "special projects," such as plant remediation, project-specific permits are nearly always required. In combination, these rules mean that levee projects will more often require permitting, and costs will not be minimal. (p. 7)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis. The rule is narrower in scope than the existing regulation and historical practices.

Weld County (Doc. #12343)

11.1.44 If the County is required to pursue permits for basic infrastructure maintenance, the cost in time and money will become prohibitive. (p. 20)

Agency Response: The agencies have sought to provide an accurate estimate of the costs and benefits associated with a change in jurisdictional determinations.

Farm Credit West (Doc. #13060)

11.1.45 This proposed rule regarding WOTUS could detrimentally impact the water rights and farmland values of our borrowers, which would create uncertainty in water availability, as well as the value of the land that is often used as collateral for the loans from the Associations. This, in turn, could have a serious impact on future agricultural lending with a ripple effect to not only food prices but to many agricultural communities and the agriculture industry throughout the U.S. (p. 1)

Agency Response: The rule defines the term “waters of the United States” as used in the Clean Water Act. The rule does not affect water rights.

Charlotte County Government (Doc. #13061)

11.1.46 Charlotte County estimates that it would cost an additional \$900 million to \$2 billion if these rules go into effect as written. For a community with the second oldest population in Florida, with homes at \$154,300 and the median household income at \$44,596, implementation of the proposed WOTUS rule would be economically devastating to Charlotte County. (p. 2)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis. It is unclear how these cost estimates were developed.

County of San Diego (Doc. #14782)

11.1.47 **14. Insufficient Cost Benefit Analysis**

The cost-benefit analysis should be expanded to include local and state costs. The Economic Analysis for the proposed rule is insufficient because it only accounts for federal agency costs. The Economic Analysis of Proposed Revised Definition of Waters of the United States was released by the agencies, consisting of a cost-benefit analysis across CWA programs. The analysis states, "The economic analysis is necessarily based on readily available information and the resulting cost and benefit estimates are incomplete." The analysis contends that the new definition of Waters of the U.S. would have minimal costs to MS4 permittees and agriculture, but did not take into account any additional monitoring, assessment, program realignment, training and outreach, BMPs, reporting, or permitting costs for these entities that would result from the expanded definition of Waters of the U.S. The report should be revised or amended to address these additional potential implications of changing the definition of Waters of the U.S. At a minimum, the Economic Analysis should be amended to account for additional monitoring, assessment, program realignment, training and outreach, BMPs reporting or permitting costs, due to the expanded definition of Waters of the U.S. at the state and local levels. (p. 10)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis. The agencies also note the rule provides an exclusion for stormwater control features created in dry land as well other several other exclusions from jurisdiction. See the preamble and compendium 7.

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

11.1.48 **1. The agencies have not provided an adequate or comprehensive economic analysis, and must undertake a more complete economic analysis prior to promulgating the rule.**

The EPA's Economic Analysis for the proposed "waters of the U.S." rule fails to provide a reasonable assessment of the proposed rule's costs and benefits. The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only about three percent. But the EPA arrives at this percentage using a questionable methodology that only accounts for the Section 404 program, relies on figures extrapolated from statistics from Fiscal Year 2009-2010 (a period of extremely low construction activity during one of our nation's greatest recessions), and fails to account for the universe of waters and features for which landowners have not previously sought CWA permits. Even the agencies note that "there is uncertainty and limitations associated with the results," due to data and information gaps, as well as analytic challenges. The analysis does not quantify all possible costs and benefits, and values are meant to be illustrative, not definitive.¹⁶ Relying on this percentage throughout the Economic Analysis, the EPA systematically and hugely underestimates the impact of the proposed rule's new definition of "waters of the U.S."

The EPA's calculations of incremental costs and benefits are also deficient. The EPA's cost analysis is focused on costs associated with the section 404 program and largely ignores the cost impact of the changes to other CWA regulatory programs due to lack of data. Moreover, the benefit calculation is based on a problematic methodology that relies on studies that are largely irrelevant, do not provide accurate estimates of benefits, and were conducted 10-30 years ago.

As a result of the incompleteness and inaccuracies of the EPA's Economic Report, we believe it is necessary for to recalculate the economic analyses to more accurately project the impacts of the proposed rule, and identify effects that the EPA failed to consider the first time. A rule of this magnitude deserves a much more accurate and defensible analyses and accounting of future costs and benefits. (p. 1)

Agency Response: See the Summary Response to Topic 11.2 on how the agencies have addressed comments regarding jurisdictional determinations.

Board of Commissioners, Phillips County, Montana (Doc. #15102)

11.1.49 WHEREAS, Phillips County's and the State of Montana's economy is driven by agriculture and natural resources, both of which are dependent on our waters. If implemented as written, the proposed rules will have serious negative consequences for our major industries. (p. 2)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis.

Fort Bend Flood Management Association (Doc. #15248)

11.1.50 **e. The costs of implementing the proposed rule are extensive and will be mostly born by local entities.**

¹⁶ Congressional Research Service (CRS), "EPA and the Army Corps' Proposed Rule to Define 'Waters of the United States'", September 10, 2014 p. 11

In estimating the proposed cost of implementing the rule the Agencies have failed to perform a full accounting of its impacts. The methods and data sets used for estimating the increased costs of Section 404 permitting are not reflective of what may be reasonably anticipated to occur in the future. Perhaps more importantly, the cost estimates fail to consider the true impact across all of the programs derived from the authority of the CWA. In past years the question of CWA jurisdiction as determined by the definition of “waters of the U.S.” has most often arisen with respect to Section 404 permitting actions. The proposed rule replaces the definition of “navigable waters” and “waters of the U.S.” for all CWA programs, including: Sec. 404 - Dredge and Fill Permits, Sec. 402 - NPDES (stormwater) permitting, Sec. 311 - Spill Prevention Control and Countermeasure Plans (SPCC), and Sec. 303 - Water Quality Standards and Total Maximum Daily Loads (TMDL’s.)

Of specific concern with respect to costs are those increases to stormwater permitting, including TMDLs. EPA has encouraged states to enhance water quality by implementing TMDLs through MS4 permits and other means, including for non-point source pollution. States presently have some authority to determine how to achieve this and can, and should, take into consideration the costs and benefits to their subdivisions of governments and businesses when deciding how to proceed. Under the proposed rule it is not clear that states will retain that authority or if unfunded mandates for enhancing water quality will be imposed. By not clarifying in the proposed rule that CWA programs beyond Section 404 would not be impacted by the new definition, the Agencies have left open that possibility. Then not addressing potential cost impacts to those programs consistent with how the Agencies have described them evolving, especially implementation of TMDLs, leaves the Agencies negligent and at best inaccurate in their estimation of the financial impact of the proposed rule on local entities and businesses. (p. 6)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis.

Calcasieu Parish Police Jury, Louisiana (Doc. #15412)

11.1.51 (...) WHEREAS, the proposed rule, should it become effective, will drain local budgets, hamper business development, increase cost of infrastructure construction and maintenance, and continue an unacceptable level of uncertainty in file permitting processes; and

WHEREAS, prior to implementation of the proposed rule, the Calcasieu Parish Police Jury respectfully requests that an economic study be commissioned to determine the following: 1) the estimated loss of revenues by local government resulting from the proposed rule; 2) the estimated increase in Federal revenues resulting from the proposed rule; and 3) the total estimated economic impact that the proposed rule would have on each state; and that the results of the study be submitted to Congress for review; and (...) (p. 2-3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. However, the agencies did prepare an economic analysis to

look at the impact relative to recent practice. See the economic analysis accompanying the rule, as well as Summary Responses in Topic 11, 11.2, 11.3, 11.3.1, and 11.4 for more details.

Associated Governments of Northwest Colorado (Doc. #16434)

11.1.52 (...) Stay the rulemaking process until the EPA’s Economic Analysis is revised and an accurate cost-benefit study is completed; (...) (p. 2)

Agency Response: The agencies have revised the economic analysis accompanying the rule. See Summary Responses under Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4.

Delaware County Department of Watershed Affairs (Doc. #16936)

11.1.53 (...) WHEREAS, the jurisdiction sought will cost not only property owners more money for compliance on properties with water features on them, including standing water on a crop field, but all citizens of the County and the municipalities they live in, with increased cost of compliance associated with transportation infrastructure, such as ditch maintenance, road repair such as potholes, bridge and culvert sites and other unintended consequences, via increased taxes, and (p. 3)

Agency Response: See Summary Responses under Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4 and the Economic Analysis accompanying the rule on how costs were taken into consideration relative to recent practice.

11.1.54 (...) WHEREAS, the implementation and enforcement of the proposal is impractical and would require more staff for enforcement, resulting in more bureaucratic oversight with un-foretold and imprecise costs to United States taxpayers. (p. 4)

Agency Response: See Summary Response under Topics 11, 11.2, 11.3, and 11.4 and the Economic Analysis accompanying the rule.

City of Slidell, Louisiana (Doc. #19451)

11.1.55 b. Before making a decision on whether to expand the current definition of Waters of the United States the EPA and U. S. Army Corps of Engineers conduct a study to fully identify any additional burden the expanded definition will lay on local governments. The study should, at a minimum,

- (1) Estimate loss of revenues by local government resulting from compliance with the proposed rule
- (2) Estimate increase administrative processing time local governments will incur to comply with new requirements
- (3) Estimate the economic impact that the proposed rule would have on local governments.
- (4) Estimate the additional resources the U. S. Army Corps of Engineers will require to meet increase in applications from local governments to comply with the new requirements. (p. 2)

Agency Response: The rule is narrower in scope than existing regulation and historical practice. See Summary Responses under Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4 and the Economic Analysis accompanying the rule on how costs were taken into consideration relative to recent practice.

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

11.1.56 The EPA and the Corps anticipate that the losses suffered by the government and regulated entities will be between \$162 million to \$279 million per year under the new rule. They determine these financial costs will be associated with activities such as administering additional permits and modifying business operations to meet new standards. The reporting agencies go on to estimate the benefits of this rule change to be between \$318 million to \$514 million per year. These benefits, however, are represented by “values of ecosystem services” and “reduced uncertainty concerning where CWA jurisdiction applies.” While the costs will be very real, SASDA believes this assessment of benefits to be extremely vague and severely inflated. (p. 3)

Agency Response: See Summary Response for Topics 11.3.2 and 11.4, as well as the Economic Analysis accompanying the rule, for more details on the benefits of this rule.

Florida Association of Counties (Doc. #10193)

11.1.57 **IV. Extraordinary Economic Impact**

The overwhelming concern with the Agencies' broad interpretation is the extraordinary burden the proposed rule is likely to have on our member counties. The cost of regulatory compliance could threaten the economic viability of these local governments, many of which are still working to rebound from the effects of the Great Recession. The Rapanos Court, in 2006, noted that the average applicant for an individual Corps permit spent 788 days (or two years and two months) and \$271,596 in completing the process and the average applicant for a nationwide permit spends 313 days and \$28,915 - not counting costs of mitigation or design changes (or the cost of carrying capital).¹⁷ These figures are disconcerting even before considering the scope of jurisdiction proposed, the increased regulatory burden on the Agencies, the costs associated with meeting new water quality criteria, and the economic realities of the present.

For that perspective, the Florida H2O coalition¹⁷ recently commissioned an economic study on the impact of the proposed rule on local governments in Florida. This study, prepared by Applied Technology and Management, Inc. (ATMI), focused on Municipal Separate Storm Sewer Systems (MS4s) in four of Florida's 67 counties to estimate the cost that counties should expect to bear in the event the proposed rule is adopted.¹⁸ ATMI utilized available data from local and federal agencies (including FEMA, NRCS, and USGS), and prepared baseline estimates with which comparisons were made with

¹⁷ The Florida H2O Coalition is broad assembly of stakeholders in Florida with an interest in water policy, including representatives from the business community, industry, agriculture, local governments, utilities, and developers.

¹⁸ Applied Technology & Management, Inc., Estimated Fiscal Impacts on Selected Municipal Separate Storm Sewer System Permittees (Aug. 29, 2014). The four counties include Manatee, Pinellas, Sarasota and Seminole counties.

likely jurisdictional scenarios under the proposed rule.¹⁹ The fiscal impacts were then calculated using project costs and nutrient removal data from Florida's Department of Environmental Protection.²⁰ The results were alarming.

According to ATMI's calculations, the median sum of costs required to meet water quality criteria in these four counties under the proposed rule is \$4,217,453,000.²¹ Notably, this figure only reflects costs for designing and constructing treatment facilities to achieve the required nutrient load reductions in expanded jurisdictional area.²² One need not extrapolate this amount to all affected programs and all 67 Florida counties to realize that the economic impact of the proposed rule is well beyond the capacity of local government. More importantly, limited revenues that are available would have to be redirected from funding other public health and safety programs and services.

These projections and their consequences are deeply troubling. What may be even more troubling is that, if these figures are representative of impacts across the country, the Agencies appear to have underestimated the economic impacts by scores, if not hundreds of billions of dollars. In their Economic Analysis published earlier this year, and in subsequent presentations,²³ the Agencies contend that the national compliance costs of the proposed rule would be between \$133,700,000 and \$231,000,000.²⁴ Although qualified by language including "the information is based upon readily available information and, estimates are incomplete" and "[r]eaders should be cautious.. . of the many data and methodological limitations as well as the inherent assumptions in each component of the analysis.,²⁵ this estimate would appear to be patently erroneous.

The compliance costs in the Agencies' Economic Analysis are further distanced from our projections by their attribution to all CWA programs affected by the proposed rule. As noted in the analysis, the proposed rule would not only affect water quality standards under §303, but also oil spill programs under §311, state certification standards under §401, pollutant discharge permits under §402 and dredge and fill permits under §404.²⁶ As demonstrated by the ATMI Study in Florida, an independent analysis of the economic impacts under all of these CWA programs, throughout the entire country, would surely exceed the Agencies' estimates by several orders of magnitude. This is certainly a consequence of immense concern. (p. 8-10)

Agency Response: The cited study is inconsistent with the rule, and is not an appropriate analysis. See Summary Responses to Topics 11, 11.3.1, and 11.4.

¹⁹ See *id.* at 5.

²⁰ See *id.* at 7.

²¹ See *id.* at 8-14. The median Figure takes into account the 25th and 75th percentiles of unit treatment cost data which form the cost range.

²² See ATMI Report, *supra*, at 8.

²³ See U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Economic Analysis of Proposed Revised Definition of Water of the United States (March 20 14); see also, e.g., EPA's Presentation before its local Government Advisory Committee, Atlanta, GA (July 14 20 14).

²⁴ See EPA/Corps Economic Analysis, at 33.

²⁵ *Id.* at 2.

²⁶ *Id.* at 3.5-7.

National Association of Conservation Districts (Doc. #12349)

11.1.58 As drafted, the proposed rule would substantially expand CWA jurisdiction post-Rapanos, granting EPA and USACE broad authority and discretion to regulate wetlands and other water bodies remote from TNWs. While EPA and USACE have continued to state that the proposed rule does not increase CWA jurisdiction, they have also stated that there's an estimated three-percent increase in jurisdiction after completing their economic analysis. While the amount of expansion is difficult to predict with any meaningful precision, if the rule were to encompass all adjacent waters and most isolated wetlands and ditches, it would be significantly greater than three-percent as estimated by EPA. A three-percent increase in jurisdictional areas is indeed significant considering the total number of acres affected and the associated potential economic impacts. (p. 7)

Agency Response: The economic analysis accompanying the rule is based on recent practice and focuses on negative jurisdictional determinations in recent practice becoming positive under the rule. In actuality, the rule is narrower in scope than existing regulations and historical practice.

Colorado Stormwater Council (Doc. #12981)

11.1.59 The Proposed Rule expands the definition of the term "Waters of the United States" to include categories of waters that were previously never regulated as WOTUS, such as all waters in floodplains, riparian areas, and certain ditches. The inclusion of these waters will broaden the scope of the CWA and will increase the costs associated with each regulated program. In support of the Proposed Rule, the Agencies provided *The Economic Analysis of proposed Revised Definition of the Waters of the United States* (Economic Analysis).

The Economic Analysis is of particular concern to CSC because of the limited discussion relative to MS4s. Under the Proposed Rule, many stormwater systems and features themselves could now be classified as WOTUS. The Economic Analysis does not address or quantify the increased permitting requirements for stormwater conveyances that would result from the Proposed Rule. In fact, the Economic Analysis states on Page 26 that "[i]t is unclear specifically how a broader assertion of CWA jurisdiction under this Proposed Rule would affect MS4 permits," and "...MS4 outfalls tend not to be in wetlands." MS4s may, at times, develop manmade wetlands for water quality features and also may need to remove features in order to protect the infrastructure's functional purpose, such as controlled release for water quality.

Any work on the stormwater conveyances, work aimed at achieving environmental best management practices, as well as routine improvements required by stormwater permits, will trigger section 404 permitting requirements under the Proposed Rule. The 404 permitting process is a time consuming and expensive process. As focal USACE offices are inundated with an increase in 404 permit applications state wide, our members are concerned about the immediate associated construction delays and cost increases for projects after the proposed rule is final. (p. 5-6)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. Additionally, the rule includes an exclusion for stormwater control features created in dry land permits (see Topic 7.4.4).

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

11.1.60 Economic Analysis

The economic analysis of the proposed rulemaking only considered additional costs from increased CWA Section 404 permitting. Since the proposed rule has global application across all CWA section, the economic analysis ignored additional costs from costly programs such as CWA Sections 303, 402, 401, and is therefore is flawed. The economic analysis evaluated the expansion of previously determined CWA Section 404 jurisdiction. **It** did not, however, consider new areas of jurisdiction that were not previously jurisdictional. As a result the economic analysis underestimates the true costs of the proposed rule.

Appendix A - Supplemental Cost Analysis Information, Exhibit 31 The high and low unit cost for stream: mitigation is predominantly \$170 and \$243, respectively, for 39 of the 50 states, including for California a state with high real estate costs. The prevalence of the \$170 and \$243 unit cost for stream mitigation is suspect, and skews the national average unit costs down to \$177 and \$265, respectively. The unit costs are not accurately represented and we respectfully request reevaluation.

Appendix A - Supplemental Cost Analysis Information, Exhibit 32 (labor rates) appears unrealistically low. As an example, Local Government mean hourly wages for Environmental Engineer, \$35.89; Lawyer, \$43.73; Economist, \$27.38 are unrealistically low. This results in underestimating the true costs of complying with the CWA provisions. We request EPA revise the economic analysis to include effects to all sections of the CWA, and to use realistic unit labor costs. (p. 4)

Agency Response: Costs from other Clean Water Act programs, including 303, 311, and 401 are quantified as part of the economic analysis. Mitigation unit costs have been updated where additional data is available. See also Summary Response for Topic 11.3.1 on mitigation costs. We understand the commenter’s concern that the labor rates presented in the analysis appear low; however, these data are from the Bureau of Labor Statistics and thus the agencies believe they are accurate.

Western Urban Water Coalition (Doc. #15178)

11.1.61 In addition, the Proposed Rule may result in new, indirect costs to municipal utilities through additional fees that may be assessed by state and federal agencies required to carry out the proposed revisions of the regulation. These indirect costs could include application fees, additional environmental compliance costs, wetlands mitigation and possible project redesign and relocation expenses. (p. 4)

Agency Response: The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis.

Wyoming County Commissioners Association (Doc. #15434)

11.1.62 The EPA also failed to consider in its analysis the economic impact of required Endangered Species Act (ESA) consultations and National Environmental Policy Act (NEPA) directives requisite when a federal permit is sought. Wyoming is ground zero for the pending decision from the U.S. Fish and Wildlife Service on the listing of the Greater sage grouse, and is home to several other threatened or endangered species. A county's ability to complete road and bridge work or other infrastructure projects is already hindered by the mitigation of impacts on these species. Any additional triggers imposed by this proposed rule that require further ESA and NEPA analysis is an unwelcome hindrance and poses an increased cost.

In addition to these direct costs on county government, the agencies failed to consider the broader economic harm imposed on counties by the regulatory hurdles placed in front of industries vital to our economy. Wyoming is the energy capital of the United States, exporting more energy to the rest of America than any other state by a wide margin. In so doing, the extractive industries provide Wyoming and its counties in excess of \$3 billion dollars annually in taxes and other payments. For property tax purposes, the oil and gas industry alone accounts for over 45% of all taxable property in Wyoming's counties. Counties rely on the continued vibrancy of the energy industry to provide jobs and a solid tax base in our communities. Unfortunately, it is this industry, along with the transmission industry (pipeline and electric transmission) that will bear the most significant brunt of the uncertainty created by the proposed rule, and any expansion of the definition of the waters of the U.S. because of their potential to disturb so many "tributaries." (p. 9-10)

Agency Response: See summary responses to Topics 11.3.1 and 13.3.

Waters Advocacy Coalition (Doc. #0851)

11.1.63 The EPA's Economic Analysis for the proposed waters of the United States rule fails to provide a reasonable assessment of the proposed rule's costs and benefits. The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent. But the EPA arrives at this percentage using a flawed methodology that only accounts for the Section 404 program, relies on figures extrapolated from statistics from FY 2009-2010 (a period of extremely low construction activity), and fails to account for the universe of waters and features for which landowners have not previously sought CWA permits. Relying on this percentage throughout the Economic Analysis, the EPA systematically and hugely underestimates the impact of the proposed rule's new definition of "waters of the United States."

The EPA's calculations of incremental costs and benefits are also deficient. The EPA's cost analysis is focused on costs associated with the section 404 program and largely ignores the cost impact of the changes to other CWA regulatory programs due to lack of data. Moreover, the benefit calculation is based on a flawed methodology that relies on studies that are largely irrelevant, do not provide accurate estimates of benefits, and were conducted 10-30 years ago.

As a result of the incompleteness and inaccuracies of the EPA's Economic Report, it is necessary for members of the public to provide their own economic analyses to project

the impacts of the proposed rule, and identify effects that the EPA failed to consider. Additional time is required for commenters to gather the necessary data and develop sound economic methodology to properly assess the proposed rule's likely increase in jurisdiction as well as its projected costs and benefits. The comment period should be extended so that the public can adequately assess the economic implications of the proposed rule. (p. 2-3)

Agency Response: The public comment period was extended several times at the request of commenters. For the final rule analysis, the agencies also updated the jurisdictional determination analysis. The commenter is inaccurate in stating that other CWA programs were excluded from the analysis. The analysis also includes a discussion of or estimated increased costs and benefits for programs under CWA Sections 303, 311, 401, and 402. See Summary Response to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4.

Northern Kentucky Chamber of Commerce (Doc. #13116)

11.1.64 The Northern Kentucky Chamber of Commerce respectfully requests that the proposed rule be withdrawn in order that a complete, and thorough economic analysis of the factors affecting the business community can be studied, and once known, these impacts can be used to evaluate the proposed rule with regard to its impact on our community. (p. 1)

Agency Response: EPA has completed a thorough economic analysis given the data resources available at the national level. Please see Summary Response to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4.

11.1.65 In our opinion, the expansion of this definition is currently too broad, and harms the ability of our community to responsibly develop land for any use, including new business. As an example, the current fee for impacting streams is \$240/credit (AMU) and is often assessed at \$300. For an impacted waterway of 400 feet, the fee would result in an additional cost of \$96,000, without consideration of the engineering and remediation costs required of the development.

We also want to reinforce the comments shared by the Small Business Administration, Office of Advocacy, who wrote to USEPA on October 1, 2014. Among several concerns addressed in their letter, we specifically ask for consideration regarding the improper certification of the proposed rule under the Regulatory Flexibility Act because of it would have a direct, significant impact on businesses both small and large.

Expansion of what is defined as "waters" by the USWA and UUCE will result in excessive delays and increased construction cost. Our local community experiences review periods of more than six month by the representative USACE office, many times extending engineering and evaluation periods by more than twelve months just to address this issue.

The Northern Kentucky Chamber of Commerce is extremely concerned about the impact of the rule as proposed. Because the definitions of what comprises a "water of the US" are broad and subject to inconsistent interpretation, we believe the rule as written is too fragmented and vague to allow for responsible land development to occur in our region, which will significantly harm our economy. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Response for Topic 11.1 regarding the Regulatory Flexibility Act.

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

11.1.66 This Proposed Rulemaking Would Lay Down Unnecessary Regulatory Hurdles to Valuable Industries

The PA Chamber’s membership includes companies and organizations from a variety of industries. Many members, including those in the electric transmission, natural resource extraction, pipeline construction, agriculture, and construction industries have expressed serious concern about how this proposal would impact their operations. Generally, it is already quite expensive for an applicant seeking to engage in these industries to secure the necessary regulatory approval, secure necessary mitigation and remain in compliance. This rulemaking threatens to add greatly to that burden, despite an existing state program that is already accomplishing the environmental protection EPA purports to seek with this rule. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. In addition, the rule is definitional in nature and does not by itself impose any new direct costs. The agencies did prepare an economic analysis based on recent practice, taking into consideration potential indirect impacts to various industries regulated under other sections of the Clean Water Act.

U.S. Chamber of Commerce (Doc. #14115)

11.1.67 The Agencies’ proposed approach is contrary to the approach wisely adopted by Congress. The Agencies have neither the resources nor the on-the-ground capability to assume control of the nation’s water infrastructure and associated land uses. If it were finalized, the Agencies’ proposed rule would have profoundly negative economic impacts on business, States, local governments, and ultimately, on EPA and the Corps themselves. (p. 2)

Agency Response: The agencies disagree with the commenters. The agencies anticipate the new rule will result in an increase in positive jurisdictional determinations and have estimated the costs and associated benefits with that increase in the economic analysis.

Outdoor Alliance and Outdoor Industry Association (Doc. #14415)

11.1.68 Protecting the quality of traditionally navigable waters is not only important to us as outdoor recreation enthusiasts; activities on these waters also provide substantial economic benefits through recreational tourism.²⁷ Water is also the driver for customers to buy gear, footwear and apparel at their local retailer, plan a trip across the country to raft or kayak, and choose what community they live in. In order to protect and maintain

²⁷ According to the Outdoor industry Association, 24 million Americans paddle kayaks, canoes, and rafts, resulting in 308,000 jobs and \$36 Billion of total economic benefits (<http://outdoorindustry.org/research/economicimpact.php?action=detail&research~id=26>).

these and other values, the proposed rule must protect the sensitive headwaters and wetlands that are important to all waters downstream. (p. 3)

Agency Response: The agencies appreciate the commenter’s recognition of the importance of protecting the Nation’s water resources, and associated economic activity supported by the aquatic ecosystem.

Katy Area Economic Development Council, Inc. (Doc. #15182)

11.1.69 The unreasonable extension of federal jurisdiction will have another adverse effect. There is no reasonable expectation of significant additional federal money for support of the increased work load at the U.S. Army Corps of Engineers. As a result, even with the best efforts of federal employees, the time and cost to obtain permits will increase.(...) (p. 2)

Agency Response: The final rule provides greater clarity on what waters are subject to the CWA. This clarity will reduce the cost and time needed to do jurisdictional determinations. National Association of Convenience Stores, et al. (Doc. #15242)

11.1.70 (...) This ambiguity and uncertainty would be expensive for fuel retailers:

- Retailers would need to expend resources to determine whether their conduct was actually covered by the rule.
- If retailers were covered, they would have to pay for the development of relevant plans and protections, permits, and other pertinent obligations.
- Retailers would have to absorb or pass along to consumers the costs inherent in the lengthy permitting process.
- Merchants would be subject to an increased litigation risk that naturally arises in ambiguous and confusing regulatory environments. (p. 4)

Agency Response: The agencies recognize that relative to recent practice, there may be additional entities subject to regulation under Section 311 of the Clean Water Act, which address oil spill prevention. The costs of this are quantified in the analysis.

National Association of Manufacturers (Doc. #15410)

11.1.71 EPA and the Corps must understand the stakes of the proposed rule; if the proposed rule goes forward as drafted, it will have substantial and far-ranging impacts on NAM’s members and industry in general that could have in turn impact the economy. Individual NAM members have suggested that potential costs of near term compliance will be millions of dollars for certain companies if the proposed rule is finalized as is. Furthermore, economic development, including jobs associated with that development, would be more likely to take place overseas where development would not face such arbitrary, capricious, and wholly unclear regulation. Specific examples of how the proposed rule would impact our members are included in these comments to illustrate the consequences of finalizing the proposed rule as drafted. (p. 3-4)

Agency Response: The agencies believe the economic analysis provides an accurate depiction of the potential costs and benefits associated with this rule-making.

United States Steel Corporation (Doc. #15450)

11.1.72 (...) The proposed rule will have unintended consequences and economic impacts because it allows for the agencies to treat ditches, stormwater drainages, MS4s, and water supply and flood control structures, as waters of the U.S. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. In particular, see Summary Responses under Topic 6 related to ditches.

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

11.1.73 Contrary to the Agencies' claim, then, administrative burdens and costs would significantly increase under the proposed rule. The potential range of costs on a per-activity basis is summarized in Table 1. Cost estimates are approximate and represent a range of costs based on best professional judgment. (p. 11-12)

Table 1. General Mining Activities

	Cost Range	Comment
Stormwater		
Updated MSGP NOI and SWPPP	\$6,000 to \$10,000 per facility	Update to reflect changes in jurisdictional waters stormwater discharged to and possible changes in monitoring requirements to reflect changes in 303(d) listing as a result of proposed rule.
SPCC		
Update SPCC plan	\$3,000 to \$5,000	Plan update to reflect changes in jurisdictional water classification and potential for oil impacts.
Section 404 Permitting for Mining Activities		
Nationwide Permit – delineation and application	\$5,000 to \$10,000 per event	With the proposed rule, will likely have to increase the use of Section 404 permitting for fill of jurisdictional waters and wetlands.
Individual Permit – delineation and application	\$10,000 to \$20,000	For larger mining projects, an individual permit may be required. This would also include the need for mitigation.
Mitigation	\$20,000 to \$500,000	For larger mining projects, mitigation for filling in wetlands and waters may be required. Mitigation may include purchasing credit at an established wetland bank or could include on-site mitigation.
NEPA Process		
NEPA Alternative Evaluation with the definition of waters of the U.S. expanded	Up to millions based on alternative selection	Alternative selection could be influenced by an increase in jurisdictional waters and wetlands at a proposed site, and the requirement to meet 404(b)(1) regulations (e.g., avoid, minimize, mitigate).
NEPA Avoidance		

Table 1. General Mining Activities

	Cost Range	Comment
NEPA required based on Section 404 Permitting Nexus	Up to millions (\$3 to \$8M) if Environmental Impact Statement required.	For private land, if no fill in jurisdictional water or wetlands, then there is often no federal nexus to trigger NEPA. With proposed rule, definition of waters of U.S. is expanded and greater potential for need of Section 404 permit on private land and therefore potential for NEPA requirements.

Agency Response: The agencies believe the illustrative economic analysis accompanying the rule reflects the most accurate cost information available for a national level analysis.

Western States Land Commissioners Association (Doc. #19453)

11.1.74 (...) Whereas, members of WSLCA have state constitutional mandates to manage millions of acres of lands and waterways for economic development, public education, conservation, recreation, and other public purposes provided by state law, which will be significantly and adversely impacted if the proposed rule is adopted; and (...) (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Response to Topic 10.

Houma-Terrebonne Chamber of Commerce (Doc. #19624)

11.1.75 This jurisdictional overreach will greatly increase the permitting requirements on local and state governments, industries, agricultural producers, real estate developers, and landowners throughout our region and will have a negative impact on our economy with little or no benefit.

The health of our water resources is important to us; however, we believe this expansion has been developed without adequate input from business, state, and local officials. This rule will both hamper the ability of state government to effectively protect the environment through thoroughly reviewed permits, but will also threaten economic growth and place additional costs on the main economic drivers in Louisiana. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The agencies also consulted industry, state, and local officials on this rule.

Pinnacle Construction & Development Corp. (Doc. #1807)

11.1.76 Housing contributes to US Gross Domestic Product (GDP) in two basic ways: through private residential investment and consumption spending on housing services. Historically, residential investment has averaged roughly 5% of GDP while housing services have averaged between 12% and 13%, for a combined 17% to 18% of GDP. These shares tend to vary over the business cycle.

Considering the significant impact housing has on the US economy and the significant negative impact the proposed rule would have on the housing sector, I believe that this measure should be reworked with the coordination and implementation of comments submitted by the National Association of Home Builders (NAHB). (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11.3.1 and 11.4 on costs.

Farris Law Group PLLC (Doc. #10199)

11.1.77 We believe the projected cost-benefit analysis is fatally flawed. It is incomprehensible to project a mere 3% increase in permitting workload. However, regardless of the percentage increase in total permitting, the proposal has no accounting for the decrease in the utility of Nationwide Permits and the migration of projects to Individual Permits. While the increased costs incurred to secure an Individual Permit should be factored in to the cost-benefit projections, the agencies must also realize the time required to secure Individual Permits will substantially stymie real estate development. Should EPA and the Corps move forward with this proposed rule in its current form, many development projects would become cost prohibitive. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11.3.1 and 11.4 on costs.

National Association of Home Builders (Doc. #10540)

11.1.78 **d. The Proposed Rule will Detrimentially Impact Housing’s Role in the Economy and Ultimately, Housing Affordability.**

The impact of home building and housing on the national economy – in good times and bad – should not be underestimated. Residential construction, including the building of new structures as well as the remodeling of existing ones, has direct, positive impacts on the U.S. economy. The most obvious impacts are the work opportunities created in the housing industry, as well as in other industries that provide products or services to home builders and buyers. Workers are employed to directly engage in the construction activity. Jobs are generated in the industries where lumber, concrete, lighting fixtures, heating equipment, and other products that go into a home are produced. More jobs are created when real estate agents, lawyers, and brokers provide services to home builders and home buyers. Other economic impacts include the revenues generated for federal and local governments. The incomes of workers are subject to federal, state and Social Security taxes. Profits made by the business owners are similarly taxed. Beyond this, states often impose sales taxes on material sold to home builders, and many local jurisdictions levy fees for approving building permits and extending utility services.

Home building typically is considered to include single family, multifamily, modular / manufactured housing, remodeling, land development and support industries. In 2014 Q3, all housing accounted for 15.3% of the nation’s annual Gross Domestic Product (GDP).²⁸ Housing contributes to the GDP in two basic ways: through private residential investment, and through consumption spending on housing services. Residential investment includes construction of new single family and multifamily structures, residential remodeling, production of manufactured homes, and brokers' fees. Consumption spending on housing services includes the amount of rent paid by tenants, the imputed value of housing services to home owners, and the amount to hotels by

²⁸ Housing’s Contribution to Gross Domestic Product, National Association of Home Builders Web Page, last accessed Nov. 14, 2014, available at www.nahb.org/generic.aspx?sectionID=784&genericContentID=66226&print=true

households for housing services. Breaking down housing's share of the country's output by home building and personal consumption, the 2014 Q43 data show that home building is responsible for 3.1% of the GDP and housing services contribute 12.2%.²⁹ Clearly, the home building industry is an important engine in the nation's economy.

Housing is an equally important contributor to state economies. Many states are reliant on housing as an engine of economic growth and the source of state income. The largest contribution of housing to states' economies is by the ongoing services provided by the housing stock that was previously constructed by the home building industry. In the case of rental housing this contribution can be measured directly through rent paid by tenants. Similarly, the impact of the housing sector on local economies can be equally significant. Home building generates income and jobs for local residents, as well as revenue for local governments. Home building also imposes costs on local governments that supply education, police and fire protection, and other public services to support the new homes. As a general estimate, NAHB research shows that the construction of 100 single family homes employs 297 individuals, generates \$28 million in income, and produces \$11.0 million in taxes and fees.³⁰

Importantly, residential construction not only creates income for those employed in the industry, but also for those working in industries supplying inputs to home builders and remodelers. Often these suppliers are located in neighboring or other states. For this reason, home building not only contributes to local economies in the states where it takes place, but also stimulates economic activity across state borders. According to the Bureau of Economic Analysis (BEA), there are more than 44 industries that supply products and services to construction. Miscellaneous professional, scientific and technical services, retail trade, manufacturing of fabricated metal, nonmetallic mineral and wood products are the largest contributors of inputs used in residential construction. NAHB research estimates this contribution amounts to 2.5% of state income, nearly as much as residential construction itself. Thus, housing not only provides jobs, income and opportunities, it also more than pays for itself by generating important state and local revenues.

As home building opportunities are stifled, however, the trickle-down effects can be felt over wide swathes of the economy. In areas that will see the most changes in jurisdiction as a result of the proposed rule, those effects could be significant. Anticipated results include decreased building opportunities, delayed projects, and higher priced products, among others. Unfortunately, this industry knows all too well the effects of price fluctuations. Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median

²⁹ Id.

³⁰ Impact of Home Building and Remodeling on the U.S. Econoq, National Association of Home Builders Web Page, last accessed Nov. 14,2014, available at <http://www.nahb.org/~/media/energy/section1/P784&~e1~ericCou~nt~>

priced new home due to a \$1,000 price increase. Nationally, this price difference means that when a median new home price increases from \$225,000 to \$226,000,³¹ 447 households can no longer afford that home. This is not a good outcome for anyone. (p. 140-141)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11.3.1 and 11.4 on costs.

Portland Cement Association (Doc. #13271)

11.1.79 To assess the cost impacts of the rule, PCA performed a survey of plant managers at cement plants. The survey addressed the industry's footprint in terms of acreage, linear feet of stream, section 402 and 404 permitting activity and costs, mitigation and other compliance costs, as well as other structural details. Using this survey data, in combination with other data and assessments, PCA performed cost estimates with respect to the proposed new WOTUS rules.

PCA's full analysis is attached hereto, but, in short, using this unique information, PCA estimates that the proposed WOTUS rules could add nearly \$73 million in compliance costs a five year time horizon. Based on reasonable changes in assumptions PCA believes the costs could range from a low of \$55 million to a high of \$103 million. Given PCA member's overall share of the economy and estimated proportion of Clean Water Act permitting needs, these figures suggest that the Agencies' economic-wide estimates of impacts of \$163 million to \$279 million is a significant underestimate. (p. 31)

Agency Response: The cement industry's relative share of the nation's economy is not a good proxy for how the portion of the industry's rule related costs compares to the overall cost of the rule. The cement industry is an extremely land intensive industry that disturbs large areas of land relative to other sectors of the economy. Therefore, the cement industry should have a proportionately higher share of rule related costs, than nearly all other sectors of the economy. See Summary Responses to Topics 11.3.1 and 11.4 on costs.

11.1.80 **A WOTUS Cross Check of EPA Net Benefit Estimates.**

To assess the cost impacts of the rule, PCA performed a survey of plant managers at cement plants. The survey addressed the industry's footprint in terms of acreage, linear feet of stream, section 402 and 404 permitting activity and costs, mitigation and other compliance costs, as well as other structural details. Using this survey data, in combination with other data and assessments, PCA performed cost estimates with respect to the proposed new WOTUS rules. PCA did not perform social benefit analysis. The intent of this report is not to estimate net social benefit. Rather, the report seeks to arrive at industry cost impacts which can then be used as a very rough cross-check against the EPA's broad macroeconomic cost estimates.

Cement Industry CWA Profile

³¹ 79 Fed. Reg. at 22,190.

The United States cement industry is comprised of 98 clinker producing plants, including 7 that are currently furloughed, nearly all with their own quarry. To generate the industry profile, all PCA member plant managers were surveyed and roughly 40% responded. Plants not reporting information were populated based on industry averages from the survey and then adjusted for plant size measured by kiln capacity.

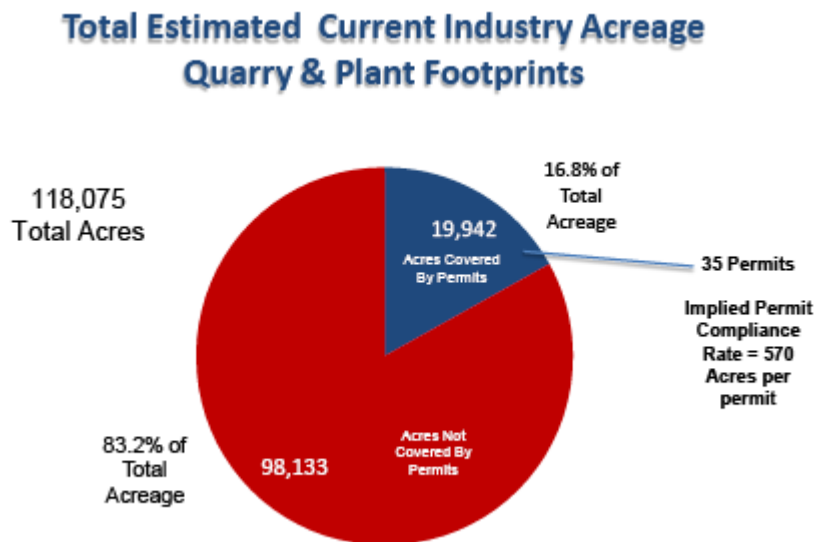
Based on the plant manager survey, PCA estimates the cement industry's quarry footprint at 118,000 acres. Of this, nearly 20,000 acres, or nearly 17%, are currently under CWA jurisdiction. In addition, the industry currently has approximately 460,000 linear feet of quarry related streams. Of this, nearly 175,000 linear feet are covered by CWA permits, or roughly 38%.

Additionally, each plant was evaluated based on its location relative to flood zones and categorized by flood risk defined by FEMA. PCA estimates that 27% of plants carry minimal flood risk, 71% have some form of elevated risk, and 2% are undetermined.

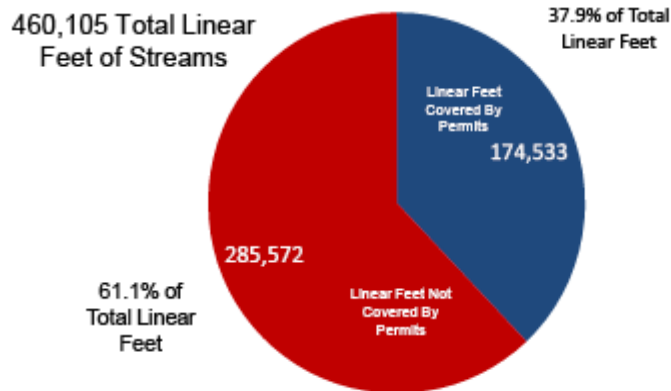
The cement industry is largely impacted by sections 402 and 404 under the CWA.

*Section 402 -establishes a program to address the discharge of most pollutants (called the National Pollutant Discharge Elimination System, or NPDES, permit program).

*Section 404 establishes a program to regulate the discharge of dredged and fill material into waters of the United States including wetlands.



Total Estimated Quarry Related Linear Feet of Streams Currently Covered by Permit VS Not Currently Covered



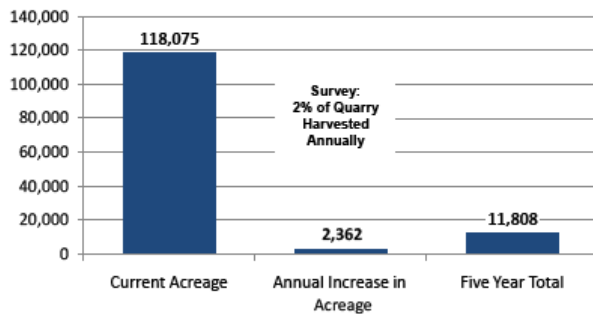
Cement Industry Compliance Cost Estimates

The cement industry is largely impacted by sections 402 and 404 of the CWA. Section 402 establishes a program to address the discharge of most pollutants (called the National Pollutant Discharge Elimination System, or NPDES, permit program). Section 404 establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Typically, permits last five years. PCA's analysis is constrained to compliance of only these sections of the CWA.

PCA's compliance cost estimates are separated into four key areas including: permitting costs, mitigation costs, testing and administrative costs, and opportunity costs. Information on the first three cost areas was garnered from the plant-by-plant survey of plant managers. Opportunity costs were estimated in-part from in dust survey responses and other data. It is important to note while the EPA's economic report mentions the potential of significant opportunity costs associated with the proposed new rules, it does not, however, include any estimates for these costs.

While the cement industry holds a large footprint in terms of acreage and linear feet of streams, not all these lands will be subject to the CWA even under broader EPA jurisdictional power. PCA assumes that section 402 and 404 permitting and compliance costs are triggered only when land is disturbed. Based on the survey results, 2% of a quarry's footprint is harvested annually. While the harvest rate can change significantly due to cyclical production levels, the 2% rate is applied to the total industry acreage footprint of 118,000 acres - yielding a maximum annual potential exposure of roughly 2,362 acres.

Section 404 Cement Compliance Acreage Estimates



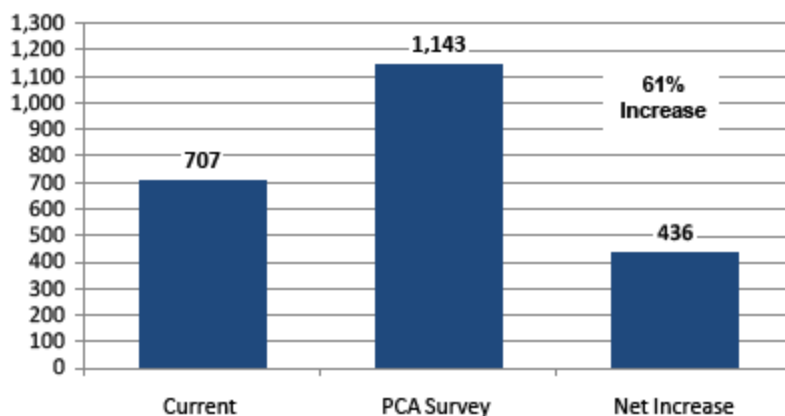
Section 402 Cost Estimates

Section 402 of the CWA establishes a program to address the discharge of most pollutants (called the National Pollutant Discharge Elimination System, or NPDES, permit program). Discharge sites typically require permits. The cement industry currently has an estimated 707 discharge sites, or roughly one per 167 acres, all of which fall under section 402 jurisdiction. Permits typically remain in effect for five years and on average each cost the industry an estimated \$11,132 per permit.

A key problem with the EPA's economic analysis is that it does not take into account the proposed rules' impact of the aggregation of isolated waters due to the lack of data and explains that collection of such data would require extensive field experience. While not EPA environmental inspectors, cement plant managers serve as a proxy for "extensive field experience."

According to PCA's survey of plant managers, the proposed changes in EPA's jurisdiction, coupled with expected quarry harvest rates could result in an additional 436 discharge sites that would fall under CWA's section 402 jurisdiction if the entire site were to fall under CWA jurisdiction today. This reflects a 61% increase in section 402 permitting and a corresponding permitting cost increase to roughly \$970,000 annually and \$4.9 million during a five year cycle.

Section 402: Cement Industry Discharge Sites Current Vs 100% CWA Jurisdiction



Survey Question: If your entire site (plant & quarry) were to fall under CWA jurisdiction, how many discharge sites would you likely have in addition?

Based on the plant manager survey, 22.6% of discharge sites require additional mitigation and treatment costs. Based on the increase in discharge sites anticipated under the proposed new rules, 22.6% are assumed to require additional mitigation and treatment expenditures to comply with the CWA, or roughly 98 discharge sites. Based on the plant manager survey, the average mitigation and treatment cost is \$30,022 per discharge site requiring mitigation and treatment. This translates into nearly \$3 million in mitigation and treatment costs assumed to occur during the five year cycle.

Discharge sites under the jurisdiction of section 402 of the CWA require testing, monitoring and other administrative costs. Based on information from the plant manager survey, this is estimated at nearly \$2,500 per discharge site. Based on estimates for new discharge sites under the new rules, this translates into slightly more than \$3.1 million in testing, monitoring and other administration costs, and \$2.3 million in other recurring costs assumed to occur during the five year cycle.

Section 404 Cost Estimates

Section 404 regulates the discharge of dredged and fill material into waters of the United States, including wetlands. The cement industry currently has 35 individual section 404 permits, or roughly one permit per 570 acres. Permits typically remain in effect for five years and on average each cost nearly \$575,000 per permit according to the plant manager survey. The industry also has several general permits. These costs have been reviewed and are considered rather small and are excluded from our estimates.

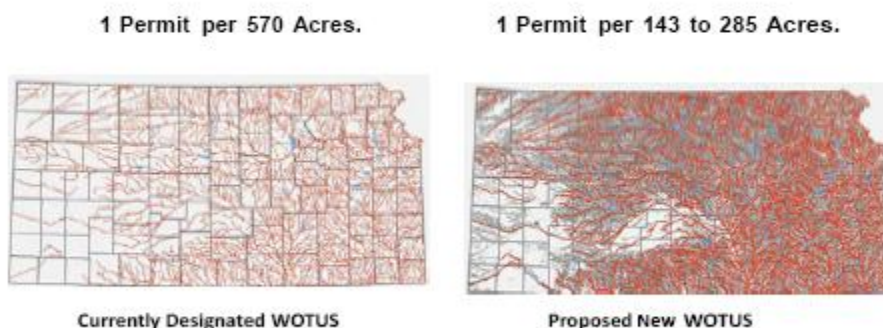
Based on assumed harvest rates of 2% annually, 2,362 acres are harvested annually by the cement industry, or roughly 11,808 acres during a five year cycle. Given the annual acreage estimate of quarry harvest, and combining it with the average permits per acreage translates into the need for an additional 21 section 404 permits during a five

year cycle. Applying the average cost per permit of \$575,000 translates into a total of \$11.9 million. These estimates, however, reflect current jurisdictional definitions.

Although the definition of "waters of the United States" proposed by the new rules may impose no direct costs, more activities will require CWA permits because of the expansion of jurisdiction. In part due to the vagueness of the proposed rule, it is very difficult to estimate the expansion of permitting activity with any degree of confidence. In essence, PCA's efforts in estimating potential cost impacts relating to section 404 compliance are not immune to the same data issues that plagued the EPA's economic report.

PCA's survey of plant managers suggests that under current rules, one section 404 permit is typically required for every 570 acres. This reflects the permitting and enforcement activity for the prevailing jurisdictional scope. The scope will widen. At issue is how much the scope will widen. As suggested by the EPA, extensive field work is required to obtain a definitive answer to this question. In lieu of field work data, several analyses have been undertaken with this regard and may provide a proxy alternative.

Kansas' Potential WOTUS Extension



Source: Waters Advocacy Council

The Water Advocacy Coalition, for example, has estimated that if ephemeral streams are included, as proposed, CWA's jurisdictional coverage in Kansas would increase from 32,000 miles to 134,000 miles of streams, or roughly a four-fold increase.³² If the prevailing permitting and enforcement activity remains constant, but the jurisdiction increases four-fold, the cement industry could require one permit for every 143 acres.

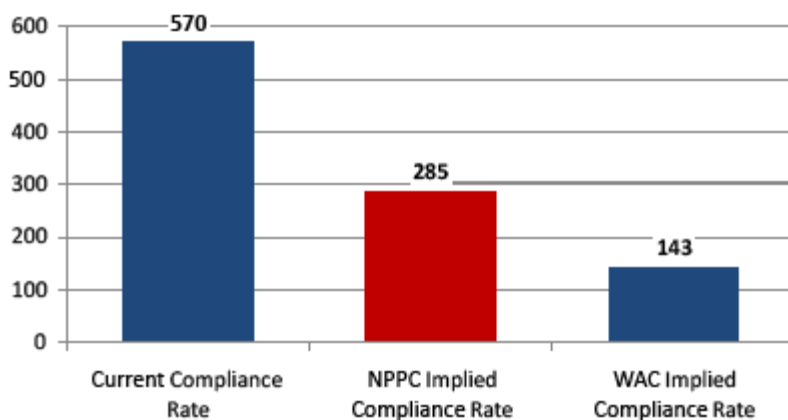
Analysis performed by the National Pork Producers Council (NPPC), together with other agricultural groups, concludes that land likely to be regulated under the Waters of the United States rule proposed by the EPA and the Corps would more than double

³² Ten years ago, EPA approved Kansas' withdrawal of designated uses" is referencing the Kansas Department of Health & Environment's nutrient reduction plan submitted to the EPA in December 2004. As part of the proposal, they are required to perform "use attainability analysis" (UAA's) which assigns designated uses to different stream/water-body cohorts. As part of this plan, certain ephemeral streams previously covered were withdrawn.

under the proposed rule in most of the 17 states studied.³³ If the prevailing permitting and enforcement activity remains constant, but the jurisdiction doubles, the cement industry could require one permit for every 285 acres.

More definitive data would add to the precision of the estimates. The implication of these two studies, however, is that the number of permits required by the cement industry will increase significantly. These studies imply that the EPA's economic estimate of a 2.7% increase in permitting activity significantly understates the magnitude of the compliance costs attached to the proposed WOTUS rules.

Section 404 Cement Jurisdictional Compliance Rate Per Acre



Based on assumed harvest rates of 2% annually, 2,362 acres are harvested annually by the cement industry, or roughly 11,808 acres during a five year cycle. PCA assumes in its estimates the NPPC's less intrusive estimate of the EPA's jurisdictional expansion under the new rules. The rationale is based on broader coverage of its analysis. In doing so it has recognized the potential of upside risk to the resulting cost estimates.

Accordingly, PCA assumes one section 404 permit is required per 285 acres. Permits typically remain in effect for five years and on average each cost nearly \$575,000 per permit according to the plant manager survey. This implies 42 new permits during the next five years and represents an incremental increase of 21 new permits compared to current jurisdictional definitions. The incremental increase in section 404 permits during a five year period is estimated at \$11.9 million.

Based on the plant manager survey, additional mitigation and treatment costs are significant and average nearly \$500,000 per permit. Given the net increase in permitting under the new rule (21), this adds roughly \$10.5 million to compliance costs. Finally, based on the plant manager survey, the incremental administrative and monitoring costs are estimated at \$2.3 million and other recurring costs at \$4.8 million over a five year time horizon.

Opportunity Costs Associated with Regulatory Compliance

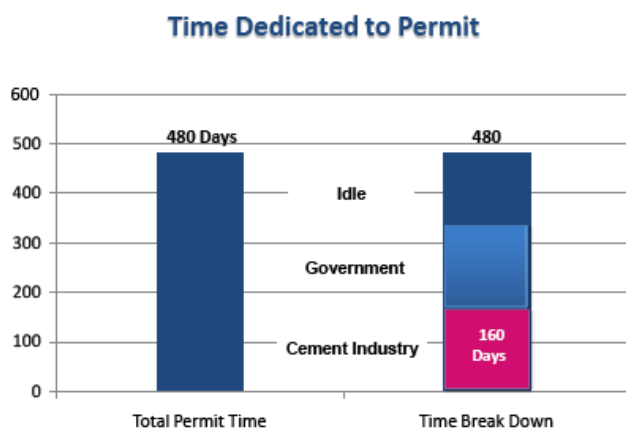
³³ National Pork Producers Council, September 8, 2014

Regulation, by its very nature, constrains economic activity and can hinder economic growth through the increase of costs (such as permit application fees and mitigation expenses). It is important to note that regulations can hinder economic growth through the increase of visible costs (such as permit application fees and mitigation expenses) **and "opportunity" costs.**

Opportunity costs include the time and expense spent complying with regulations that could otherwise be spent on other projects. If a developer, for example, is forced to spend time and money to secure the necessary permits to begin a project, then that is time and money that cannot be dedicated to another project that could expand business and create jobs - to the detriment of economic growth.

According to various research studies, the opportunity costs associated with acquiring permits to comply with regulatory adjustments can be significant. Indeed, the real damage to economic growth may not be in the additional processing fees developers have to pay, or in the additional headaches the new rules create, but in the projects that never happen, and the profits that are never generated, and the jobs that are never created.³⁴

With the broadening of the definition of waters covered under the CWA, permitting will increase. Time is involved to prepare a permit and receive a decision from the Corps. According to the Corps, it takes between 16 to 127 days for a decision on permits, depending on the type and complexity of the permit. Research that has been conducted to validate these estimates indicate the permitting process is considerably longer.³⁵ Based on surveys of permitting applicants, it takes an average between 405 to 788 days from the time they began preparing the application to the time they received a permit, depending on type and complexity of the permit.



The main reason for the discrepancy is that the Corps only counts the time from the date that it deems an application to be complete until it reaches a decision. This accounting

³⁴ An Analysis of the USEPA's Economic Analysis of Proposed Revised Definition of Waters of the United States, Marc Seelinger, Jr.

³⁵ David Sunding & David Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process. The Natural Resource Journal, 1999.

ignores the time needed to prepare the application, which comprises the majority of the total permitting time required for both nationwide and individual permits.

Based on the plant manager survey, the cement industry averages 480 days from the start to completion of the permit process. From an applicants' perspective, the survey results seem more appropriate for a rough estimation in opportunity costs associated with the WOTUS proposal. Since some of the time-in-process does not actively include the applicants work time, PCA assumes that only half of the time in process includes applicant work time. Furthermore, applicant work time will likely include junior and senior level staff time. PCA assumes that one third of the total staff time is comprised of junior level staff time and two thirds of senior level staff time. Finally, PCA applies daily wage rates to each level of staff time. The wage rates are taken from the Federal Government's annual GS pay scale using a GS-10 for junior staff and a GS-15 for senior staff. Conversion to a daily rate was achieved by dividing the annual salary by 232 days per year (365 days per year, less 104 weekend days, less 15 vacation days, less 13 holiday days, less 2 roaming holidays). Benefits are added at a ratio of one third wages.

This crude method results in an opportunity cost estimate for the permit requester of slightly more than \$64,000 for a section 402 permit and nearly \$94,000 for a section 404 permit. Clearly, the assumptions used can be tinkered with and adjusted -yielding somewhat different results. PCA believes it has used somewhat conservative estimates. Section 402 compliance under the proposed rule is expected to require permits for an additional 436 points of discharge, each with an opportunity cost estimated at \$64,000 and totaling \$27.9 million over a five year time horizon. Similarly, section 404 compliance under the proposed rule is expected to require a net 21 additional permits, each with an opportunity cost estimated at \$94,000 and totaling nearly \$2 million over a five year time horizon. Opportunity costs that may materialize at the government level are not calculated into these estimates.

Keep in mind, as more projects become subject to the federal Clean Water Act, more of them will also have to submit to consultation with other federal agencies to ensure compliance with the Endangered Species Act and the National Historic Preservation Act. The regulatory compliance efforts, as a result, could be multiplied. In the end, more projects will become subject to regulation and many could become subject to additional regulation prolonging compliance time and expense and adding to opportunity cost estimates. PCA has not included the possibility of these compliance efforts into its opportunity cost estimates.

The critical point that is being made is that opportunity costs are an important, and significant, cost associated with regulation. While the EPA's economic report recognizes the existence of opportunity costs, it fails to include these costs in its social welfare analysis.³⁶ Without incorporating these significant costs, the economic social benefit assessment is compromised. Interestingly, the EPA's economic report includes "opportunity benefits" into its estimates of social welfare.

³⁶ *The Agencies (EPA and the Corp) recognize the time and impact avoidance and minimization costs can be significant for some share of permit applicants. However, because there is not a defensible, ready basis for estimating these cost, the agencies did not estimate these compliance costs as Dart of this economic analysis "Economic Analysis of Proposed Revised Definition of the waters of the United States", USEPA & Army Corp of Engineers, March 2014.*

Microeconomic Cross Check of EPA's Net Welfare Assessments

Data, or the lack thereof, lies at the root of criticism regarding the EPA's economic assessment of net social benefit associated with WOTUS. The dearth of good data forces the EPA into a methodological estimation approach that rests on strong assumptions and problematic methodology - raising concerns of the EPA's net social benefit assessments.

The EPA suggests that extensive field testing is required to collect the necessary data in order to provide a more definitive estimate regarding the net social benefits associated with the proposed WOTUS changes. The structure of the cement industry provides a unique opportunity to conduct a survey based microeconomic cross-check of the EPA's general macroeconomic cost estimates. For surveying purposes, the cement industry has a manageable number of plants (98), a relatively large acreage footprint, significant exposure to the CWA's section 402 and 404, and finally seasoned plant managers that are familiar with each inch of their facility. While the plant managers are not EPA environmental inspectors, cement plant managers serve as a proxy for "extensive field experience" that the EPA suggests is needed for better social welfare analysis.

Using this unique information, PCA estimates that the proposed WOTUS rules could add nearly \$73 million in compliance costs over a five year time horizon. Based on reasonable changes in assumptions PCA believes the costs could range from a low of \$55 million to a high of \$103 million.

This microeconomic approach used to generate compliance costs are compared against the economic wide estimates provided by the EPA and the Corps of \$163 million to \$279 million. If both research is correct, the cement industry would account for a range of 33% to 37% of total national compliance costs. Keep in mind, the cement industry is a \$14 billion industry in the context of a \$16 trillion economy, or accounting for less than one-tenth of one percent.

Total Compliance Costs of Proposed WOTUS Rules			
(Million Current \$, 5 Year Horizon)			
		Total =	\$72.6 Million
	Section 402		Section 404
	Initial Permit Costs	\$4.9	Initial Permit Costs \$11.9
	Mitigation Costs	\$2.9	Mitigation Costs \$10.5
	Administration Costs	\$3.1	Administration Costs \$2.3
	Recurring Costs	\$2.3	Recurring Costs \$4.8
	Opportunity Costs	\$27.9	Opportunity Costs \$2.0
	Total	\$41.1	Total \$31.5

How can an industry so small account for such a large part of the EPA estimates? Perhaps PCA's cost estimates are off ten-fold. Then, the cement industry, accounting for

less than one tenth of one percent of overall economic activity would account for 3% to 4% of EPA's national WOTUS Corps' dramatic underestimation of costs to the United States economy.

Other Costs: Economic Growth and Jobs.

Regulation, by its very nature, typically involves compliance and remediation costs borne by the regulated industry. These direct costs to industry multiply, industry after industry, and under the weight of higher production costs can constrain broader economic activity, reduce growth and inevitably net job creation. A recent study estimates that federal regulations have reduced economic growth by about 2 percent per year between 1949 and 2005. They find that if federal regulations were still at levels seen in the year 1949, current GDP would be \$38.8 trillion higher. While that number seems extraordinarily high, a number of other studies have similarly concluded that regulatory accumulation slows down economic growth. Neither PCA nor the EPA included these impacts into assessments. Nevertheless, such impacts are very real and should be included in net benefit social welfare assessment. (p. 33-43)

Agency Response: Many aspects of this comment from the report submitted by PCA are addressed by the Summary Responses for Topic 11. However, there were several parts of this PCA's comments that are addressed directly here.

The PCA analysis states that there are currently 707 NPDES (CWA 402) permitted discharge sites at the 105 cement plants nationally. The analysis estimates that “if the entire site were to fall under the CWA jurisdiction today”, then there would be an additional 436 permitted discharge sites. The PCA analysis applies an estimated \$11,132/permit cost to each of the new discharge point they estimate will occur due to the rule to derive an estimate of \$4.9 million in permit costs per permit cycle. The agencies believe this may lead to an overestimation for several reasons. First, NPDES permits are plant not outfall or discharge site based so there is typically one permit per plant, which can cover multiple outfalls therefore the \$11,132 is likely an overestimate of unit permitting cost for each additional discharge site. Secondly, the 436 permitted discharges per permit cycle are presumably for land disturbances, because any permanent wastewater outfalls from industrial buildings are very likely already covered by their permit and would not be affected by an incremental change in CWA jurisdiction. According to PCA, on average only 2% of the site is actively disturbed in a year, and permits only last for five years, so only 10% of a site would likely be active during a permit cycle. Since, the 436 potential discharge points are an estimate of CWA jurisdiction covering the entire site, it would suggest that the increase per permit cycle would be closer to 44. Finally it is highly unlikely that the CWA jurisdiction would apply to the entirety of each plant's site due to the incremental change in jurisdiction under the rule.

The PCA analysis also considers the monitoring, testing, and administrative costs for the additional NPDES permitted discharge sites. These costs are presented as the average per discharge site. It is very likely that the average costs are comprised of fixed and variable costs. So as the number of discharge sites increases, while the number of plants remain the same, the primary effect will be on variable costs, and

so the incremental increase in costs from an additional discharge site should be less than the average for the plant.

The PCA analysis estimates the additional need for 404 permit coverage, based in part on two separate jurisdictional expansion analyses done by third parties. The first, performed by the Water Advocacy Coalition, estimates a four-fold increase. The second, performed by the National Pork Producers Council, estimates a doubling of jurisdictional coverage. However, the agencies do not consider these independent estimates to accurately represent the jurisdictional changes due to the rule.

The PCA analysis includes an estimate of opportunity costs, based on the time taken by plant employees during the 404 permitting process. The PCA analysis relies on a plant survey estimate of 480 days for the time it takes from initiating the permit process until the time that the 404 permit. At this point in the description of the analysis, it is unclear exactly what calculations are made, but they estimate that each 402 permit will add \$64,000 in opportunity for a 402 permit and \$94,000 for a 404 permit. The PCA analysis does not elaborate on exactly what labor activities are represented by these costs, but they presumably are for permit preparation. However, given that PCA analysis includes several other permit related costs, such as the \$11,132 permit cost for 402 permit, it would be helpful to understand how these permit preparation activities differ from the activities that go into the earlier cost estimates. The hour and cost burdens suggested by PCA's opportunity cost analysis far exceed EPA's own permit hourly burden and cost estimates in its Information Collection Request Renewal for the National Pollutant Discharge Elimination System (NPDES) Program (OMB number 2040-0004).

PCA states that "...as more projects become subject to the federal Clean Water Act, more of them will also have to submit to consultation with other federal agencies to ensure compliance with the Endangered Species Act and the National Historic Preservation Act. The regulatory compliance efforts, as a result, could be multiplied." Compliance with the ESA and NHPA are separate from compliance with the CWA. Furthermore, changing of jurisdictional boundaries for the CWA does not affect whether or not a project is in compliance with either of those two separate acts, even if a party is made aware of their ESA and NHPA obligations during the CWA permitting process.

The PCA analysis suggests that the agencies' national cost estimates cannot be accurate because their own cost estimate is approximately 33% to 37% of the agencies' cost estimate for the proposed rule, even though the cement industry accounts for less than one-tenth of one percent of the national economy. The agencies readily acknowledges that some sectors, such as the cement industry, will likely be disproportionately affected due to its land intensive nature. In fact PCA makes a compelling case for their impact would be disproportionately high relative to other sectors of the economy.

...the cement industry has a manageable number of plants (98), a relatively large acreage footprint, significant exposure to the CWA's section 402 and 404

Due to the fact that the cement industry would likely disproportionately affected by the rule, relative to other sectors of the economy, it is not appropriate to use estimates of its rule related costs to assess the accuracy of the agencies' national cost analysis.

Big Horn County Commission (Doc. #13599)

11.1.81 The proposed rule imposes significant direct impacts on county government and significant indirect impacts to county economies. Neither is adequately quantified by the agency's economic analysis. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. In addition, the rule is definitional and therefore imposes no direct costs. See Summary Response to Topic 11.

Building Industry Association of Washington (Doc. #13622)

11.1.82 The EPA's proposal will cause increased delays and financial stress for home builders especially small home building companies-without adding to environmental protection in Washington. Overall costs on projects will rise as will the total interest paid on bank loans needed to finance projects. The added time it takes to realize financial return will not only harm them, but it will also adversely affect the financial health of local economies and governments reliant on tax revenues. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs and benefits that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

11.1.83 Perhaps most harmful to the average American, since relatively small price increases in the median price of a home can have a big impact on whether large groups of people can afford such homes at all the proposed rule adversely affects housing affordability nationwide. This is something that neither the economy nor the environment dependent on a thriving economy can afford. For example, nationally, a \$1,000 increase in the median price of a new home from \$225,000 to \$226,000 causes a group of over 230,000 American households nationwide to no longer be able to afford that home. In Washington State a \$1,000 price increase prices out 4,702 households from homeownership. This proposal will undermine the myriad of housing program sponsored by federal, state, and local governments and will cause housing prices to increase Expanding the definition of navigable waters directly conflicts with housing programs at all levels of government. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice and therefore is not an expansion of jurisdiction. The agencies do not see how the rule will undermine the myriad of housing programs cited above. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

Hawaii Reserves, Inc. (Doc. #14732)

11.1.84 We are also concerned that currently developable State- and privately-owned land in Hawaii subject to permit requirements may also need to be reclassified as a result of the proposed rule (to conservation or another lower land classification) which would likely preclude the owners' development of such property.

Finally, as a landowner which previously operated its own agricultural business, and currently leases land to farmers, we are concerned about the negative impact this proposed rule could have on agriculture in our state.

Hawaii farmers, ranchers and agricultural stakeholders already experiencing financial difficulties due to increased operating costs cast upon them in recent years by various safety and security standards, programs and regulations relating to maintenance and operation of water systems, infrastructure, and growing/processing machinery and facilities, will be further impacted by the proposed rule since normal farming activities will be subjected to additional federal restrictions and consultations that will translate into greater compliance time, costs, and most significantly, potential liability.

For these reasons and others we respectfully urge you to hold the above-referenced proposed rule. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11, 11.3, 11.3.1, 11.3.2 and 11.4.

Wesy Valley Planned Communities (Doc. #18906)

11.1.85 **III. The Economic Impacts Of The Proposed Rule Will Be Significant.**

EPA should undertake a full evaluation of the effects this rule will have on planned communities and its recreational features, particularly recreation lakes, ponds, golf courses, parks, and green space. EPA's economic analysis of this rule does not accurately reflect the cost to planned communities that would be caused if the proposed rule were implemented. The increased cost would stem from potential sanctions for failure to have the appropriate permits, increased cost for jurisdictional determination to confirm that a particular drainage canal system is not within the jurisdiction of the CWA, and the cost of securing the appropriate permits with respect to the water features that fall within the purview of "waters of the U.S." (p. 4)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

Henderson Forestry Consultants, P.A. (Doc. #8665)

11.1.86 If ephemeral streams are included, the result will be catastrophic for all private forest landowners that desire to manage and harvest their timber. 25% to 40% of their property could be included in WOTUS stream zones. Many of the small, private forest

landowners would not have enough available acreage to economically manage and harvest their timber. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

Ernst Concrete, Inc. (Doc. #12347)

11.1.87 Ernst Concrete Inc. has concerns that this rule will greatly increase the cost of doing business, as well as raise the cost of all construction projects across the country to unacceptable and unnecessary levels. Ernst Concrete Inc. suggests EPA take great consideration of the economic effects on both materials. Please see comments submitted by the National Ready Mixed Concrete Association for more information, in part, on the economic impacts on the industry as a whole. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice. See Summary Responses to Topics 11, 11.3, 11.3.1, and 11.4 on how the agencies address potential costs.

Pennsylvania Coal Alliance (Doc. #13074)

11.1.88 The anticipated delineation of more jurisdictional waters under the Proposed Rule would make it more likely that the thresholds of the PASPGP-4 would be exceeded and would result in an increased need for individual Section 404 permitting, necessitating significant lead time and increased permitting expenses. The delay associated with obtaining an individual permit can presently be as much as a year or more. In part, this delay is because the Corps' individual an increased need for individual Section 404 permitting, necessitating significant lead time and increased permitting expenses. The delay associated with obtaining an individual permit can permit process includes a public notice that is sent to various resource agencies and other interested parties. The Corps must evaluate all comments received as a result of the public notice, and in some cases hold a public hearing. (p. 8)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses costs that may occur relative to recent practice, and includes permitting expenses. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

The Mosaic Company (Doc. #14640)

11.1.89 The estimated costs and benefits in the study do not provide useful information for assessing the consequences of the proposed WOTUS rule. Indeed, EPA states that “[r]eaders should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis.”(EPA Study, pg. 2) Based on our assessment, we concur that caution is appropriate. The study contains methodological flaws, suffers from the absence of direct data, and incorrectly applies the data that is available. As a result, the study is

based on unreliable data: overestimating benefits and underestimating costs. In a seminal article published in Science magazine, a team of economists articulated eight principles for the appropriate use of benefit-cost analysis. One instance they felt benefit-cost analysis would not be useful is when the benefits and costs are too uncertain (Arrow et al. 1996). The EPA's cautioning note and this review clearly show that in this case, the benefits and costs are too uncertain, and as explained in Section 4, the benefits in particular are overestimated and do not meet the requisite standard of reliability.

The approach relied on in the Study significantly understates costs. Key issues are:

- *Use of non-representative permit data from 2009-10 during the “Great Recession”, which will underestimate future demand for permits
- *Use of the ORM2 database, which could significantly underestimate the total acreage affected by the proposed rule
- *Socio-economic costs and lost profits are not quantified
- *Omits key Section 404 cost categories, which EPA notes could be significant.

In addition, because of the uncertainty of the magnitude and location of areas that would become jurisdictional, the Study assumes they have the same geographic distribution as current jurisdictional acres. This is a highly speculative assumption and could have a significant impact on costs given variation in mitigation credit prices both across and within states.

The approach adopted overstates benefits associated with mitigating impacted wetland acres resulting from the proposed rule. Benefits are measured by using stated preference studies that are inherently unreliable. Moreover, this approach cannot account for the fact that ecological benefits from the isolated waters decline with increasing isolation from traditional navigable waters (TNWs), and decline with their size. The assumption that per acre benefits are constant, with no basis for assuming their purported benefit estimates can be applied to the small wetlands and waterbodies is central to the proposed WOTUS rule. The benefit estimates are also subject to double-counting, as the Study's calculations ignore that more than half of all states already claim jurisdiction and require mitigation for current federal non-jurisdictional (isolated) waters. Notably, the EPA warns that these benefit estimates are “illustrative”.

It is our recommendation that EPA develop reliable data and methods that reduce the need for caution and take the analysis beyond illustrative. Specifically, we suggest:

- *Collecting adequate data required for robust projections of CWA permitting activity.
- *Improving estimates of impacted acreage under the proposed rule and developing a more accurate inventory of the waters subject to the expanded CWA jurisdiction.
- *Developing approaches for estimating the types and level of ecological benefits the waters provide, particularly those remote to TNWs.
- *Including appropriate compliance costs currently omitted from the current EPA's estimates.

*Discarding benefit estimates based on hypothetical values in favor of avoided costs, which shows the cost of developing and maintaining an engineered solution providing the same services.

*Developing approaches for considering incremental, not average, benefits and costs.

Only with the additional data can the regulated community and decision-makers begin to determine whether the proposed CWA jurisdiction provides benefits above costs. (p. 40-41)

Agency Response: The agencies have modified the economic analysis accompanying the proposed rule in response to suggestions and new information. See Summary Responses for Topics 11, 11.2, 11.3, 11.3.1, 11.3.2, and 11.4 for more details.

11.1.90 3.5 Future Mitigation Credit Prices and Scarcity

Federal guidance on economic analysis also requires cost-benefit analyses to account for how the regulation will affect future prices and scarcity (EPA 2010), such as price impacts of increased demand for mitigation credits spawned by the proposed rule. As the potential jurisdictional acreage increases for future projects, so too will the demand for mitigation credits. Unless and until the supply of mitigation credits can adjust to meet increased demand, the regulated community will face higher credit prices. For government sponsored projects, these costs are passed on to the taxpayer. Further, there could be instances where the demand for credits exceeds the available supply. The degree to which the proposed rule could tip the scale of credit prices is critically important in light of the encouragement applicants receive from the 2008 Guidance to satisfy mitigation through credit purchases, and the expectation of an increase in development associated with an improving economy. (p. 50)

Agency Response: See Summary Responses for Topics 11.3, 11.3.1 and 11.3.2.

Montana Mining Association (Doc. #14763)

11.1.91 Such permitting also would bring with it additional mitigation requirements, which would place further strain on mitigation banks. In certain parts of the country, mitigation credits are already very limited - a problem that has been compounded by increasing demands by the Corps for higher mitigation ratios. As a result of the proposed rule, mitigation costs are almost certain to rise to the point where at least some mining operations and expansions become cost prohibitive.

In addition to the implications for Section 404 permitting, the proposed rule is also likely to trigger increased Section 402 permitting obligations for mining-related activities as additional waters within mine sites that were previously non-jurisdictional become jurisdictional. In particular, many ditches, which are already regulated as stormwater conveyances under Section 402(p), as well as ditches 'conveying waters to ponds and impoundments, could likely be considered jurisdictional waters subject to water quality standards, total maximum daily loads, and NPDES requirements. As a result, companies needlessly will have to treat not only discharges from such ditches to downstream waters, but also discharges to those very same ditches. Additionally, by way of another example, under the proposed rule mining companies could be put in the

impossible situation of having features designed to either store or treat mining-related materials to improve water quality be themselves required to meet water quality standards. (p. 4)

Agency Response: See Summary Responses to Topic 11.3.1 and 11.4 on costs, as well as Topic 6.2 on excluded ditches.

Black Hills Regional Multiple Use Coalition (Doc. #14920)

11.1.92 The EPA has not provided any meaningful analysis of the potential for impact on CWA programs. In fact, the economic analysis accompanying the rule downplays non-404 impacts, concluding that only an artificially small increase in jurisdictional waters will occur. Many questions remain about the definitions used in the proposal and the impacts to most CWA programs, leaving these to become known only after the proposed rule is finalized and implementation begins.

The regulatory changes suggested by the rule will have significant direct economic impacts on our sectors of the economy. For example:

- In light of the scope of the proposed jurisdictional expansion, it will be nearly impossible for private property owners, state and local governments and industry to use or develop public or private land containing water that is arguably subject to the rule's expansive jurisdictional reach without first obtaining a costly federal CWA permit.
- Under the proposal, third parties could assert that features such as drainage ditches, stormwater ditches and water storage or treatment ponds, utilized by municipalities, states, federal agencies, and industry to manage and convey water in order to protect jurisdictional waters would now become jurisdictional waters. As a result, the continued use, care and maintenance of these features would require federal permits.
- The proposed rule would subject private land conservation projects to added regulatory burdens and costs therefore creating a disincentive to landowners pursuing important and needed conservation projects that benefit watersheds, waterfowl and riparian habitats. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

American Petroleum Institute (Doc. #15115)

11.1.93 **3.3 A perspective on benefits of the Proposed Rule**

One primary benefit to arise from implementation of the Proposed Rule, according to the Agencies' analysis, is the preservation or recreation of 1,332 acres of wetlands each year—about 2 square miles.

To put this in perspective, we turn to a recent report to Congress by the Fish and Wildlife Service³⁷. Upon analysis, we find that:

³⁷ Dahl, T.E. 2011. Status and trends of wetlands in the conterminous United States 2004 to 2009. U.S.

*There were an estimated 110.1 million acres of wetlands in the Conterminous U.S. in 2009.

*Wetland area declined by an estimated 62,300 acres between 2004 and 2009. This equated to an average annual loss of 13,800 acres. However, the difference in the national estimates of wetland acreage between 2004 and 2009 was not statistically significant [emphasis added].

*Although the rate of total wetland gain (from restoration) increased 17 percent from the previous study (1998-2004), the rate of total wetland loss increased 140 percent. Heaviest losses were noted by coastal wetlands, specifically estuarine intertidal emergent wetlands, which experienced a loss of 111,500 acres over the period, three times greater than during the previous study period. Interestingly, less than 1 percent of these estuarine losses are attributed to direct anthropogenic activity (Section 404 of the Clean Water Act in addition to state regulations protect them from being filled) while 99 percent are attributed to physical processes such as coastal storms, land subsidence, and sea-level rise.

*Nonetheless, this represents marked improvement from the period prior to the Clean Water Act's enactment (1950s-1970s), in which average net wetland loss has been estimated at 458,000 acres per year³⁸. Steady progress peaked in 1998-2004 with an estimated net gain of 32,000 acres per year³⁹, before falling back to a net loss of 13,800 acres per year, as described in the previous paragraph. Again, it should be emphasized that these are estimates, subject to considerable uncertainty.

Given this background, the objective of this Rule to preserve 1,332 acres of additional wetlands each year appears exceedingly modest, falling well below the level of statistical measurement accuracy of the U.S. wetlands inventory. Gains twenty to thirty times greater have been achieved in recent years under the existing Clean Water Act.

Given the Proposed Rule fails completely to achieve regulatory clarity and that its promise of improved protection of waters is illusory, the tangible objective of preserving so much as 1,332 acres of wetlands is an important benefit. It is fair to ask however, whether this is a reasonable exchange for the costs and shortcomings of the Proposed Rule outlined in this document; and whether a better policy option could not be found to achieve the same objective at lower cost and regulatory burden. (p. 84-85)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis is illustrative in nature, and addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

Department of the Interior; Fish and Wildlife Service, Washington, D.C. 108 pp.

³⁸ Frayer, W.E., T.J. Monahan, D.C. Bowden, and F.A. Graybill. 1983. Status and trends of wetlands and deepwater habitats in the conterminous United States, 1950's to 1970's. Colorado State University, Fort Collins, CO. p. 31

³⁹ Dahl, T.E. 2006. Status and trends of wetlands in the conterminous United States 1998 to 2004. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. p. 112

11.1.94 **5.3 The Proposed Rule effectively will further restrict access to state and private lands essential for growth in domestic onshore U.S. energy production, and may even further restrict offshore production.**

Oil and natural gas development on state and private lands has been essential to offsetting decreased development on federal lands. Between fiscal year 2009 and 2012, U.S. oil production increased 19 percent overall, with a 6 percent decrease in federal oil production offset by a 31 percent increase in production on state and private lands.⁴⁰ U.S. natural gas production increased 13 percent overall, with a 21 percent decrease in federal natural gas production offset by a 25 percent increase in production on state and private lands.⁴⁰ In fact, 100 percent of the increase in U.S. oil production between 2007 and 2011 has occurred on non-federal lands.⁴¹

Onshore production is especially important considering that, offshore, over 87 percent of federal acreage remains effectively off limits to oil and natural gas development. The Proposed Rule has the potential to further increase that number because the redefinition of WOTUS could extend the reach of the Coastal Zone Management Act (CZMA) inland.

The CZMA provides for the management of the nation’s coastal resources, including the Great Lakes. The CZMA is intended to balance competing land and water issues through state and territorial coastal management programs and was passed to encourage coastal states to develop and implement coastal zone management plans. Consistency determinations are required for issuance of CWA permits in coastal zones and include requirements that the activities being permitted under the CWA also demonstrate compliance with applicable state laws. These include state environmental protection acts, state endangered species acts, state air protection policies, and many others. The cost assessment for CWA permits in coastal states should be separately assessed to ensure that the costs of compliance with the CZMA are fully represented in the Agencies’ cost impact analysis. For instance Coastal development Permits in California can cost between approximately \$50,000 and \$200,000 to obtain, and are costs in addition to the costs associated with the necessary Section 404 and 401 permits. (p. 126-127)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have adjusted the accompanying economic analysis.

11.1.95 **5.4 The Proposed Rule will increase the costs of assessing and complying with virtually every type of permit available under the Clean Water Act and associated regulations that rely on the CWA definition of WOTUS.**

It has been argued in Section 3 that the PEA severely underestimates the regulatory costs associated with the Proposed Rule, if finalized in its current form. In this section we will identify and qualitatively describe multiple areas of these increased costs for the oil and natural gas industry, and will adduce a detailed permitting cost breakdown for

⁴⁰ See

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20130228CRSreport.pdf>

⁴¹ See

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20130228CRSreport.pdf>

Section 404 dredge and fill permits that we believe better represents the regulatory costs likely to be borne by project proponents for that one type of permit under the Proposed Rule's regime.

5.4.1 The site selection process will become more time-consuming and expensive – regardless of whether or not a permit is ultimately necessary.

As the scope of jurisdictional features expands under the Proposed Rule, oil and natural gas operations will need to commit more time and money to identifying those features. This process will also become more technologically difficult, since many dry land features may be deemed jurisdictional waters under the Proposed Rule. This cost will be particularly pronounced in the upstream segment, because well sites are carefully selected based on factors which often include a desire to avoid potential impacts to WOTUS. Continuing to avoid WOTUS under the Proposed Rule will require expert guidance for both primary and secondary screening – costing additional money and time. It can also be expected to impact gathering lines, as well as midstream and downstream activities such as refining. Impacts will be especially pronounced in the arid west, where longer desk reviews and more actual field surveys will be necessary to assess jurisdictional features such as ephemeral and non-perennial streams that may change over time.

To illustrate the complexity, Figures 5-1 to 5-4 show examples of features that would likely be jurisdictional under the Proposed Rule as currently written.

Descriptions of the figures are as follows:

- Figure 5-1 Old Logging Road Potentially Jurisdictional. The old logging road in this picture was categorized by Agency field personnel in a jurisdictional determination as a non-relatively permanent tributary with bed, bank, and high water mark, but one which failed the test for a significant nexus due to minimal sheet flows into its channel, and so was considered non-jurisdictional under current guidance. Under the Proposed Rule, which defines per se any feature with bed, bank and ordinary high water mark as a tributary without regard to frequency, this would be a Federally-protected jurisdictional water.
- Figure 5-2 Path Possibly a Tributary. Another example from a recent jurisdictional determination. Under current guidance, the overtopping of this pond due to heavy rain and flow to down-gradient waters was insufficiently frequent to classify the flow as a tributary. Under the Proposed Rule, however, frequency no longer matters. The flow path may be a tributary, and if so, would make the otherwise isolated pond itself jurisdictional.
- Figure 5-3 Arroyo Potentially Jurisdictional. The arroyo would be jurisdictional (a Federally-protected “Water of the U.S.”), even though it flows about 10 days a year. This location is roughly 130 miles from the nearest Traditional Navigable Water.
- Figure 5-4 Combining Jurisdictional and Non-Jurisdictional Ditches. The yellow ditch is likely not jurisdictional as it drains only uplands and has only intermittent flow, qualifying it for one of two exclusions for ditches. However, just downstream, the red ditch is likely jurisdictional, due to the fact the road cut has intersected shallow groundwater that keeps the ditch full (perennial flow). The

flow from the red ditch passes through an erosional feature (nominally non-jurisdictional) as it is re-absorbed into the arid soil. It is not clear from the Proposed Rule ditch exclusions under what conditions or connections the red ditch (downstream) might impact the jurisdictional status of the yellow ditch (upstream), nor how perennial flow at the inlet to the erosional feature might affect its excluded status. If the red ditch is WOTUS, it may require permits for any subsequent work, such as ditch cleanout and road maintenance.

Proposed Rule. Tributary.



Proposed Rule. Tributary and Impoundment.



Man-made impoundment that overflows after large rain events (>1" per hour). Overflow down-gradient to a stream makes this pond WotUS. Flow path itself may be a tributary

Proposed Rule: Tributary



Proposed Rule. Tributary / Ditch



(p. 127-132)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See the preamble, the Technical Support Document and Compendium 8 for more information on tributaries. See Summary Responses to Topics 11 and 11.2.

11.1.96 5.4.7 Lack of clarity in jurisdictional features will increase the risk of permit denials, effectively increasing costs for appeals and potentially deterring investors.

The regulated community requires clear measurable parameters that define regulated resources to facilitate effective project planning and to make decisions regarding resource avoidance and costs for permitting and mitigation of impacts. If the required data are not well defined and the jurisdictional determination for these features is left to the Corps to be determined on a case-by-case basis using criteria that are not quantifiable or that are yet to be established, the regulated public is unable to effectively plan proactively to protect WOTUS through project design measures. The more subtle landscape features swept into jurisdiction (categorically and without appeal) by the Proposed Rule are characterized by, e.g., elevation differences of inches and determinations of flow based on leaf litter, making them impossible to define under a desk review or Lidar study. “Boots on the ground” are necessary (and even that may not be sufficient to spot all features). Moreover, it is difficult to properly evaluate project alternatives when significant time and effort must be expended to determine jurisdiction and when the findings are uncertain due to poorly defined criteria. This increases direct

and indirect costs for the regulated community, reduces protection of WOTUS by precluding effective advanced avoidance planning, and is likely to result in more frequent appeals and repetitive assessments and design changes. It is difficult for the regulated community to work within this realm of uncertainty regarding jurisdiction and to be subject to extended schedules due to delays in obtaining jurisdictional decisions and permits. This may dissuade capital investment or result in other lost opportunity costs.

As previously stated, more definitive measurable criteria to determine jurisdiction are necessary to allow the regulated community evaluate potential resource impacts in a more accurate and timely manner and would allow for more proactive resource protection during the project design phase. The Agencies need to develop these criteria and better define the data requirements to document these criteria, to enable the regulated community to assess jurisdiction during project planning. (p. 135)

Agency Response: The agencies have clarified determining jurisdiction for this rule. See Preamble and Technical Support Document, as well as Summary Responses under Topic 11 for more detail.

- 11.1.97 5.4.8 Increased enforcement risks resulting from the lack of clarity in jurisdictional features will increase costs for contesting or settling enforcement actions and may potentially deter investors.

As more geographic features are deemed to be jurisdictional, there is an increased risk of enforcement actions by EPA and an increased risk of third-party citizen suit challenges by environmental groups. Two recent examples of settlements between operators and the EPA highlight this risk. For example, the subsidiary of one operator recently agreed to pay a \$3.2 million civil penalty and pay an additional \$6.5 million in compensatory mitigation costs for filling geographic features without a permit at natural gas drilling sites in West Virginia that EPA claimed were jurisdictional streams and wetlands.⁴² Another operator agreed to pay a \$110,000 civil penalty as well as to abandon three natural gas wells that had been drilled in dry land near the Green River in Colorado. EPA thereafter determined that the land was in the within the floodplain of the Green River, and therefore alleged that the operator should have obtained a Section 404 permit before constructing the roads and the well pads.⁴³ The potential for retroactive changes in jurisdictional status like this raises the specter that large numbers of projects across the U.S., fully permitted in good faith by conscientious project proponents, could with the stroke of a pen be placed in jeopardy of enforcement action or civil suit. This may have a chilling effect not only on new investment projects, but may also raise unforeseen risks on projects already under construction or in operation. (p. 135-136)

Agency Response: See Summary Response under Topic 11.

- 11.1.98 5.4.9 Other costs including maintaining created WOTUS, conflicts between state and federal regulations, and grandfathering should also be considered.

⁴² See <http://www2.epa.gov/enforcement/chesapeake-appalachia-llc-clean-water-settlement>

⁴³ See <http://www2.epa.gov/enforcement/gasco-energy-inc-clean-water-act-settlement>.

Under the Proposed Rule, developers may build dikes, impoundments, drainage or other water-control features, that may subsequently (after the completion of the initial construction project) be classified as WOTUS that need to be protected. This in turn may increase the permit requirements and complexity of post-construction activities, such as maintenance, expansion, or decommissioning and remediation. In effect, this “created WOTUS can effectively “paint developers into a corner.”

Additionally, development could foreseeably be impacted by potential conflicts between State and Federal regulation. For example, the need to obtain Section 404 permits may delay ditch maintenance, decommissioning and restoration work required (on a certain schedule) by State permits.

Finally, the Proposed Rule as currently written contains no “grandfathering” or “grace period.” Under the Proposed Rule, all current jurisdictional determinations would become invalid the moment the Proposed Rule goes into effect. These could substantially effect existing and planned operations. (p. 136)

Agency Response: See Summary Response under Topic 11. The final rule includes a “grandfathering” provision.

11.1.99 **6. Even a conservative estimate of financial and temporal costs associated with the Proposed Rule indicate over \$8 billion in GDP impacts to the U.S. economy.**

For the oil and natural gas industry, one of the most significant impacts is delay and these costs are entirely omitted from the Agencies’ economic analysis.

Sunding and Zilberman state that the average time to prepare and obtain a general permit is 313 days, and an individual permit 788 days or a little over two years.⁴⁴ For optimum rig scheduling and minimal imposition on the local community, it is desirable that all wellpads in an oil and gas field development project be drilled in sequence at about the same time. From the values above it is clear that will not be possible for wellpads requiring additional permits. In addition to the costs due to time-value of idle investment and inefficiencies in scheduling of operations, it should be noted that typical lease terms from the owners of mineral rights are on the order of three years. Individual permits, therefore, may have the practical effect of rendering a wellpad undevelopable, with concomitant reduction in total production, and foregone revenue for the landowner.

At a cumulative level, these potential delays will cost significantly in terms of reductions in the investment of drilling of oil and gas wells, domestic US oil and natural gas production, employment, gross domestic product and government revenues; especially in the initial phases of the rules implementation.

This document adduces detailed permitting analysis by API member companies, indicating that the proposed rule could more than double the number of general and individual permits required for oil and gas field developments, far more than the Agencies’ estimate of a 2.7 percent increase (equivalent to their estimate of increased jurisdiction). However, for the sake of argument, let us provisionally accept the

⁴⁴ Sunding and Zilberman, 2002. The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources Journal 59, pp 74-76.

Agencies' low estimate; the opportunity costs of delay are conservatively estimated to run into the billions of dollars, an order of magnitude higher than the Agencies' upperbound estimate of all other costs combined. (This fact may explain why costs of delay were conveniently excluded from the cost-benefit analysis supporting this rulemaking.)

To estimate the opportunity cost of the initial year of implementation, this calculation assumes that 2.7 percent of potential onshore wells will not be drilled that otherwise would have, due to permitting delay. The Agencies' cost benefit study estimates 1327 additional general permits (average delay 313 days) and 75 additional Individual permits (average delay 788 days) will be required, by multiplying the actual number of such permits issued in 2010 by the 2.7 percent increase. Using this same proportion, 94.7 percent of these wells would be delayed for nearly a year, and only about 5.3 percent will be delayed for over two years. Since this calculation looks at only the first year, 100 percent delayed for one year is reasonable conservative approximation. Note that the evaluation provided below is a high level assessment of potential impacts that were ignored in the Agencies' analysis. Nevertheless, it shows that there are significant impacts that need to be considered in order to provide a meaningful cost benefit analysis.

The number of wells delayed is estimated to be 1,215 wells assuming number of wells in the future will be similar to the 44,992 wells drilled in 2013.⁴⁵

The average cost of a well will be \$5 million per well, assuming 2013 average well costs. This is investment not spent due to permitting delays.⁴⁶ The drilling and other related expenditures not spent equal \$6.1 billion.⁴⁷

Total employment not supported due to drilling delays is estimated at 67,200 jobs. This number is estimated using the IMPLAN modeling system based on \$6.1 billion not spent and includes direct, indirect and induced employment in the economy.⁴⁸ Total loss of labor income is estimated at \$4.5 billion based on IMPLAN modeling.

Total Gross Domestic Product loss throughout the economy is estimated to be \$8.0 billion based on IMPLAN modeling.

In addition, there are production impacts that need to be included in the assessment. Average production lost for the first year of rule implementation is estimated to be 229,000 barrels per day of oil and 1.37 Billion cubic feet per day of natural gas. This is based on EIA initial production estimates and typical 2013 decline curves.⁴⁹ The first

⁴⁵ American Petroleum Institute, "Quarterly Well Completion Report", October 2014.

⁴⁶ Xu, Conglin, "E&P Spending to Rebound in North America", Oil & Gas Journal, March 3, 2014. Table 1. \$229 billion spent for Drilling Exploration in 2013 / 44,992 wells drilled in 2013 equals \$5.0 million per well.

⁴⁷ \$5.0 million per well times 1,213 wells

⁴⁸ Employment, GDP, and Labor Income impacts per well were estimated using the IMPLAN 3 database version 3.1001.12 assuming \$5 million investment per well - \$2.5 million Drilling oil and gas wells. \$2.5 million Support activities for oil and gas operations.

⁴⁹ Energy Information Administration, "Drilling Productivity Report", October 14, 2014. Based on fir waited first month average production for the most active basins in the U.S. and Drilling Info, DI Desktop database (formally HPDI). Decline curves and average first year production is based on 22,422 wells with initial production between October 1, 2012 and August 2013 with 13 months of reported historical production data.

year value of production lost is estimated to be \$9.9 billion based on projected 2015 commodity prices.⁵⁰

Based on historical relationships between revenue and taxes, total government revenue loss is estimated at \$415,000,000 in corporate federal Income taxes⁵¹ (10) and \$534,000,000 in production taxes; mostly state severance taxes. Lost personal income taxes based on IMPLAN modeling is estimated at 307,000 (11).⁵² These identified government revenue losses total approximately \$1.3 billion; however, they exclude such items as local and state property taxes, state corporate income tax, and labor taxes such as Social Security and Medicare. The government revenue also does not include any royalties if future development takes place on federal or state owned land.

While it may be argued that a certain amount of substitution will take place (other wells not requiring permits will be drilled in the first year, instead of the delayed wells), this substitution is constrained by the availability and quality of the oil and gas in a company's undeveloped portfolio, and by the fact that, due to the sweep and lack of clarity in jurisdictional definitions, it is likely the permit requirements will become clear only in the course of detailed development planning. Moreover, any substitution is likely more than balanced out in that wells may never be drilled if permit delays approach the term of the land lease, or if needed drilling infrastructure has been moved to a different development area; and that lost efficiencies from the staggering of drilling programs will never be recouped. Consequently, the approximation here is a reasonable and very conservative one. (p. 138-141)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes in the assertion of jurisdiction that may occur relative to recent practice and the resulting impacts on CWA programs. See Summary Response for Topic 11.3.1

ConocoPhillips (Doc. #16346)

11.1.100 The proposed rule is a significant expansion of regulatory authority for which the costs and negative impacts will far outweigh the environmental benefits. The economic analysis in the proposed rule significantly underestimates the cost impacts and substantially overestimates the benefits. ConocoPhillips supports the cost impacts analysis of the proposed rule that API has submitted with its comments. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4.

⁵⁰ Energy Information Administration, "Short-term Energy Outlook", October 7, 2014. Estimated commodity prices for 2015.

⁵¹ Energy Information Administration, "Performance Profiles of Major Energy Producers 2009", Table T-5 February 25, 2011. Relationship of revenue from sales in the Production segment to income tax expense.

⁵² Energy Information Administration, "Performance Profiles of Major Energy Producers 2009", Table T-13 February 25, 2011.

Pennsylvania Aggregates and Concrete Association (Doc #16353)

11.1.101 **15. Economic Analysis is Significantly Incomplete and Underestimates Impacts.**

By the Agencies' own admission, "...the resulting cost and benefit estimates are incomplete."⁵³The Agencies estimate that CWA Section 404 permit costs would increase between \$19.8 million and \$52.0 million dollars annually, and they estimate that CWA Section 404 mitigation costs would rise between \$59.7 million and \$113.5 million annually. These amounts fail to address the additional cost increases associated with other CWA programs, including Section 402 permitting. (See U. S. Small Business Administration comments concerning lack of compliance with the Regulatory Flexibility Act resulting in an underestimation of costs to small businesses.⁵⁴) (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The agencies do address other CWA programs. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on costs and benefits, and 11.1 on RFA/SBREFA.

Martin Marietta (Doc. #16356)

11.1.102 For this project, the effort required to obtain the jurisdictional determination included 4 years of site work and 2,100 man-hours of consultant time at a cost of \$250,000. In total, seven field visits were made to the site by local Corps representatives and another five meetings were held in their offices. All of h s effort was for an impact that totals less than 7 acres of wetlands. This process began in early 2004 and more than 10 years later we are still waiting for our permit to be issued. Under this proposal, every step in this process will become more difficult, more costly and the delays will increase as USACOE field offices get further and further behind in their reviews. (p. 1-2)

Agency Response: The agencies have used cost information from across the nation to approximate potential costs related to changes from recent practice. See the economic analysis and Summary Responses to Topics 11.3.1 and 11.4 on costs.

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #18016)

11.1.103 Given the wide-reaching and dynamic nature of mining operations, ephemeral streams are frequently encountered during active mining throughout the SVC. If Virginia's mine operators were forced to obtain a permit before impacting these features, the cost of additional permitting and associated delays could be enormous. In addition, given the confusion in the Proposal over which features are in (e.g., ephemeral tributaries) and which ones are out (e.g., gullies, rills and non-wetland swales), mine operators will be forced to incur substantial expense just to determine whether or not a permit is required. Even the Agencies themselves acknowledge in the Preamble (see Proposed Rule at 22218-19) and elsewhere" that drawing this line can be exceedingly difficult. This is compounded by the fact that mine operators already have to meet numerous requirements when impacting ephemeral streams under SMCRA. (p. 5)

⁵³ Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (March 11, 2014).

⁵⁴ Found at: <http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies modified the proposed rule to address concerns related to clarity and uncertainty of jurisdiction. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4, as well as the Preamble and Technical Support Document for the rule.

Family Farm Alliance (Doc. #1431)

11.1.104 The EPA's Economic Analysis for the proposed waters of the United States rule fails to provide a reasonable assessment of the proposed rule's costs and benefits. The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent. But the EPA arrives at this percentage using a questionable methodology that only accounts for the Section 404 program, relies on figures extrapolated from statistics from FY 2009-2010 (a period of extremely low construction activity during one of our nation's greatest recessions), and fails to account for the universe of waters and features for which landowners have not previously sought CWA permits. Relying on this percentage throughout the Economic Analysis, the EPA systematically and hugely underestimates the impact of the proposed rule's new definition of "waters of the United States." The EPA's calculations of incremental costs and benefits are also deficient. The EPA's cost analysis is focused on costs associated with the section 404 program and largely ignores the cost impact of the changes to other CWA regulatory programs due to lack of data. Moreover, the benefit calculation is based on a problematic methodology that relies on studies that are largely irrelevant, do not provide accurate estimates of benefits, and were conducted 10-30 years ago. As a result of the incompleteness and inaccuracies of the EPA's Economic Report, it is necessary for members of the public to provide their own economic analyses to project the impacts of the proposed rule, and identify effects that the EPA failed to consider. Additional time is required for commenters to gather the necessary data and develop sound economic methodology to properly assess the proposed rule's likely increase in jurisdiction as well as its projected costs and benefits. The comment period should be extended so that the public can adequately assess the economic implications of the proposed rule. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Colorado Livestock Association (Doc. #7930)

11.1.105 Economic analysis of the Proposed Rule demonstrates a net economic gain, however analytical methods are flawed and not well documented. Estimated costs are based on an incremental growth of only 3% of new permits required and include one-time costs of permitting and administration. Benefits on the other hand, are projected on "willingness to pay" calculations for all of society and capitalized as a present value on 50 years of accrued benefits. In one calculation, 112,000,000 households are claimed to

benefit from 1,332 acres of wetland mitigation, with a present value of \$250-350 million.

Point: Economic analysis drafted to support the Proposed Rule compares real costs with phantom benefits, and fails to acknowledge the ongoing costs of compliance into the future. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Michigan Farm Bureau (Doc. #10196)

11.1.106 While the proposed rule does not directly address the economic impact of implementation, the EPA has published an *Economic Analysis of Proposed Revised Definition of Waters of the United States* on its website and we wish to include a response to this Analysis in our comments. The impact upon the regulated community is a key component of considering any rulemaking, and the flaws in EPA's *Analysis* must be brought to light for a full consideration of that impact.

The *Analysis*, short on support and inconsistent in data used, contains three essential flaws that make its estimation of impact incorrect and unusable as a metric for actual burden on the regulated community: the *Analysis* underestimates incremental acreage, it incorrectly calculates incremental costs and impacts, and it offers a flawed calculation of incremental benefits. First, the incremental acreage, as it is estimated in the *Analysis*, reviews 262 project files from 2009 – 2010. In examining how jurisdictional determinations were made during that period, EPA estimated that they would increase under the proposed rule by 2.7%, based on increases in stream, wetland, and “other water” jurisdictional findings. However, the *Analysis* included no discussion of impacts of the new and revised jurisdictional terminology described above such as “neighboring”, “adjacent”, “tributary”, “riparian areas”, or “floodplain”, or the number of permit applications that may be expected. The USACE categories of jurisdictional waters are not compatible with EPA draft rule categories, and therefore the universe of jurisdictional waters under the proposed rule underrepresented in the USACE database of permit applications. Additionally, neither preliminary jurisdictional determinations nor consideration for the number of individuals who did not seek permits who would fall under the new “other waters” category was included in the estimation.

Second, the *Analysis* reviews incremental impact of the proposed rule and as mentioned above, uses the fiscal years 2009 – 2010 as its baseline, years of reduced development and economic contraction across the country. This impacts both number of projects and average size of projects reviewed. The review of impacts does not address potential new permit seekers, but rather only looks at applicants already in the system. The *Analysis* also improperly extends Section 404 impacts to all systems within the CWA affected by this proposed rule, and ignores the significant differences within the project files. It additionally fails to address state-level projects or acknowledge the difference in project sizes that can also radically influence impact results. When analyzing costs,

the *Analysis* does not include key components like the permitting time costs and the impact avoidance and minimization costs, which can add a heavy burden to the regulated community. It does not account for the relative shift of permit numbers from general permits toward more individual permits (particularly in light of the massive expansion of “other waters” significant nexus testing needed under the proposed rule, such as Section 303 and 402. Worst of all, the program costs list in the *Analysis* are outdated and therefore do not account for inflation or increased cost of programmatic changes.

Third, the *Analysis* calculates benefits in a way that overestimates the dollar value of the proposed rule’s implementation. It assumes greater clarity in the CWA which is incorrect and therefore does not account for the reduced benefit of confusion and failure to account for benefits in a way truly reflective of the advantages derived from program implementation. The *Analysis* synthesizes together many valuation studies to provide willingness to pay estimates of wetland preservation, then multiplies that estimate by acres and households for each wetland region. The selection of willingness to pay studies is arbitrary and not representative of actual willingness to pay across the country, the studies are outdated, and many were not published in peer-reviewed journals. The *Analysis* presumes an unreasonable transferability of result, by applying localized benefits equally to all members of a wetland region, and making no adjustment for changes in economic trends, recreational patterns, or stated preferences over time. Overall, what this *Analysis* does is grossly underestimate the cost and burden on the regulated community, and vastly overstate the benefits this rule change will provide, painting a rosy picture of the rule’s implementation that bears no resemblance to reality. (p. 10)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.107 Further, the *Economic Analysis* does not reflect the true cost of the proposed rule for farmers, landowners, and businesses, and those people can be hurt badly by the expanded regulations, with far less benefit to the American public than the *Analysis* suggests. (p. 12)

Agency Response: The agencies provide an estimate of costs in the economic analysis accompanying this rule. See Economic Analysis, as well as Summary Responses under Topic 11.

Michigan Farm Bureau, Lansing, Michigan (Doc. #10197)

11.1.108 The rule limits private property rights, which clearly goes beyond Congressional intent for the Clean Water Act, and beyond the limits set on agency jurisdiction multiple Supreme Court decisions. Further, the *Economic Analysis* does not reflect the true cost of the proposed rule for farmers, landowners, and businesses, and those people can be hurt badly by the expanded regulations, with far less benefit to the American public than the *Analysis* suggests. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies provide an estimate of costs in the economic analysis accompanying this rule. See Economic Analysis and Summary Responses under Topic 11.

Southeastern Aerial Crop Service, Inc. (Doc. #11774)

11.1.109 As an aerial application business in Florida, we are subject to state and federal regulations for pesticide use and aircraft operation, including performance requirements under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) and Federal Aviation Administration (FAA) for record keeping. The proposed rule would vastly expand not only federal jurisdictional waters but ultimately waters of the state - adding responsibilities, challenges and potential liabilities to our business as we work to consistently comply with the requirements of their various contract, pesticide general permits (PGPs) and FIFRA label requirements. From our prospective, the agencies have not considered these impacts in its economic analysis, determination that small businesses like Southeastern Aerial Crop Service Inc. would experience adverse effects or the potential legal jeopardy under both CWA and FIFRA. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Bayless and Berkalew Co. (Doc. #12967)

11.1.110 The proposed rule would have far reaching negative economic impacts related to food costs, the vitality of rural communities, and dissolution of family farms. There is no way a family farm such as ours would be able to withstand the hefty fines which would be enforced as a result of this rule. I have no doubt, that my family and hundreds of other Arizona farming families will be forced to break this rule, given that it is unavoidable to manage a farm or ranch without the ability to make critical decisions on the hour based upon changing conditions. There is no possibility we could account for these costs in our operation. I would love to speak more specifically to the economic impacts just to Arizona Agriculture in general, but this would be very difficult to do considering the broad ambiguity and unknowns in the implementation of this rule. (p. 4)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.111 A recent report by economist and University of California-Berkley faculty member Dr. David Sunding has given a failing grade to the EPA's economic study of the proposed rule. According to the report, the EPA excluded costs, under-represented jurisdictional areas and used flawed methods to arrive at much lower economic costs of the proposed rule. There is a serious lack of transparency in the report making it difficult to

understand or replicate EPA's calculations, examine the agency's assumptions or understand discrepancies in its results. For example, the EPA alleges that only 1300 acres will be affected by the rule which is ludicrous at best. (p. 4 - 5)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis, including those by Dr. Sunding.

Iowa Corn Growers Association (Doc. #13269)

11.1.112 The Small Business Administration (SBA) Office of Advocacy recently submitted comments to the Agencies outlining their concern that the rule has been improperly certified because it will have a direct cost and economic impact to small businesses. SBA Advocacy correctly points out that the accompanying analysis with the rule says that the CWA jurisdiction increases approximately 3%, however the Agencies certified the rule by saying the proposed rule is narrower than that under been raised about the economic analysis behind this 3% expansion. We recommend that a more existing regulations. In addition, almost every public statement by EPA officials has argued that the proposed rule is not an expansion, when by their very own statement it is. Many questions have thorough analysis be completed with data provided by the states on new jurisdictional areas. (p. 5)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice, and is illustrative in nature. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

North Carolina Soybean Association (Doc. #13621)

11.1.113 It is our belief that our soybean industry including our national and state organizations and other agricultural stakeholders have clearly identified the inconsistencies inherent in the proposed rule including these:

...Finally, the representation of the "Economic Analysis" document misleads farmers about the expansion of jurisdiction under the proposed rule. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The agencies did not attempt to mislead the farmers or other entities with the economic analysis. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Irrigation Association (Doc. #15217)

11.1.114 **Economic Impact of Irrigated Agriculture**

We feel that the economic impact of irrigated agriculture was never taken in to consideration when developing the proposed WOTUS rule. According to a study commissioned by the Family Farm Alliance and the Irrigation Association, the estimated total production (farm gate) for the 17 states that comprise the Western U.S. region is \$171 billion, with approximately \$117 billion tied to irrigated agriculture. Considering the economic impact that irrigated agriculture, the fully integrated green industry and the golf course industry provides to the United States, an economic analysis of how the proposed WOTUS rule will affect industry needs to be considered by the EPA and the Army Corps of Engineers. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Wisconsin County Forests Association (Doc. #16341)

11.1.115 Wisconsin's forest industry generates \$20 billion of economic activity each year, second only to agriculture. Those who live and work here cannot afford possible negative impacts to our sustainable forest management practices resulting from expanded federal authority under CWA as our northern rural communities are already suffering from the lack of forest management on our national forests due in large part to complex federal regulation and federal policy. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

New York Farm Bureau (Doc. #16547)

11.1.116 The term "tributary" is just one example, but the other definitions like "adjacent," "neighboring," "significant nexus" and even "floodplain" (what floodplain interval are the agencies referring to?) are similarly broad and confusing. As a result, farmers wishing to ensure their compliance with the Clean Water Act will be forced to seek individual determinations for a host of low spots, ditches, seasonal drainages, and isolated wetlands just to make sure they are legally farming. However, no additional staff, or resources are planned for NRCS, or other agencies, which make these determinations. In fact, there is already a significant delay in NRCS determinations in areas of our state. Increasing the need for these determinations will delay farming and other land activities, add costs, and be a disincentive to landowners to responsibly manage their land. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.117 Lack of Resources to Handle Exponential Increase in Feature-by-feature Determinations.

It is clear to our farmers that the number of features on their farms that will need to receive determinations from NRCS will grow significantly should this rule go into effect. This will be necessary just to ensure that they are in compliance with the law and do not place themselves at greater risk for a citizen suit. No agency is able to certify for a farmer that he does not have jurisdictional waters on his property-or at least that is what Ms. Stoner told us in person in Syracuse-and the rule makes it too confusing for a farmer to make this assertion himself, so they will need to rely on requesting NRCS determinations for any areas in question. They will do this just to protect themselves and have something to defend against any violation notices or lawsuits should another regulator or citizen decide that a feature on the farm "looks like" it should be a water of the U.S.

In response to this anticipated increase in determination needs, EPA and the Corps have provided no additional resources for NRCS or anyone else to handle this workload. In fact, NRCS in our state is already facing serious backlogs in many areas and unable to keep up with the current demand. One county reportedly has more than 1,000 determination requests in the queue.

Waiting for determinations in a system that is not prepared or equipped for this workload will undoubtedly cause great delays for farmers in conducting the normal and necessary farming activities needed to conduct their business. The agencies have provided no indication that they acknowledge this problem, let alone a plan or the financial commitment to address the problem?

Additionally, this increase in individual determinations will be done by the best professional judgment of staff. While NRCS officials are generally well respected in the farm community, it is inevitable that individuals will come to different conclusions on some of the confusing features on farms, especially those that seldom carry water. This will directly undermine the rule's stated goal of consistency by increasing subjectivity. We have already seen a range in determination decisions within our state and certainly within the country.

The agencies should only be developing rules that are clear, concise, and can be implemented consistently across the country, not rules that muddy the waters more and lead to more subjective enforcement. (p. 4-5)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.118 Citizen Suits Threaten Farms, Businesses, Municipalities and State Agencies r- The lack of clarity in definitions proposed in this rule opens farmers up to the very real risk of citizen r suits that attempt to enforce the Clean Water Act. Farmers strive for

compliance, but when the requirements become hazy to discern and even the officials writing the rules are unable to answer questions clearly and to the satisfaction of practical landowners, it seems a true risk that litigation is likely. Farmers in full compliance with these complex and unclear rules may still have to go through great expense, stress and time to defend themselves against the claim of a violation brought by someone who is confused by the lack of clarity in the new rules. The agencies involved here have significant knowledge about the length of time and the cost of a typical citizen suit, including those that are unsuccessful or otherwise lack merit.

Furthermore, the fines and penalties associated with the Clean Water Act can be imposed on a farmer even if the so-called discharge was into a dry feature when there was no water present. In our opinion, this equates to land regulation, rather than an effort to better protect the nation's navigable waters, interstate waters and territorial seas.

The citizen suit threat and risk of hefty fines are just as concerning for businesses, municipalities and state agencies. Lawsuits can be lodged by those with legitimate complaints just as easily as by special interests or disgruntled neighbors. These can cause massive delays, halting projects for an extended amount of time and driving up costs. Expanding the Clean Water Act will open up more small businesses and projects for the public good to citizen suits and this threatens the opportunities for economic development and infrastructure improvements that we so desperately are seeking in New York. (p. 6)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.119 It is concerning that this rule places generations-old family farm businesses all across our state at serious risk. They cannot afford a violation of the law to the tune of \$37,500 per violation per day just because EPA decides a dry spot in their field was fertilized and it should be classified (through murky definitions) as a "water of the US." Nor can these farms afford the thousands of dollars of additional permitting fees just to conduct the activities required to grow a crop and raise livestock. And they certainly can't afford the tens of thousands of dollars that it could cost to defend themselves against a citizen suit claiming they violated the CWA when they did everything they could to ensure compliance. These costs are serious threats to the 36,000 farms in New York, nearly all of them family-owned small businesses.

Finally, this rule as written is in conflict with our domestic food production goals. New York and the country are seeing growing demand for local food, but this regulation makes it more expensive and difficult to farm domestically by expanding the Clean Water Act to areas best regulated by the states. When foreign sources of food are less safe and much less regulated, this rule could indirectly lead to a less safe food supply for our population. (p. 7)

Agency Response: The rule is narrower in scope than existing regulations and historical practice, and therefore does not expand the Clean Water Act. See Summary Response to Topic 11.

11.1.120 Grave Impacts on Our Communities and State

In the same way that farms will face delays if they have to wait for feature determinations and approval of new permits, this rule will add delays and additional costs for projects our communities and state initiate. These could include public transportation, renewable energy installations, disaster recovery (as our state will be hampered in providing waivers to do necessary conservation work following weather disasters), flood mitigation, and more.

A total of 35 counties in New York-more than half-passed resolutions opposing this definition change and calling on EPA to withdraw this rule. Copies of all these resolutions were forwarded to EPA under separate cover and should be entered into the docket. These counties realize that routine maintenance of their roadside ditches could be impacted by this rule and drive up costs for their highway departments. One county estimated that their highway department would need \$750,000 to \$1 million more in its budget just to continue its current maintenance work under the new regulatory definitions.

The changes also hamper the economic development plans that our communities and state work to create. The responsible and careful use of our land for development purposes makes sense in our communities, but excessive regulation that unnecessarily impedes this without measureable benefits to the environment represents a serious overreach by the agencies. (p. 7)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Response to Topic 11.

Mendocino County Farm Bureau (Doc. #16648)

11.1.121 The term "navigable water" has a distinct meaning in the CWA with requirements for government (state and local) regulatory actions. By changing the definition of tributary, as well as vaguely defining "adjacent waters," this Rule will create increased regulatory costs. Of further concern is the inconsistency that would be created by regional offices having discretion to interpret and apply the vague definitions in the proposed rule-uplands," "floodplain," "subsurface connection," "waters" and "waste treatment." The cost of the regulatory burden on the states will also be borne by our members and our county government in terms of the inevitable delays the Rule will create. EPA and the Corps have not considered any of these additional burdens. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary Responses to Topics 11, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.122 By expanding the number of waters deemed jurisdictional, activities on farms and ranches may require CWA permits. Getting a permit to plant crops, build a fence, or clear out brush is not a simple task. It could require consultation with state and federal agencies, hiring consultants, and waiting for approvals. If the permit is obtained, it often includes paperwork and reporting requirements in addition to any requirements aimed at protecting water quality. Violations of these paperwork or reporting obligations carry potential penalties up to \$37,500 per violation per day-and may be enforced by EPA, the state, or even interested citizens groups. (p. 2)

Agency Response: See Summary Responses under Topics 11.3.1 and 11.4 regarding costs.

Greene County Farm Bureau (Doc. #17007)

11.1.123 As written, this rule has the potential to have great cost in implementation. First, it appears that numerous features will be regulated which have not historically required permits. We understand that the agencies have asserted that the current rule is more encompassing. It may be that some of the language in the current rule is more broad than that within the proposed rule. That does not change the fact that the agencies have only recently implemented the more broad interpretations of the existing rule. By adding more features under the regulations, farmers, units of government, builders, and other businesses will be required to hire more staff to handle permitting and compliance issues or to contract with other businesses. Those requirements have significant costs, especially to local government in times when the economy is down and tax revenue is limited. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. Furthermore, it is definitional in nature, and does not impose any direct costs on any entities. See Summary Response to Topic 11.

Schroeder Law Offices, P.C. (Doc. #18873)

11.1.124 It is important to look not just at public health and water quality concerns, but also to the economic impacts such a proposal may have on the nation as well as private land owners. Particularly, as an industry, agriculture/ranching/stock-raising has the potential to be injured the most by this rule. Should farmers and ranchers be required to comply with further federal regulations and obtain federal permits every time they irrigate, clean ditches, spray for weeds and insects, the added costs for permits alone could go as far as to make farming and ranching not economically feasible. It is important to consider such implications. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

New Salem Township (Doc. #8365)

11.1.125 The economic analysis acknowledges there may be additional implementation costs for a number of CWA programs and cautions that data used and the assumptions made to craft the analysis may be flawed. (p. 1)

Agency Response: As the rule is narrower than current regulations and historical practices, the economic analysis accompanying the rule is illustrative in nature. See Summary Responses under Topic 11 regarding how the agencies have addressed concerns related to the economic analysis.

Association of American Railroads (Doc. #15018)

11.1.126 Applying EPA's mitigation figure of \$177 to \$265 per linear foot (which is well below what Railroads have paid in some areas of the country), the potential mitigation costs for mitigating rail ditches as tributaries under the proposed rule would exceed \$100 billion. This would be in addition to the full costs of additional permitting and consultation should the proposed rule move forward. (p. 4)

Agency Response: See Summary Response under Topic 6.2 and the Preamble with respect to excluded ditches.

JEA (Doc. #10747)

11.1.127 **The Agencies Should Reconsider the Proposed Rule and Reevaluate the Expected Benefits and Costs of the Rule Proposal**

The Agencies could significantly alleviate concerns about the proposed rule by addressing the aforementioned issues. Also, in a more general sense, JEA believes that the Agencies should reevaluate the purported benefits and anticipated costs of the rule. (p. 5)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

County of San Diego (Doc. #15172)

11.1.128 **14. Insufficient Cost Benefit Analysis**

The cost-benefit analysis should be expanded to include local and state costs. The Economic Analysis for the proposed rule is insufficient because it only accounts for federal agency costs. The Economic Analysis of Proposed Revised Definition of Waters of the United States was released by the agencies, consisting of a cost-benefit analysis across CWA programs. The analysis states, "The economic analysis is necessarily based on readily available information and the resulting cost and benefit estimates are incomplete." The analysis contends that the new definition of Waters of the U.S. would have minimal costs to MS4 permittees and agriculture, but did not take into account any additional monitoring, assessment, program realignment, training and outreach, BMPs, reporting, or permitting costs for these entities that would result from the expanded

definition of Waters of the U.S. The report should be revised or amended to address these additional potential implications of changing the definition of Waters of the U.S. At a minimum, the Economic Analysis should be amended to account for additional monitoring, assessment, program realignment, training and outreach, BMPs reporting or permitting costs, due to the expanded definition of Waters of the U.S. at the state and local levels.

Example: The Economic Analysis indicated minimal costs to MS4 permittees and other agencies. However, the proposed rule will require San Diego County time and costs for program administration, including planning, monitoring, training, implementation, and permitting costs. These all include additional costs that were not considered as part of the Economic Analysis. (p. 10)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Utility Water Act Group (Doc. #0852)

11.1.129 EPA’s Economic Analysis of the Proposed Revised Definition of Waters of the United States is cursory and, we believe, fundamentally flawed. UWAG believes that EPA’s economic analysis does not adequately assess the increase in overall jurisdiction that will result from the proposed rule, or the impacts that increase will have on a variety of different regulatory programs. Nor does EPA’s analysis adequately or accurately evaluate the proposed rule’s costs and benefits. The economic impact of the rule on the electric utility industry and the nation as a whole will need to be evaluated, as well as EPA’s calculations of the environmental benefits of the rule. In order to provide even a preliminary analysis of the proposed rule’s economic impacts for the electric utility industry across the variety of Clean Water Act programs that will be affected by the proposed rule, we will need to solicit outside expertise and collect and analyze a significant amount of information. In doing so, we will need to coordinate with many members of UWAG to ensure that the information and analysis provided are accurate and take into account all the economic ramifications of the rule. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

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

11.1.130 The economic analysis completed for the Proposed Rule is critically flawed.

In support of the Proposed Rule, the Agencies rely on the *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014; Analysis), which is critically flawed. The Analysis was also completed prior to the Report being reviewed by the SAB, and to our knowledge was never released for public comment. Like the Report, the Analysis is used to support the Proposed Rule, so it should withstand basic scrutiny.

For purposes of the Analysis, the Agencies evaluated requests for JDs from 2009 and 2010, which corresponds with one of the worst economic periods in U.S. history, marked by very little construction activity. As such, the Analysis substantially underestimates the incremental cost of the Proposed Rule.

The most significant (and erroneous) conclusion of the Analysis is that the total jurisdiction of the Agencies would only be expanded by 2.7 percent with the promulgation of the Proposed Rule. This is a gross underestimate based on a flawed analysis of JDs. There are two significant problems with how the Agencies determined the 2.7 percent increase. First, in the 2009-2010 time frame most of the regulated community was operating based on a reasonable Interpretation of language resulting from Rapanos and may not have engaged the Agencies for a formal JD at all. Indeed, the current (December 2008) guidance provides that "small washes characterized by low volume, infrequent, short duration flow" are not waters of the U.S. This definition would seem to encompass a great number of the ephemeral washes that are typically under consideration for jurisdiction in the arid West. It would not be unreasonable, therefore, for a landowner to assume that the minor ephemeral washes on their property are not jurisdictional and not seek concurrence from the Corps. The Agencies attempt to quantify this phenomenon by simply making an assumption **4** that these "other waters" are likely the most isolated: *"Landowners and developers may assume that some washes are non-jurisdictional and not request a determination or engage in the permitting process. These waters would not be represented in the ORMZ FV2009-2010 data base. However, these waters are also likely to be the most isolated and the least connected to other waters and therefore the least likely to have their status changed under this proposed rule."* Without some ability to quantify how many projects were never submitted for review and what the surface water features on those projects consisted of, there is no realistic way to know what the Agencies would have concluded regarding their jurisdictional status.

Second, the Agencies relied on a review of 262 project case files to determine what additional waters of the U.S. would be identified while applying the Proposed Rule. However, the case files were from only 30 states and the Analysis does not identify which states were subject to this review. Additionally, there is no mention of which districts the "Corps experts" represented. The aforementioned problems associated with the Report's inadequacy in dealing with small ephemeral washes combined with the fact these conditions may not have been present in the case files reviewed, seriously calls the Analysis into question.

In the Analysis, the Agencies assert that 58% of JDs submitted for review in 2009 and 2010 were "preliminary JDs" (PJD), but it is unclear if the Agencies included any PJDs in the analysis that produced the estimate of a 2.7 percent increase in federal jurisdiction. PJDs, by definition, assume that all surface water features within a given

analysis area are waters of the U.S. for the purpose of a single permitting effort. In essence, federal jurisdiction of surface water features is conceded by the applicant in exchange for what is hoped will be a timely review and permitting process. In such instances, the surface water features in question may or may not be considered jurisdictional as part of an Approved JD review. Therefore, if PJDs were considered in the Analysis of the 262 project case files, the estimated 2.7 percent increase in federal jurisdiction would undoubtedly be low. The Proposed Rule states that, "[m]ost prairie streams and southwest intermittent and ephemeral streams are likely to be considered tributaries to (a)(1) through (a)(3) waters". Because this is such a significantly unlikely that the stated 2.7 percent total increase in jurisdiction is not even close to accurate.

To further demonstrate how much the Agencies have underestimated the degree to which the Proposed Rule will expand federal jurisdiction, MEC reviewed the most recent 24 AJDs approved in Arizona (2013 and 2014) posted on the U.S. Army Corps of Engineers Los Angeles District's webpage. Of the 24 Arizona JDs that were completed in 2013 and 2014 (and that have been posted to the Corps website) the Corps asserted jurisdiction over surface water features in only 7 of them (or 29%). Therefore, 17 of the 24 JDs had negative determinations for waters of the U.S., i.e. no surface water features were identified.

Of the 7 JDs that had positive determinations, 6 had jurisdiction asserted only over relatively permanent waters (RPWs, which refer only to Intermittent or perennial waters) As such, in only 1 of 24 (or 4%) of AJDs for Arizona, completed in 2013 and 2014, did the Corps assert jurisdiction over ephemeral washes.

This is in contrast with the proposed rule, where the EPA states that most ephemeral streams will likely be considered tributaries, i.e. waters of the U.S. It is reasonable to conclude therefore that most or all of the 17 negative determinations described above would have some degree of federal jurisdiction under the new rule.

Delving further into the data, for the 7 JDs in which federal jurisdiction was asserted, the Corps asserted jurisdiction over approximately 334 acres of non-wetlands and 2.5 acres of wetlands. Of the 17 JDs in which the Corps did not assert jurisdiction, detailed information on the evaluated ephemeral surface water features was provided in only 5 (or, coincidentally, 29%) The total area of ephemeral washes identified on these 5 determinations was approximately 242 acres, all of which would likely be considered jurisdictional under the Proposed Rule. These 5 determinations alone would increase the extent of federal jurisdiction by over 72% (i.e. raising the total area of jurisdictional waters from 336.5 acres to 578.5 acres). Adding data from the other 12 AJDs with negative determinations would undoubtedly increase this number much higher. These analyses are based on readily available public information and clearly illustrate that, at least regionally, the increase in the extent of waters of the U.S. under the Proposed Rule would be much larger than that assumed by the Agencies in the Analysis. (p. 4-7)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into account concerns regarding clarity and uncertainty, and have attempted to address these concerns in the rule and accompanying economic analysis. See Summary

Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis, in particular Topic 11.2 on Jurisdictional Determinations.

Professional Landcare Network (Doc. #11831)

11.1.131 Further, the expanded jurisdiction and the imprecision of the terms used by the agencies may result in significant added legal and regulatory costs for businesses—impacts that the agencies should have assessed before proposing the rule. Under the proposed rule, permits may be required for activities such as removing debris and vegetation from a ditch, applying pesticides and fertilizer, and building a patio, fence or pond. Permitting can be a costly and time-consuming process that requires small businesses to hire attorneys and environmental consultants. In addition, the future development potential of certain land may be affected, which could diminish its value. Businesses also could be subjected to litigation under citizen suit provisions of the CWA. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.132 The majority of PLANET members are small businesses who do not have in-house attorneys or hydrology professionals on staff to help them make the very complicated assessment about whether a customer’s property includes a “Water of the U.S.” There are also significant costs associated with expanded permit requirements including the assessment that need to be conducted and the staff time associated with planning, monitoring and reporting. In addition, some customers could choose to forgo professional lawncare and landscape services due to the potential litigation associated with Clean Water Act permits.

The Small Business Administration’s office of Advocacy recognized these significant costs in a letter submitted to the agencies on October 1. The Office of Advocacy found that the rule will have significant economic impact on a substantial number of small businesses. A survey of our own membership supports this conclusion. We agree with the Office of Advocacy’s finding that the EPA and the Corps should have conducted a Small Business Advocacy Review Panel prior to releasing the rule for comment. (p. 3)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis. See also Topic 11.1 on RFA/SBREFA.

Duke Energy (Doc. #13029)

11.1.133 EPA's economic analysis for the draft proposed rule, Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014), fails to provide a reasonable assessment of costs and benefits. Economist David Sunding, the Thomas J. Graff Professor at the University of California-Berkeley's College of Natural Resources,

has identified several major flaws with EPA's economic analysis. Please refer to the Water Advocacy Coalition's comments⁵⁵ for more details on the areas of concern. Below are a few specific areas to note.

First, EPA evaluated FY 2009-2010 requests for jurisdictional determinations, a period of extremely low construction activity due to nation-wide depressed economic investment and activity, as the baseline to estimate the incremental acreage impacted, which results in artificially low numbers of applications and affected acreage that are not representative. This timeframe is not appropriate to use for this analysis.

Second, EPA's calculation of incremental costs is deficient. EPA's analysis is focused on costs associated with only the § 404 (dredge and fill) program and largely ignores the cost impact of the changes for other CWA regulatory programs. It also excludes several important types of costs, such as, the increased need for permits, costs associated with permitting delays, additional costs associated with siting challenges and use of special tools or processes for impact avoidance and minimization. The economic analysis acknowledges there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed. In addition, the Economic Analysis fails to consider impacts as a result of new land use restrictions with the expanded federal jurisdiction.

As discussed throughout the comments, there are several examples of costs that will be borne by Duke Energy, and ultimately its customers, that were not addressed in EPA's Economic Analysis. Duke Energy recommends that EPA withdraw the economic analysis and perform a thorough new review of impacts. (p. 71)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Southern Company (Doc. #14134)

11.1.134 Southern Company has evaluated the implications of the proposed rule on three different capital projects in various phases of design and siting, including one new gas-fired generation facility and two renewable energy facilities. As is demonstrated from the table below, the proposal would impose significant new costs (in one case exceeding an eight-thousand percent increase) in terms of permitting and mitigation for two projects and, in those two cases, possibly foreclose the projects altogether. In the cases of one renewable energy project and the new gas-fired generation facility, the increased jurisdictional area would result in that site not being a suitable option for development due to site layout constraints and costs associated with site preparation, permitting, and mitigation. In the case of another renewable energy site, although the project would still be viable, it would be severely constrained to minimize impacts to jurisdictional waters, thereby causing a direct proportional reduction in the renewable energy build-out and increasing the price per megawatt generated. (p. 16-17)

⁵⁵ see Water Advocacy Coalition Comments on WOTUS Rule, Page 75 (November 14,2014)

Table 1. Cost Implication of Proposed Rule on Three Planned Energy Capital Projects.

	Under Existing Regulations		Under Current Proposal		Cost Increase from Proposal
	Jurisdictional	Total Estimated Cost	Jurisdictional	Total Estimated Cost	
Site 1	2 of 31 features (wetlands, ephemeral and intermittent streams) are jurisdictional; covered by NWP.	\$10K for permitting	31 of 31 features would be deemed jurisdictional based on the new definition of tributary and adjacency, requiring individual permit and mitigation.	\$878K for permitting and mitigation.	8680% Increase
Site 2	7 of 14 features (wetlands) deemed jurisdictional.	\$91K for permitting/mitigation	14 of 14 would be jurisdictional under new definition of adjacency, requiring individual permit and additional mitigation.	\$448K for permitting and mitigation.	392% Increase
Site 3	1 of 7 features (wetlands and streams) was deemed jurisdictional.	\$10K for permitting	7 of 7 would be jurisdictional based on new definition of tributary and adjacency, requiring individual permit and mitigation.	\$468K for permitting and mitigation.	4580% Increase

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. The agencies have taken into consideration individual examples and concerns expressed by commenters. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Utility Water Act Group (Doc. #15016)

11.1.135 Nowhere have the Agencies examined the impacts of the Proposed Rule on industrial water features. The Agencies also have neither acknowledged nor accounted for the costs of classifying such features as jurisdictional. Although the Agencies provide no explanation for the missing analysis of this issue, EPA has told UWAG that it does not intend to exert jurisdiction over industrial water features. See also EPA, Facts About the Waters of the U.S. Proposal at 3 (July 2014), available at <http://www2.epa.gov/uswaters/facts-about-waters-us-proposal-pdf> (“Waters that have never been protected remain outside the scope of the Clean Water Act . . .”). EPA’s intention is laudable, but the Proposed Rule does not reflect that intention. Instead, the proposed definitions of “adjacent waters” and “tributaries” apply broadly to man-made and manaltered water features, without regard to their use. Under the Proposed Rule, jurisdiction depends solely on the feature’s location vis-a-vis a jurisdictional water or its connection (no matter how attenuated) to such a water. (p. 19-20)

Agency Response: See Preamble, Technical Support Document, and Summary Responses under Topic 7 on Features and Water Not Jurisdictional.

11.1.136 **H. The Agencies Failed to Consider the Range and Depth of Costs the Proposed Rule Would Cause the Electric Utility Industry and Its Customers.**

EPA concludes that the Proposed Rule will result in a small increase of jurisdictional waters, with the increase in jurisdiction being at most 3.2%.⁵⁶ EPA developed this estimate by evaluating only a select sample of § 404 permits, evaluating the Corps' JDs during a low spell in the nation's economy; it did not consider the effect of the Proposed Rule more broadly, including the effect of expanding jurisdiction where none was understood to exist or to require a JD under the current regulations or the effect on projects that did not involve § 404 permits or were able to rely on general permits but might not be able to do so under the Proposed Rule (e.g., transmission lines). EPA's 3.2% estimate is a substantial understatement, as the discussion and examples above indicate. See *supra* Section III (explaining how many more features would be jurisdictional under the Proposed Rule). The Agencies' failure to estimate the number of features that would be deemed jurisdictional led to an underestimation of costs and burdens associated with the Proposed Rule. The Agencies also considered only a sliver of potential types of costs.

The Agencies focused on costs associated with § 404 permitting (in a flawed manner), then considered costs associated with other programs in a limited way or not at all⁷⁰ (i.e., costs associated with § 404 impacts), and assessed those costs at a time when the economy was in the depths of a recession (i.e., from 2009 to 2010).⁷¹ This estimate did not consider other costs such as:

- Higher costs associated with a shift toward individual rather than general permits⁵⁷
- Costs of having to secure more § 402 permits and engage in more § 401 state certifications
- Costs (e.g., negative benefit) of decision not to complete projects at all
- Increased water treatment costs (e.g., costs to meet water quality or ecological monitoring)⁵⁸
- If the Florida ponds discussed *supra* pp. 70-71 were deemed jurisdictional, discharges entering the pond would be required to meet restrictive water quality effluent limits. This would require installation of a physical-chemical treatment system to treat the wastewater upstream of the pond, eliminating the pond's intended purpose as a waste treatment entity. The cost of such a system would be dependent on the size and treatment level required but could easily cost millions of dollars. Additional costs would be associated with permitting and increased pond maintenance, assuming they were not abandoned in lieu of a required physical-chemical treatment site.
- Degree of increased mitigation costs (e.g., failure to use appropriate mitigation unit costs)⁵⁹
- Costs associated with increased spill prevention and planning⁷⁵

⁵⁶ Sunding Report at 13 & Table 2.

⁵⁷ *Id.* at 16.

⁵⁸ *Id.* at 23 ("EPA claims that a definitional change will have little to no effect on traditional Section 402 NPDES discharge permits such as those for municipal wastewater treatment facilities or industrial operations."); Economic Analysis at 26.

⁵⁹ Sunding Report at 17-19.

- Expanded ancillary compliance (e.g., broader ESA/NEPA and historic and cultural resources evaluations)
 - For example, the proposal would increase ESA consultations, as 29% of wetlands in the United States (81 of 276 wetland types) are geographically isolated, and, as of 2005, 86 threatened and endangered listed animal and plant species were supported by isolated wetlands.⁶⁰
- Project delays resulting from increased jurisdiction
- Projected cost and reliability impacts to customers and other economic sectors
- Costs associated with increased likelihood of third party challenges to permits
- For state agencies, the cost to establish beneficial uses and associated water quality objectives, conducting § 303(d) reviews and, when applicable, TMDLs

If the Agencies had considered the full range of the potential jurisdictional increase and the number of programs affected, and also chosen a more representative time frame of economic activity and development, the costs of the rule would have been significantly higher, for the utility sector alone.⁶¹ (p. 98-100)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Northern California Water Association (Doc. #17444)

11.1.1372. The Agencies Have Not Adequately Analyzed the Proposed Rule's Implications on the Multiple CWA Programs Affected by the Proposal.

The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including section 404 discharges of dredge or fill material, the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 401 state water quality certification process, and section 303 water quality standards and total maximum daily load (TMDL) programs. We do not believe the agencies have truly considered the complex implications that this proposed rule will have for the various CWA programs.

Although the EPA's Economic Analysis purports to analyze the costs of overlaying this new "waters of the United States" definition onto other CWA programs, the analysis largely focuses on the section 404 program and essentially concludes that there will be no additional costs for other CWA programs. This cursory analysis seems inadequate. The agencies have not considered, for example, that many ditches and other water features, including intermittent or ephemeral streams, may now meet the definition of "waters of the United States," thereby requiring the features to achieve water quality standards, including numeric effluent limitations. The agencies have not looked at how this type of change may create confusion over whether an NPDES permit is required for

⁶⁰ See NatureServe, Biodiversity Values of Geographically Isolated Wetlands in the United States at 1 (2005), available at http://www.natureserve.org/sites/default/files/projects/files/isolated_wetlands.pdf.

⁶¹ See Sunding Report at 1-4, 31-32.

certain features or may place an increased burden on states administering stormwater programs and setting water quality standards. The EPA and the Corps have not truly considered how the proposed rule may affect the states implementing the various CWA programs or the stakeholders regulated by these programs. Nor have the agencies analyzed how the proposed definition of "waters of the United States" will affect their own administration of each of the CWA regulatory programs. (p. 4)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Ducks Unlimited (Doc. #11014)

11.1.138V. Some Economic and Social Considerations

Although not directly linked to the issue of the technical substance of the draft guidance, the economic and social implications of restoring protection to wetlands and other waters and of striving “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” should provide important context within which the final rule is developed. There are significant economic and societal implications if protection of the Nation’s water quality and wetland conservation continue to be compromised.

In the context of documenting connectivity between other waters and navigable waters, the discussions above essentially focus on some of the primary functions of wetlands, all of which provide valuable services to our society and the economy. Costanza et al. recently (2014) updated earlier estimates of the total global value of ecosystem services provided by a number of major ecosystems. They estimated that the value of those services for “inland wetlands” averaged \$25,682/ha/yr, significantly higher than their 1997 estimates, in part because of the continued loss of those wetland habitats. Interestingly, the value of the services provided by the navigable waters themselves (included within “rivers and lakes”) averaged only \$4,267/ha/yr. In the U.S., every sector of the economy, and every individual person, is affected by the economy of water in various ways (EPA 2013). The water systems that supply 86% of the U.S. population with household water, for example, involves at least \$53 billion a year (EPA 2012) even though domestic water supplies accounted for only 12% of off-stream use of water in 2005 (EPA 2013).

Focusing on economic issues more directly related to conservation interests, the outdoor industry contributes an estimated \$730 billion to the Nation’s economy, and fish and wildlife-related recreation (hunting, angling, and wildlife-watching) accounts for \$122.3 billion in annual expenditures (U.S. Fish and Wildlife Service 2006), and is a major industry. A high percentage of that economy is associated with water resources. Waterfowl alone represents a tremendously valuable interstate and international economic resource. In 2006, more than 1.3 million waterfowl hunters expended approximately \$900 million with a total related industry output of \$2.3 billion (Carver 2008). This analysis also calculated that waterfowl hunting created approximately

28,000 jobs in 2006. Birding, much of it also water-related as evidenced by waterfowl accounting for the type of bird observed by 77% of away-from-home birders, supported total trip-related and equipment expenditures of \$36 billion in 2006 (Carver 2009). These direct expenditures resulted in a total industry output of \$82 billion and created 671,000 jobs (with an average annual salary of \$41,000; Carver 2009). The total economic contribution of fishing, obviously dependent upon water resources, is \$61 billion (American Sportfishing Association 2002). These economic benefits of water resources simultaneously accrue to the states, as indicated by the example of Texas in which the expenditures by migratory bird hunters and wildlife watchers totaled \$1.3 billion in 2001 (U.S. Fish and Wildlife Service 2002), a level of expenditure that when compared to the state's agricultural commodities would rank second behind only cattle and calves (<http://www.ers.usda.gov/statefacts/TX.htm>).

The issue of the negative economic consequences of increased flooding associated with a reduction in the flood storage capacity of wetlands in the Nation's watersheds was touched upon earlier. Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a \$250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains (Daily et al. 1999). The city viewed this as a way to protect the quality of its water supply as an alternative to constructing water treatment plants which could cost as much as \$6-8 billion. In South Carolina, a study showed that without the wetland services provided by the Congaree Swamp, a \$5 million wastewater treatment plant would be required (www.epa.gov/owow/wetlands 2003). Thus, wetlands provide low cost services to society, as well as reducing costs of infrastructure and long-term maintenance.

The algal blooms that cause health problems also come at high economic costs. For example, Dodds et al. (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was \$2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between \$50 and \$100 million. Southwick Associates (2006) estimated that the present value of Saginaw Bay coastal marshes for active recreational use was \$239 million, or approximately \$10,000 per acre.

Additionally, the vast majority of the citizens of the United States and our society place a high priority on conservation of wetlands and maintenance of high standards of water quality, for many reasons that go well beyond their direct economic values. A nationwide survey (Responsive Management 2001) documented that there were 15 times the number of citizens who believed there were too few wetlands compared to the number that thought there were too many. The same survey showed that 91% of the public thought that it was "very" (64%) or "somewhat" (27%) important to protect or conserve wetlands. Only 3% were neutral or considered it unimportant.

Furthermore, survey after survey has documented that the American public has a deep concern about water quality and high expectations for water conservation. For example: water pollution was identified as the most important environmental issue facing Florida

(Responsive Management 1998a); 65% of Idaho residents thought more time and money should be spent on protecting Idaho’s water resources (Responsive Management 1994); 89% of Indiana residents thought that improving water quality was very important (Responsive Management 1998b); 75% of West Virginia residents thought much more effort should be spent on restoring streams that have been damaged by acid rain or acid mine drainage (Responsive Management 1998c). Kaplowitz and Kerr (2003) noted that 75% of Michigan residents viewed the flood control services provided by wetlands as very or extremely important, and 87% viewed the wildlife habitat functions provided by wetlands similarly. A recent survey of Minnesota residents found that 83% of the electorate is concerned about the pollution of drinking water (Fairbank, Maslin, Maulin, Metz and Assoc. and Public Opinion Strategies 2010). Duda et al. (2010) describes how survey after survey of sportsmen and of the general public shows significant concern regarding safe, abundant, high quality water resources.

Many additional studies could be cited that demonstrate the value of wetlands and other water resources to federal, state and local economies, and to the great majority of U.S. citizens. Although we understand that this issue is not directly relevant to the technical aspects of the draft guidance, we nevertheless believe that the available literature regarding the economic benefits of protecting the Nation’s wetlands and other resources, and regarding the sentiment of the general public in support of clean and abundant water, provides valuable context for the overall direction that the final rule should take. Taken together, the overall message of the relevant economic and societal information supports the view, frequently shown to be shared by the vast majority of the public, that the conservation of wetlands and water resources is not and should not be viewed as a choice between economic and environmental benefits, but rather that long-term, shared economic benefits are dependent upon water resource protection. (p. 69-71)

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments related to the potential benefits of this rule.

11.1.139 We provide an overview of some socioeconomic data and information relating to the importance of continuing to seek progress in achieving the goals and purposes of the Clean Water Act. Clean, abundant water resources not only supports the economically important outdoor recreation industry and desires of the sportsmen and sportswomen, but also avoids the economic burdens associated with the increasing frequency of damaging floods and harmful algal blooms, for example. Additionally, scientific surveys of the public from all across the country continue to show that very large majorities support wetland conservation and clean water goals. (Pages 68-71) (p. 80)

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments related to the potential benefits of this rule.

National Wildlife Federation (Doc. #15020)

11.1.140 We also support the agencies’ decision to retain much of the structure and text of the agencies’ longstanding definition of “waters of the United States” where revisions are not warranted. We agree that continuity with the existing regulations, where possible, will minimize confusion and reduce transaction costs for the regulated community and

the agencies. 79 Fed. Reg. at 22198. To that end, we support the agencies’ decision to retain without change the existing related definitions of “wetlands,” “adjacent,” and “ordinary high water mark,” and the following provisions within the definition of “waters of the United States”: Traditionally navigable waters, interstate waters, the territorial seas, and impoundments of “waters of the United States.” 79 Fed. Reg. at 22198-99. (p. 24)

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments related to the potential benefits of this rule.

11.1.141 X. Clarifying and Restoring Clean Water Act Protections Fosters Strong Local Economies and Millions of Jobs.

Even EPA’s conservative economic analysis demonstrates that this rule clarifying and restoring clean water protections is good for the economy. “Overall, a comparison indicates that the benefits justify the costs of this proposed action.”⁶² As EPA and Corps economic analysis notes, the definition of “waters of the U.S.” does not itself impose direct costs. EPA estimates the indirect costs and benefits of implementing the proposed rule as compared to implementation of the existing guidance.”⁶³

The agencies estimate a 3% change in overall CWA jurisdiction from the existing guidance will result in indirect costs associated with some additional CWA 404 and 402 permitting costs, including wetland and stream mitigation (along with administrative costs), and CWA 311 oil spill implementation. The total annual indirect cost is estimated to be \$133.7 to \$231 million. 269 EPA’s estimated annual indirect benefits of \$300.7 million to \$497.6 million are based primarily on estimates of ecosystem services flowing from protected or mitigated aquatic resources as a result of this increased compliance, as well as government savings on enforcement expenses:

Benefits that accrue from this action include the value of the many ecosystem services provided by the small streams, wetlands, and other open waters protected by the many CWA provisions that would apply to them. These waters provide habitat and biodiversity, support recreational fishing and hunting, filter sediment and contaminants, reduce flooding, stabilize shorelines and prevent erosion, recharge ground water, and maintain biogeochemical cycling. Other benefits include government savings on enforcement expenses through reduced need for costly jurisdictional determinations where jurisdiction has been unclear under the current interpretation of the existing regulation. Business and government may also achieve savings from reduced uncertainty in where CWA jurisdiction applies. Id. at 32.

We cannot resist noting that the private sector mitigation banking industry with its jobs and other fiscal contributions to local economies survives and thrives on a broad, strong, and strictly enforced Clean Water Act.⁶⁴

⁶² Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014) at 32.

⁶³ Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014).

⁶⁴ See National Mitigation Banking Association website and members list available at <http://www.mitigationbanking.org/index.html> (last visited November 14, 2014).

The agencies' benefit estimates are solidly supported by other economic analyses. Some of these are summarized here, as well as in the economics considerations discussion above (particularly with respect to flood storage and avoided flood damage costs. Costanza et al (2014) estimated that the value of ecosystem services for "inland wetlands" averaged \$25,682/ha/yr., significantly higher than their 1997 estimates, in part because of the continued loss of those wetland habitats. For comparison, the value of the services provided by the navigable waters themselves (included within "rivers and lakes") averaged only \$4,267/ha/yr.

Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that anglers generated more than \$201 billion in total economic activity in 2011, supporting more than 1.5 million jobs.⁶⁵ The U.S Fish and Wildlife Service estimated that duck hunting in 2006 had a positive economic impact of more than \$2.3 billion, supporting more than 27,000 private sector jobs.⁶⁶

As Western Resource Advocates notes, clarifying and restoring Clean Water Act protections will foster the local economies of the western mountain states. Through the final rule, the agencies will be able to confirm jurisdiction for many more headwater rivers and streams that support economically important river recreation. In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represent billions of dollars in commerce.⁶⁷

*In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending \$1.7 billion that generated \$2.5 billion in total economic output.⁶⁸

*Commercial guides take rafting clients on numerous sections of the Green, Yampa, and Dolores Rivers in Colorado and Utah, the San Juan River in New Mexico and Utah, and the Cache La Poudre, Arkansas, Gunnison and Upper Colorado Rivers in the state of Colorado.

*The Colorado River Outfitters Association 2013 annual assessment reports almost \$57 million in direct expenditures for commercial rafting in the state, with the overall economic impact estimated at over \$145 million.⁶⁹

*Companies like Renaissance Adventure Guides⁷⁰ in Colorado offers classes to teach kayaking on the Colorado River, and to teach swiftwater rescue in the Waterton Canyon

⁶⁵ 271 American Sportfishing Association, Sportfishing in America (January 2013).

⁶⁶ Economic Impact of Waterfowl Hunting in the United States, Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, November 2008. US Fish and Wildlife Service.

⁶⁷ Western Resource Advocates 2014 Rule Comments.

⁶⁸ SOUTHWICK ASSOC., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER & ITS TRIBUTARIES (May 3, 2012) (Table E-3), available at http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.

⁶⁹ Colorado River Outfitter's Association, Commercial River Use in the State of Colorado, 1988-2013: 2013 Year End Report, available at <http://www.croa.org/wp-content/uploads/2014/05/2013-Commercial-Rafting-Use-Report.pdf>.

reach of the Upper South Platte River, upstream of Denver, CO, while Arizona Outback Adventures takes kayakers on trips down the Salt River.⁷¹

*Cities in Colorado bordering rivers host water competitions on surprisingly small streams. In 2010, there were 30 whitewater parks across the state.⁷² For example, Vail uses Gore Creek, tributary to the Eagle River which is tributary to the Colorado River above its confluence with the Gunnison; the recent Mountain Games event attracted 58,000 spectators who spent \$4M.⁷³ Golden pioneered a summer whitewater competition on Clear Creek, tributary to the South Platte;⁷⁴ Boulder hosts kayak competitions on Boulder Creek. Utah has one park, in Ogden,⁷⁵ while Nevada has at least three, in Reno,⁷⁶ Sparks,⁷⁷ and Carson City.

The 2011 U.S. Fish and Wildlife survey on freshwater fishing expenditures reports that 2.2M anglers, 16 years old and up, fished in Arizona, Colorado, New Mexico, Nevada and Utah, with between 16 and 23% of these recreationists coming from out of state to do so. For the equipment and trips, these anglers spent \$2.4 billion and their expenditures supported almost 38,000 jobs.⁷⁸ These figures include both guided and non-guided trips, and show that angling represents a significant contribution to these states' economies and to interstate commerce. Even more so than boating, a significant percentage of fishing trips occur on smaller headwaters rivers and streams. For those anglers interested specifically in fly fishing for native trout in this region, for example, all of the options are on relatively small streams, such as those in Rocky Mountain National Park.

⁷⁰ <http://raguides.com/> (last visited Oct. 8, 2014).

⁷¹ Arizona Outback Adventures Half-Day Kayaking Tour, <http://aoa-adventures.com/guided-half-day-kayaking-tour/> (last visited Oct 1, 2014). Note that the Salt River above Roosevelt Lake is seasonal, with paddling limited to March-May in most years. Salt River Report, <http://southwestpaddler.com/docs/salt2.html> (last visited on Oct. 1, 2014). Below Phoenix' wastewater treatment plant discharge, the river is effluent dependent, both due to seasonal flows and extensive diversions for the Salt River Project. Joseph R. Gebler, Water Quality of Selected Effluent-Dependent Stream Reaches in Southern Arizona as Indicated by Concentrations of Periphytic Chlorophyll a and Aquatic-Invertebrate Communities (USGS 1998), available at <http://pubs.er.usgs.gov/publication/wri984199>.

⁷² Pete Gauvin & Wendy Lautner, California's Dearth of Whitewater Parks, CALIFORNIA'S ADVENTURE SPORTS JOURNAL, May 4, 2010, available at

http://adventuresportsjournal.com/water_sports/kayaking/california%E2%80%99s-dearth-of-whitewater-parks.

⁷³ Melanie Wong, GoPro Mountain Games in Vail Draw Record Crowds, VAIL DAILY, June 13, 2014, available at <http://www.vaildaily.com/news/sports/11810089-113/games-vail-gopro-crowds>. These events appear to be growing. A few years earlier, the Games attracted 30,000 people who spent \$3M. COLEY/FORREST INC. FOR NORTHWEST CO. COUNCIL OF GOV'TS FOUND., INC., WATER AND ITS RELATIONSHIP TO THE ECONOMIES OF THE HEADWATERS COUNTIES 24 (2011), available at http://nwccog.org/docs/qq/QQStudy_Report_Jan%202012.pdf.

⁷⁴ Colorado Whitewater Competition, <http://www.coloradowhitewater.org/racing-competition>. (last visited on Oct. 1, 2014).

⁷⁵ Ogden's Kayak Park – Ogden City, http://www.ogdencity.com/en/community/parks/kayak_park.aspx (last visited Oct. 3, 2014).

⁷⁶ Truckee River White Water Kayak Park, Reno, NV, <http://www.visitrenotahoe.com/reno-tahoe/what-to-do/water-adventures/kayak-park> (last visited Oct. 3, 2014).

⁷⁷ White Water Park at Rock Park, <http://www.cityofsparks.us/residents/parks-and-facilities/whitewater-park-rock-park> (last visited Oct. 3, 2014).

⁷⁸ U.S. FISH & WILDLIFE SERV., NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION (Tables 56 and 60), available at <https://www.census.gov/prod/2012pubs/fhw11-nat.pdf>.

Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a \$250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains to protect the quality of its water supply rather than constructing water treatment plants which could cost as much as \$6-8 billion. (Dailey et al. 1999). In South Carolina, a study showed that without the wetland services provided by the Congaree Swamp, a \$5 million wastewater treatment plant would be required (www.epa.gov/owow/wetlands 2003). See Ducks Unlimited 2014 Rule Comments.

The algal blooms that cause health problems also come at high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was \$2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between \$50 and \$100 million. Southwick Associates (2006) estimated that the present value of Saginaw Bay coastal marshes for active recreational use was \$239 million, or approximately \$10,000 per acre. See Ducks Unlimited 2014 Rule Comments.

By any measure, clarifying and restoring clean water protections for America's waters is a good investment for healthy communities and a healthy economy. (p. 103-106)

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments related to the potential benefits of this rule.

National Federation of Independent Business (Doc. #8319.1)

11.1.142 The Proposed Rule Will Have Direct Adverse Impacts on Many Small Businesses

The Agencies are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties-including many owned by small businesses. As a result, the proposed rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial, uses of his or her land once it is considered jurisdictional. And if an owner proceeds with a project on a portion of land that might be considered a water of the U.S., the owner faces the prospect of devastating fines-up to \$37,500 per day.

Consequently, most landowners-especially small businesses-will be forced into keeping their properties undeveloped. If the purported jurisdictional water covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. Indeed, the Supreme Court noted in *Rapanos* that the average CWA permit costs more than \$270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford necessary permits, nor legal representation to challenge improper jurisdictional assertions. And lawsuits challenging these assertions are fact intensive and extremely costly to litigate. (p. 5)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.143 The Proposed Rule Will Also Have Indirect Adverse Impacts on Many Small Businesses

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. And now that the Agencies have proposed this rule, it is apparent that they are taking an even more aggressive approach to jurisdictional issues—a signal that landowners can expect greater enforcement actions in the future.

NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the proposed rule is finalized. Indeed under the proposed rule a landowner may have legitimate cause for concern if – at any point during the year – any amount of water rests or flows over a property.

And contrary to the Agencies' assertions, the proposed rule will do little or nothing to make CWA jurisdiction clearer for most properties. The reality is that landowners will have to seek out experts and legal counsel—which gets costly quickly - before developing on any segment of land that occasionally has water overflow. And, the only way to have definitive clarity is to seek a formal jurisdictional determination from the Agencies, which costs more money and further development plans.

Of course, in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. Indeed, they face ruinous fines of up to \$37,500 per day if they errantly begin filling in - or dredging - land that the Agencies believe is a jurisdictional water. And for this reason any property that might be viewed as containing a jurisdictional water will be greatly devalued. In addition, even if the property owner is found to be in the right, he or she may use all their assets fighting to prove that their land is not jurisdictional. (p. 5)

Agency Response: See Summary Responses under Topic 11 regarding how the agencies addressed concerns related to the economic analysis.

11.1.144 Conclusion

NFIB believes that the Agencies have clearly failed to comply with the requirements of the RFA. The Agencies have incorrectly certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. As such, the Agencies should withdraw the proposed rule, perform an IRFA and convene an SBAR panel before considering issuing a new proposal. (p. 6)

Agency Response: See Summary Response under Topic 11.1 RFA/SBREFEA.

Colorado Stormwater Council (Doc. #12981)

11.1.145 The Agencies' Economic Analysis Underestimates Costs

The agencies' cost-benefit analysis of the Proposed Rule significantly underestimates its associated costs. The agencies rely on data concerning requests for jurisdictional determinations in fiscal years 2009-2010 to determine the Proposed Rule's economic impacts. However, economic activity was constrained and construction activity was at a low point during that time due to the recession. For example, per U.S. Census Bureau data on seasonally adjusted monthly total construction, the average monthly spending on construction for that two-year baseline period was lower than the monthly average of any previous year since 2002. Additionally, current (September 2014 (preliminary)) construction spending and the monthly average for 2014 thus far are much higher than the 2009-2010 average.

The choice to focus on 404 permitting activity during a recession may introduce another bias, Economic constraints during the recession likely led developers to avoid higher-cost projects compared to others, and jurisdictional determinations result in delay and direct costs, in addition to costs associated with mitigation and avoidance. That suggests a likelihood that jurisdictional determinations at that time may have fallen at an even greater rate than the overall slowdown in construction activity.

The agencies' chosen baseline to measure economic effects does not reasonably represent a normal level of permitting activity for purposes of evaluating the Proposed Rule's economic impact. The economic analysis is therefore fundamentally flawed. (p. 11)

Agency Response: See Summary Response for Topic 11.2 regarding the 2009-2010 permit data and how the agencies addressed this concern.

Royalty Owners and Educational Coalition (Doc. #14795)

11.1.146 The Economic Analysis of Proposed Revised Definition of Waters of the United States acknowledges that most of the projected costs of this definitional change "will accrue to landowners and development companies, state and local governments investing in infrastructure, and industries involved in resource extraction," but fails to consider adequately the broader impact on royalty/mineral owners; federal, state and local tax receipts (as well as infrastructure improvements and educational and social safety net programs supported by such receipts); U.S. GDP, and America's trade balance.

The agencies' cost estimate of between \$133.7 million and \$231 million likely misses the mark by several orders of magnitude as it chills impacted industries and undermines

the development of marginally economic oil and gas projects made impossible by new Clean Water Act compliance costs. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Nebraska Water Resources Association (Doc. #13565)

11.1.147 Nebraska's economy is closely tied to agricultural production. In 2012 the export of farm and ranch products alone contributed \$7.2 billion to Nebraska's economy. Much of this production is undertaken by small businesses. The role of small business is important in Nebraska and throughout rural America. According to the USDA, small businesses support one in three jobs in rural America. We share the concern of the Small Business Administration Office of Advocacy, that the EPA and Corps have not adequately considered the proposed rule's impact on small businesses. (p. 3)

Agency Response: See Summary Response to Topic 11.1 RFA/SBREFA. See also other Summary Responses under Topic 11 for how the agencies addressed concerns with the economic analysis.

Coalition of Alabama Waterways (Doc. #15101)

11.1.148 The agencies also have greatly underestimated the costs that will be associated with their Proposed Rule. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Tulane Environmental Law Clinic (Doc. #15123)

11.1.149 In addition to their prevalence and importance as a drinking water source, headwaters are an important economic driver. Each year, millions of people within the Mississippi River Basin pursue waterdependent recreational activities. Protecting small streams and headwaters supports this large sector of the economy. These are two examples from our states:

- “In 2001, Missouri anglers’ retail purchases of fishing-related items totaled \$832,776,355. Those purchases helped fund approximately 15,000 jobs in the state. These purchases also generated more than \$14,100,000 in state income tax and \$57,714,000 in federal income tax revenues. The revenue that Missouri generates from water-related tourism, such as floating, fishing, and duck-hunting, is dependent upon the quality of those waters, which are dependent upon the quality of connected wetlands and the intermittent headwaters that feed them.”⁷⁹

⁷⁹ Missouri Department of Natural Resources, Comments on “Advance Notice of Proposed Rulemaking on the

- The majority of Tennessee’s trout streams are not traditionally navigable streams. In fact, the vast majority of Tennessee’s aquatic biological diversity, including state and federally threatened and endangered species, occurs in non-navigable streams as traditionally protected by the Act.⁸⁰ (p. 6)

Agency Response: See Summary Responses for Topics 11.3 and 11.4 for how the agencies addressed comments on the economic analysis.

Amigos Bravos, et al. (Doc. #15346)

- 11.1.150 Closed basins are essential to New Mexico’s economy and are essential to interstate commerce. The Department of Game and Fish has stated that they believe a significant portion of wildlife viewing in New Mexico, which brings in about 550 million annually, is conducted by out of state recreationists in the closed basins of New Mexico.⁸¹ (p. 5-6)

Agency Response: See Summary Responses for Topics 11.3 and 11.4 for how the agencies addressed comments on the economic analysis.

Red River Waterway Commission, State of Louisiana (Doc. #15445)

- 11.1.151 The RRWC has deep concerns with the proposed regulation to amend the definition of Waters of the United States (WOTUS) by your agencies. This jurisdictional expansion will greatly increase the regulatory burden of industrial facilities, agricultural producers and landowners in our district. While we remain a strong advocate of ensuring the health of our water resources, we believe that this expansion has been developed without adequate input from industry, state and local officials and that it will have an unjustifiably negative impact on our economy. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Clean Water Action Minnesota, et al. (Doc. #16155)

- 11.1.152 EPA estimates that the proposed rule would provide \$388 million to \$514 million annually in benefits to the public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. Protecting small streams and wetlands is vital for fish and wildlife and Minnesota’s vibrant recreational industry. The U.S. Fish and Wildlife Service reports that Minnesota residents and nonresidents spent \$3.9 billion on wildlife recreation, including \$2.4 billion on fishing, in 2011. More than 2.5 million Minnesotans participated in wildlife

Clean Water Act Regulatory Definition of ‘Waters of the United States,’” Docket ID OW-2002-0050, at p-4 (Mar. 5, 2003).

⁸⁰ Tennessee Wildlife Resources Agency, Comments on “Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of ‘Waters of the United States,’” Docket ID OW-2002-0050 at p- 2-3 (Feb. 26, 2003).

⁸¹ Letter from Larry Bell, Director of the New Mexico Department of Game and Fish to EPA (NMDGF comment letter on the 2003 ANPRM), April 15, 2003, at 6.

recreation activities in 2011. Another benefit of this rule is that it will streamline the permitting process by providing greater certainty to the regulated community and better guidance to regulators, by establishing specific categories of waters which are protected by the Clean Water Act, and specific categories of waters which are not protected by the law.

The EPA and Corps commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay and better protect for critical water resources on which our communities depend. (p. 2-3)

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments related to the benefits of this rule.

Missouri Coalition for the Environment (Doc. #16372)

11.1.153 F. Waters of the United States in Missouri Provide Economic and Recreational Benefits Worth Protecting.

Finally, Missouri’s various water bodies and the life they support provide a number of economic benefits worth protecting. As the proposed Rule states, waters of the United States “provide many functions and services critical for our nation’s economic and environmental health.”⁸⁰ These waters deliver enhancements “to our quality of life by providing myriad recreational opportunities.”⁸¹ The National Survey of Fishing, Hunting, and Wildlife-Associated Recreation shows the important functions that America’s great outdoors provide, and relays important data on its steady and increasing use. In fact, the 2011 census shows that 2.5 million Missouri residents and nonresidents fished, hunted, or wildlife watched in the state, with a 9% increase in hunting and 11% increase in angling participation compared to 2006 levels.⁸²

With over 1.1 million anglers, 576,000 hunters, 1,716,000 wildlife watching participants, and \$2.7 billion spent in 2011 just on wildlife recreation in Missouri, these figures demonstrate the recreational and economic significance of Missouri’s natural environment.⁸³ Missouri fishing also holds significant importance to state residents, as 827,000 anglers (77%) were residents of Missouri for the 2011 year.⁸³ Common fish types anglers catch from Missouri’s freshwater bodies include crappie, panfish, bass (white, striped, black), catfish, bullheads, and trout. In addition, a large majority (estimated at 95%) of Missouri residents who fished anywhere in the United States did so in Missouri.⁸⁴ These economic benefits from recreational uses in Missouri support the critical need for healthy waterways and underscore the importance of the proposed Rule in protecting these waterways. (p. 14)

⁸² U.S. Fish & Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: Missouri (revised Dec. 2013), available at <http://www.census.gov/prod/2013pubs/fhw11-mo.pdf>.

⁸³ Id.

⁸⁴ Id.

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments on the benefits of this rule.

Conservation Federation Missouri (Doc. #16461)

11.1.154F. Waters of the United States in Missouri Provide Economic and Recreational Benefits Worth Protecting.

As the proposed Rule states, waters of the United States “provide many functions and services critical for our nation’s economic and environmental health.”⁸⁵ In fact, the 2011 census shows that 2.5 million Missouri residents and nonresidents fished, hunted, or wildlife watched in the state, with a 9% increase in hunting and 11% increase in angling participation compared to 2006 levels.⁸⁶ With over 1.1 million anglers, 576,000 hunters, 1,716,000 wildlife watching participants, and \$2.7 billion spent in 2011 just on wildlife recreation in Missouri, these figures demonstrate the recreational and economic significance of Missouri’s natural environment.³⁴ Missouri fishing also holds significant importance to state residents, as 827,000 anglers (77%) were residents of Missouri for the 2011 year.⁸⁷ (p. 4)

Agency Response: See Summary Responses to Topics 11.3.2 and 11.4 on how the agencies have addressed comments on the benefits of this rule.

Greater Fort Bend Economic Development Council (Doc. #18009)

11.1.155 In the world of economic development, time kills deals. Increasing regulatory oversight over water through expansion of the definition of waters of the United States will increase costs for land development, increases time to permit and develop land and ultimately costs jobs and reduce opportunity to expand the economy. At a time when our deficits are swelling and our nations recovery from a recession is one of the slowest on record, economic expansion needs to be the priority consideration. This proposed rule will result in lost jobs, lost wages, lost opportunity and lost taxes to the federal government. In conclusion, we believe that the public interest is not served by this proposed rule. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

Mercatus Center at George Mason University (Doc. #12754)

11.1.156 The Environmental Protection Agency and Army Corps of Engineers have proposed a rule changing the definition of "waters of the United States" under the Clean Water Act (CWA). Under the status quo, whether or not a water body qualifies as jurisdictional "waters of the United States" is determined case-by-case and based on precedence,

⁸⁵ Id. at 22,191

⁸⁶ U.S. Fish & Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: Missouri (revised Dec. 2013), available at <http://www.census.gov/prod/2013pubs/fhw11-mo.pdf>.

⁸⁷ Id.

science and case law. The proposed rule seeks to add clarity to this process by providing more robust definition for “waters of the United States”. The rule, however, is a hasty step that leads to expansion of the agencies’ jurisdiction and higher costs for those that must comply with the CWA.

While the intent behind the rule to add clarity and decrease uncertainty for regulators and economic actors is a worthwhile goal, the increase in the agencies' de facto jurisdiction and the expansion into new areas actually creates additional uncertainty that will incur substantial economic costs while not improving environmental outcomes.

We **urge** the agencies to reconsider this rule for the following reasons:

- The rule actually increases areas of uncertainty for those that must comply with CWA;
- The agencies have underestimated or failed to accurately describe their proposed increase in jurisdiction;
- The agencies have failed to analyze the costs of delayed and forgone development;
- The agencies have failed to adequately analyze the costs to local governments;
- The definitions utilize a one-size-fits-all approach that ignores the variety of environmental and economic realities across the nation;
- The scientific report upon which the agencies have based the rule has not yet been peer-reviewed or released for public scrutiny.

In addition to this proposed rule, the agencies promulgated an associated rule interpretation in a manner that may allow important elements to slip under the radar in terms of analysis. The agencies should fully comply with Executive Order 12866 and prepare a regulatory impact analysis for all significant regulatory actions. (p. 2)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.157 The agencies acknowledge that the status quo interpretation of "waters of the United States" "results in significant resources being allocated to... determinations by Federal and State regulators." Uncertainty, however, affected not only the agencies; it has also affected the decisions private landowners, small businesses, and local governments make about how to use their land. The time and capital costs of the permitting process, especially when case-by-case determinations of jurisdiction are necessary, impose deadweight losses on the economy, which are borne by development, landowners, local governments, and the federal government.⁸⁸ (p. 2)

Agency Response: See Summary Responses to Topics 11.3.1 and 11.4 on costs.

11.1.158 Inclusion of floodplains, tributaries, and riparian areas as jurisdictional would have dramatic effects on local economies as the agencies systematically increase their

⁸⁸ David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” *Natural Resources Journal* 42 (Winter 2002), [http://areweb.berkeley.edu/~sunding/Economcs %20of%20Environmental%20Regulation.pdf](http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf).

jurisdiction by broadening the definition of jurisdictional areas. Will the entire city of New Orleans be claimed jurisdictional because it is in the Mississippi River floodplain? What about Pittsburgh and St. Louis? (p. 3)

Agency Response: The rule is narrower in scope than existing regulation. See Summary Response to Topic 11.

11.1.159 The agencies' economic analysis vastly oversimplifies economic costs. To measure impact, the agencies simply measure the dollar cost of the permitting process against the projected dollars saved by conservation. The approach ignores current and potential economic activity. It also fails to account for other costs imposed by the new rule, such as community infrastructure maintenance, storm water control costs, local water supply management costs, impacts on water reuse facilities, the costs of mapping and determining floodplain and riparian areas, the costs of increased permit applications, and especially the costs of delayed and forgone development.

A detailed survey of wetlands permit applications and the Army Corps of Engineers' own statistics found that the agencies "significantly underestimate" the time required for applicants to finish permitting processes, thus underestimating the economic costs imposed by delay.⁸⁹ Indeed, our own experience with permitting/consulting has shown that even small projects are significantly delayed by CWA compliance. On a recent project, we estimate that CWA compliance cost an additional 3.5 years of delay and over \$2.5 million in direct costs.

In addition, our consulting experience with the agencies and the CWA has shown a particular lack of resources devoted to the EPA and Corps regulatory offices. There are many projects and insufficient staff. Project costs and timeframes are routinely exceeded as the EPA and Corps personnel maximize timeframes and request more time to complete even rudimentary tasks because of insufficient resources. Private groups are then forced to pay consultants to have regulatory matters handled in a timely manner because agency personnel are unable to provide their services in a reasonable timeframe. Consultants can be expensive, especially for private citizens seeking only to make small changes in land use. For example, a small CWA 404 permit application through a consultant often costs \$5,000. Larger and more complex permits can cost millions of dollars.

In addition to increased costs, delays of months and years are common. The wheels of federal bureaucracy turn slowly, and there is no better example of that than CWA compliance with the Corps of Engineers. Increasing the agencies' jurisdiction when they are already unable to cope with current demand will only lead to greater costs and delays, transferring the largest burdens of regulatory cost to citizens. (p. 4)

Agency Response: See Summary Responses to Topics 11.3.1 and 11.4 on costs.

11.1.160 While the proposed rule claims that it "does not affect Congressional policy to preserve the primary responsibilities and rights of the states to prevent, reduce, and eliminate pollution..."⁹⁰ the realities of expanded jurisdiction and increased uncertainty would necessitate more involvement by the agencies in state and local affairs. Not only will

⁸⁹ Sunding and Zilbeman, "Economics of Environmental Regulation by Licensing."

⁹⁰ EPA, Economic Analysis.

this erode local jurisdictional authority, but it will also incur great costs on state and local governments.

The categorical classification of flood plains, riparian areas, and intermittent and ephemeral streams as ‘waters of the United States' will especially increase these costs. According to the Senate Committee on Environment and Public Works, "almost every city and county in the United States contains floodplain and riparian areas."⁹¹

The new rule will necessitate the use of local resources in mapping and determining the boundaries of flood plains, a costly and time-consuming process. Under the CWA Section 404, it is the responsibility of the CWA applicant to demonstrate that "waters of the United States" are not impacted by a project. Thus, cities in floodplains or with streams and rivers must spend time and money to prove to the agencies that they are not affecting jurisdictional waters. As noted previously with the back-of-the-envelope calculation for Provo, Utah, these uncounted costs can add up quickly. As areas of CWA jurisdiction increase, so will the costs of compliance to local governments. (p. 5)

Agency Response: See Summary Responses to Topics 11.3.1 and 11.4 on costs.

11.1.161 For all the reasons provided in this comment, the rule will likely cause more economic harm than disclosed in the RIA. We have significantly departed from the original intent of the CWA and the "navigable waterways" jurisdiction definition. The definition of "flood plain," "riparian area," and "significant nexus" in this rulemaking leave room for such broad interpretation as to be all encompassing. More importantly, the broad definitions expand jurisdiction in such a way that timeframes and costs are increased without any appreciable gains in environmental quality. (p. 6)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Responses to Topics 11 and Topic 10.

George Washington University Regulatory Studies Center (Doc. #13563)

11.1.162 The Agencies' Economic Analysis attempts to evaluate the impact of the proposed rule on Affirmative assertions of jurisdiction using a baseline of 2009 - 2010 field practices.⁹² But nowhere in this document, nor in the proposed rule itself, do the Agencies outline a plan of retrospective review or for evaluating the outcomes of any expansion or increase in jurisdictional coverage of CWA regulations brought about by their undefined process or establishing significant nexus. (p. 13)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Responses to Topics 11 and Topic 10.

11.1.163 Since the Agencies have not included a plan of retrospective review in this proposed rule, it follows that there is no timeframe for such an evaluation in it at this moment. The Agencies' Economic Analysis does use the baseline of 2009 - 2010 from which data was collected on assertions of jurisdiction. 'Pile data were then loaded into models

⁹¹ US Senate Committee on Environment and Public Works, How the Obama Administration's Clean Water Act Abuse Impacts Local Governments, May 22, 2014, 30, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=7928f692-977b-d12d-3b91-aec526c9ce4

⁹² Economic Analysis at page 2 and 12.

to predict future assertions of jurisdiction, say, over "other waters." The Agencies may want to solicit further comment on what baseline or baselines should be used post promulgation. Given the resort, over the past, to interim guidances and now invalidated rules, multiple baselines may be useful to policy-makers in the future who need to evaluate alternative regulatory regimes and their impact on regulated entities.

In any final rule including such a "lookback" plan, the Agencies should identify a timeframe for such a review to indicate, with sufficient specificity, how soon after implementation it will begin to measure the progress of its stated metrics. That said, data collection should begin immediately at the inception date of the rule with a view toward ensuring accurate evaluations of definitional impacts on the assertion of jurisdiction by the Agencies, in the field, and reducing reliance on modeling. Monitoring of these metrics should occur throughout the implementation period and for several years afterward. (p. 16)

Agency Response: The agencies have considered multiple baselines. As the rule is narrower in scope than existing regulations and historical practice, this can be considered an initial baseline. Another baseline could be based on recent practice. This is the baseline the agencies chose to analyze in more depth for illustrative purposes.

Water Environment Federation (Doc. #16584)

11.1.164 Finally, there is the issue of the cost of bringing these ditches into compliance. In its economic analysis, EPA calculated a net positive impact nationwide of around \$200 million, but that analysis used a very narrow assumption of "new" waters included in the rule. In contrast, for example, studies⁹³ by the Florida Stormwater Association (FSA) show that the cost of bringing ditches up to current water quality standards typically runs about \$1 million per mile. More comprehensive studies found that the rule would cost between \$200 million and more than \$1 billion per county in areas examined.⁹⁴ (p. 6)

Agency Response: See Topic 6.2 on excluded ditches, and Summary Responses under Topic 11 regarding how the agencies addressed comments submitting studies such as FSA's and others.

Congress of the United States (Doc. #4901)

11.1.165 The threat of ruinous penalties for alleged noncompliance with the CWA is also likely to become more common given the proposed rule's expansive approach. For example, the EPA's disputed classification of a small, local creek as a "water of the United States" could cost as much as \$1 87,500 per day in civil penalties for Wyoming resident Andrew Johnson. Similar uncertainty established under the proposed rule will ensure that expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property. (p. 1)

⁹³ Proposed Regulations Waters of the United States: Assessment of Impacts," July 25, 2014.

⁹⁴ Estimated Fiscal Impacts on Selected Municipal Separate Storm Sewer System Permittees", Study by the Florida H2O Coalition, August 29, 2014.

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Responses to Topics 10 and 11.

U.S. House of Representatives (Doc. #19475)

11.1.166 My district, the Second Congressional District of Illinois, is home to 1,200 farms that produce \$367 million in corn, soybeans, and wheat annually. Should the proposed rule, as written, go into effect, these farmers will need to spend more time applying for Agency permits to conduct daily farming activities. An action as small as installing or mending a fence around a corn field could potentially require an EPA permit because the adjacent strip of land would be considered a "tributary" for purposes of the proposed rule - despite the fact that the land in question is generally dry and would only have water on it following a rainstorm or in the spring as snow melts.

Requiring farmers to seek permits for daily farming activities will increase their operational costs and reduce their productivity. This threatens an important part of the economy of the Second District, and could potentially force consumers to pay more at the grocery store. To a farmer, time is money during planting and harvest season. Having to wait even one day for EPA approval could result in thousands of lost dollars for farmers and our economy. Decreased farming productivity will cause food to become less abundant and more expensive. Our nation's farmers help feed the world, and regulations limiting farming activities can have devastating consequences for consumers worldwide. (p. 1)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. See Summary Responses to Topics 10 and 11. See also Summary Responses under Topic 6.2 and 7 for exclusions and features not considered jurisdictional.

The Property Which Water Occupies (Doc. #8610)

11.1.167 The *cost* of taking private property for a public purpose is not included in the economic analysis. Yet, public use of what has always been considered 'non-navigable waters' – including private property- is included as an 'economic benefit' in the same analysis. Such a public lands expansion is not without consequences; the U.S. constitution requires just compensation for such a regulatory taking of title. Further, the economic benefits to the public as a whole is compared against the burden imposed upon those individuals whose property rights are eviscerated by the expanded scope of CWA jurisdiction. Even then, only the cost of permitting to the ACOE is even considered in the comparison. Permit denials, property claims, evisceration of any productive value in lands, and for mitigations costs are ignored in the economic analysis of burden to individual landowners whose land may sometime be occupied by surface water as a result of rain. The economic analysis also calculates the public benefits to all waters, not the incremental benefit of expanding jurisdiction over waters not currently covered by the CWA. Such a skewed of economic analysis is a significant oversight. The financial liability to taxpayers (judicially, property compensation, etc.) is also completely ignored

in the analysis. Such a skewed analysis to justify an agency action is considered to be an "unlawful sham".⁹⁵ (p. 5-6)

Agency Response: The rule is narrower in scope than existing regulations and historical practice. The accompanying economic analysis addresses changes that may occur relative to recent practice. See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1.168 The proposed Rules do not calculate the cost of turning millions of acres of private property into 'water filters' to prevent sediment flowing downstream toward navigable waters. Nor do the Rules factor the cost of future clean-up of these lands years after having forced to *trap* these sediments -labeled as pollutants by the EPA- on their property. Property owners following such policy are creating tomorrows 'super clean-up sites' as the sediment trapped on private property become unusable as a result of filtering sediment. (p. 15)

Agency Response: See Summary Responses to Topics 11, 11.2, 11.3, 11.3.1, 11.3.2 and 11.4 on how the agencies have addressed concerns related to the economic analysis.

11.1. RFA/SBREFEA

Agency Summary Response

Summary of Comments Regarding RFA/SBREFEA

Summary Comment

The majority of comments in this section questioned the agencies' compliance with the Regulatory Flexibility (RFA) and Small Business Regulatory Enforcement Fairness (SBREFEA) Acts. Commenters stated that the rule was improperly certified, and the agencies claim that the proposed rule would not create significant adverse impact on a substantial number of small entities is inaccurate.

Many commenters viewed this rule as an expansion of the scope of waters covered under the Clean Water Act (CWA) as well as federal jurisdiction. Some commenters stated that the rule was not needed or authorized by law, and would improperly require assertion of jurisdiction in contravention of the Supreme Court precedent. Future implementation concerns were also raised regarding the ease of permitting, the impact this rule would have on current exemptions, and the potential economic burden this rule would create for small businesses.

Many commenters also stated that the agencies failed to formally engage small entities in accordance with RFA. While some commenters did acknowledge that outreach focused on small

⁹⁵ Sierra Club v. Sigler, 695 F.2d 957,979 (5th Cir. 1983) (agency citation of benefits while ignoring negative effects from a proposed action is an "unlawful sham"). See also McGreary County v. American Civil Liberties Union of Ky., 545 US 844,864 supra (2005)

entities was conducted during the rulemaking process, these efforts were considered minimal and insufficient to meet the requirements.

Commenters largely supported the need for a Small Business Advocacy Review (SBAR) panel and the development of regulatory flexibility analysis to fully evaluate the impacts of this rule on small entities. Absent these milestones within the rulemaking process, most commenters did not agree that the agencies conducted sufficient outreach or analysis to meet the terms of RFA and SBREFA.

Agency Summary Response to Comments on RFA/SBREFA

Background on the Regulatory Flexibility Act

The purpose of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act, is to fit regulatory requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to the regulation. The RFA requires that agencies determine, to the extent feasible, the rule's direct economic impact on small entities, explore regulatory options for reducing significant economic impacts on a substantial number of small entities, and explain their ultimate choice of regulatory approach. Small entities include small businesses, small organizations, and small governmental jurisdictions. Unless the Agency certifies that a rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE), RFA requires the agencies to conduct a formal analysis of the rule's potential adverse economic impacts on small entities, including holding a Small Business Advocacy Review Panel and preparing an initial and a final Regulatory Flexibility Analysis. Because the Agencies were able to certify this rule as having no SISNOSE, they were not required by the RFA to hold a panel or prepare a Regulatory Flexibility Analysis.

The Clean Water Rule

Today's rule does not "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies' technical expertise and extensive experience in implementing the CWA over the past four decades. The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Consequently, this action will not affect small entities to a greater degree than the existing regulations.

The Clean Water Rule does not directly establish any specific regulatory requirements. Instead, it is a definitional rule that clarifies the scope of “waters of the United States” that are protected under the CWA, using the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience in implementing the statute. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all rely on the definition of “waters of the United States.” Entities currently are, and will continue to be, regulated directly under these programs that protect “waters of the United States” from pollution and destruction.

The Agencies’ Certification of no SISNOSE

The Agencies disagree with comments suggesting that the rule could not be certified under the RFA because the rule has direct impacts on small entities. As explained by the D.C. Circuit, the economic impact of concern under the RFA is “the impact of compliance with the proposed rule on regulated small entities . . . subject to the requirements of the rule.” *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985). The relevant impacts are those associated with “reporting, recordkeeping and other compliance requirements of the proposed rule.” *Id.* (quoting 5 U.S.C. § 603(b) (4)). *See also, Aeronautical Repair Station Ass’n v. FAA*, 494 F.3d 161, 176 (D.C. Cir. 2007) (The RFA is satisfied “if the agency determines ‘the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.’”) (internal citation omitted); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (“[A]pplication of the RFA does not turn on whether particular entities are the ‘targets’ of a given rule,” rather it turns on whether the “small businesses . . . are ‘subject to’ the regulation, that is, those to which the regulation ‘will apply.’”). The Rule does nothing more than revise a definition, it does not itself regulate or impose any compliance burden on any entity. Entities whose actions impact waters of the U.S. are subject to legal obligations imposed by the Clean Water Act and existing implementing regulations. The rule does not alter those obligations. For example, several commenters noted that, under this rule, small entities would be required to obtain permits and would be subject to large fines if they fail to do so. This rule, however, only revises the definition; it does not require any entity to obtain a permit, nor does it impose fines on entities that fail to obtain permits. Permitting requirements and fines for failure to obtain a permit are imposed by existing CWA statutory and regulatory provisions, not this rule. The rule’s definitional change may make it more likely that a particular water will, or will not, be deemed a “water of the U.S.” Nonetheless, any compliance requirements applicable to actions impacting that water will be imposed by existing federal regulatory requirements, not this rule.

Some commenters disagreed with EPA’s use of *Mid-Tex* and *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir 1999) to support certification of this rule. While commenters are correct that in those cases the rules’ impacts on small entities were mitigated or translated by the intermediary entities directly being directly regulated, the situation with this rule is another step removed from direct regulation. This rule merely informs whether regulations implementing various CWA programs may be implicated. But, impacts are the result of the requirements of those other CWA regulations, not this definitional rule. Another commenter cited *National*

Association of Home Builders v. U.S. Army Corps of Engineers, 417 F.3d 885 (D.C. Cir. 2005) as supporting its position that the Agencies’ argument that the rule only indirectly regulates small entities was incorrect. The commenter, however, misreads that case. In *Home Builders*, the Corps argued that the nationwide permits (NWP) were not subject to the RFA because they were not rules and the RFA applies only to rules. The court held that the NWPs were rules and, therefore, plaintiffs could bring a claim under the RFA. The court did not reach the issue of whether the Corps could certify the rule or whether there were direct impacts on any small entities.

Several commenters noted that many small businesses may fail to get permits and as a result may be subject to large fines because they do not have the resources to determine whether their actions were subject to permit requirements. This rule, however, does not require anyone to obtain a permit. Those requirements are imposed by existing CWA regulations. Similarly, other impacts cited by commenters, such as that the rule would place a cloud on the title of countless properties, increase costs of doing business due to regulatory burdens (e.g. having to hire consultants to prepare permits, cost of permits), cause project delays, place restrictions on land use, result in longer permit review times, and reduce property values, would not be caused by this rule, if they were to occur at all, but rather by existing CWA regulations.

Several commenters suggested that the proposed rule did not provide a factual basis for the no SISNOSE determination. On the contrary, the proposed rule explained two bases for the no SISNOSE determination. First, because this rule is only definitional, it does not by itself have any impact on any entity. The preamble to the proposed rule explained that the rule is designed “to clarify the statutory scope of the term ‘waters of the U.S.’” and, therefore, does not impose regulatory requirements on any entities, large or small. As the D.C. Circuit explained in *American Trucking*, “an agency may justify its certification under the RFA upon the ‘factual basis’ that the rule does not directly regulate any small entities.” 175 F.3d at 1045. Second, as discussed above, the definition of the term “waters of the U.S.” is narrower than under the current regulations. The rule does not include any waters that historically have not been covered under the Clean Water Act and places important qualifiers on some existing categories. In fact, the rule specifically reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court. Waters that have never been protected remain outside the scope of the Clean Water Act. As a result, the rule is deregulatory because fewer waters will fit within the definition and, thus, fewer waters will trigger regulatory requirements set out in other CWA regulations.

The Agencies disagree with comments suggesting that the Agencies could not certify this rule because it has significant impact on small entities. Commenters point to EPA’s economic analysis to support their view. First, as discussed above, this rule does not have direct impacts on any entities, including small entities. Second, the economic analysis of the rule was not focused on the RFA analysis, but on other, broader issues relating to certain Executive Orders and on providing decisionmakers with additional information. Third, some of the comments mischaracterize the Agencies’ economic analysis, which analyzed data from the Corps’ ORM2 database. Commenters are not correct that the database shows that under current practice 98% of streams and 98.5% of wetlands are waters of the U.S. The ORM2 database is a collection of jurisdictional determinations the Corps has made typically in response to landowner requests. The database does not assess the jurisdiction of waters nationwide. Of the jurisdictional

determinations in that database, 68% are categorized as streams and 98% of those jurisdictional determinations found the water to be waters of the U.S. Likewise, of the waters categorized in the database, 27% were jurisdictional determinations for wetlands and 98.5% of those jurisdictional determinations found the water to be waters of the U.S. To provide a conservative impact estimate, the Agencies assumed only for the purpose of that analysis that under the rule 100% of those jurisdictional determinations would be positive.

Some commenters also cited OMB Circular A-4 to support their view of what baseline the Agencies should have used in the economic analysis. But, Circular A-4 is not relevant to the RFA analysis. Circular A-4 provides OMB's guidance for conducting a regulatory impact analyses as required by E.O. 13563 and E.O. 12866; it does not provide guidance on conducting an analysis under the RFA. Further, the economic analysis conducted for those Executive Orders is broader than the analysis required by the RFA. As discussed above, the economic impact of concern under the RFA is "the impact of compliance with the proposed rule on regulated small entities . . . subject to the requirements of the rule." *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

Some commenters suggested that this rule would increase costs for individual sites due to endangered species studies, archeological surveys, jurisdictional waters determination, stream mitigation, wetland mitigation, and long-term mitigation monitoring. As with other claimed impacts, these costs are not the result of this rule, but are imposed by other statutory and regulatory requirements.

Finally, because the rule does not have direct impacts, the baseline used in the economic analysis is not relevant. Nonetheless, the Agencies believe that it was appropriate to compare this rule to the regulations as originally promulgated. Notwithstanding effects of Supreme Court cases, it is appropriate to compare the new rule to the regulations as currently codified. The existing definition is broader and includes more waters in the definitions. As compared to the original rule, this rule will be narrower and include fewer waters. Therefore, this rule does not expand, but rather narrows jurisdiction.

Outreach to Small Entities

Although the Agencies were not required to conduct a Small Business Advocacy Review Panel for this rule, they nonetheless conducted outreach to small entities to obtain their input on the rule. The agencies sought wide input from representatives of small entities while formulating the proposed and final definition of "waters of the U.S." Such outreach, although voluntary, is also consistent with the President's January 18, 2011, Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy.

From August to October 2011, EPA worked with the Corps, OMB and SBA to convene an informal group of small entities in order to exchange ideas on various potential jurisdictional policies. A second outreach meeting was held with small entities in October 2014. In addition to engaging small entities in person during these key milestones in the rulemaking process, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach in 2014.

This process enabled the Agencies to hear directly from these representatives throughout the rule development about how they should approach this complex question of statutory interpretation. It also allowed the Agencies to consider related issues that representatives of small entities identified. The Agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Final Summary of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-xxxx), is available in the docket.

Specific Comments

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

11.1.150 In addition, the Regulatory Flexibility Act requires that any proposed Major Federal Actions demonstrate that the least net cost alternative to local governments has been selected. When combined with EO 12291, EPA is required to perform impact analysis to individual industries, ranching and agriculture in the context of current economic conditions. Please provide this Committee with a complete RFA analysis as indicated by the QAD, including the RFA impacts to each Kansas County proposed for WOTUS jurisdiction. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11.2, 11.3.1, 11.4 and section 12 of the final rule EA.

Wyoming House of Representatives (Doc. #14308)

11.1.151 According to the Waters Advocacy Coalition, the public and private sectors already spend \$ 1.7 billion a year to obtain Section 404 wetlands permits and securing one such permit through the Corps takes an estimated 788 days with an average cost of \$27 1,596 - without taking into account costs for mitigation or design changes. Expanding the definition and federal permitting requirement would also open up businesses, farmers, local governments, and landowners to citizen suits and legal liability as EPA and the Corps pick and choose when an action is deemed jurisdictional through a "significant nexus" determination. Even the independent Office of Advocacy within the Small Business Administration has recognized the undue burdens to come and has correctly urged with withdrawal of the rule, "under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rule-making."⁹⁶ (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

⁹⁶ Dr. Winslow Sargeant, Chief Counsel for Advocacy, Small Business Administration. October 1, 2014. [http://www.sba.gov/advocacy/I 0 120 14-definition-waters-united-states-under-clean-water-act](http://www.sba.gov/advocacy/I%20120%2014-definition-waters-united-states-under-clean-water-act)

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

11.1.152 The agencies did not adequately consider adverse impacts on rural communities and small agribusinesses. Throughout this rulemaking process, the Agencies have failed to engage with the States, as required by Executive Order 13,132 (Federalism), or the small business community, as required by the Regulatory Flexibility Act (RFA). Instead, the Agencies certified, without any supporting analysis, that "this proposed rule will not have a significant impact on a substantial number of small entities" because, in their opinion, "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations." There is no factual basis for this certification. It is based on several false assumptions: That the jurisdictional scope of the proposed rule is smaller than existing regulations, all the impacts of the proposed rule will be "indirect" and such impacts on farmers, ranchers and small agribusinesses will be insignificant.

Even a cursory analysis indicates that the revised definition will have a significant economic impact on a substantial number of small entities and on the States. Notwithstanding impacts on state agriculture and water programs, the proposed rule will have dramatic impacts on farmers, supporting agribusiness companies, and the infrastructure of small rural communities. The specter of new federal regulations for traditional stakeholder activities in and around previously unregulated marginal conveyances, ditches or other land features on farms and rural communities speaks volumes about likely impacts on such small entities. PDA is convinced the agencies have not adequately considered small business impacts in the development of the proposal. (p. 4-5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

For additional information on the agencies engagement with state and local governments, see the Federalism section in compendium #13.

11.1.1537. The economic analysis conducted by EPA and the Corps is flawed.

The proposed rule does not comply with EO 12866. For example, the rule relies on nearly 20-year old cost data that has not been adjusted for inflation. As a consequence, the agencies March 2014 economic analysis does not provide the public and policy makers with reliable and credible information regarding the magnitude of the proposed rule's economic impacts. Further, EPA and the Corps fail to consider future costs of compensatory mitigation in light of the expansive jurisdiction proposed under the rule. The costs for compensatory mitigation are relentlessly escalating.

By the federal agencies' own estimation, implementation of the proposed rule will result in higher costs in at least millions of dollars for the agencies and the regulated community. Section 404 permit costs are projected to increase between \$19.8 million and \$52 million annually, while 404 mitigation costs are projected to rise between \$59.7 million and \$113.5 million annually.⁹⁷

⁹⁷ Id. at 16.

However, the economic analysis does not include the costs associated with other CWA programs,⁹⁸ or the potential costs of litigation that will flow from the implementation of the rule. Thus, the costs of adopting and implementing the proposed rule are likely to be exorbitant, because

- waters and wetlands that could not reasonably be found jurisdictional under a common sense reading of the CWA and Supreme Court precedent will, nonetheless, be deemed jurisdictional;
- any person or entity proposing activities in those additional waters and wetlands found to be jurisdictional under the rule will be subject to lengthy and expensive permitting reviews that produce no appreciable environmental benefit, or be exposed to stiff civil and criminal penalties for acting without a permit;
- vital public and private projects will suffer needless expense and delay, and the compensatory mitigation costs for these projects will increase; and
- taxpayers will have to help fund the federal agencies' ambitious exercise of nearly boundless jurisdictional authority under the guidance.

In short, EPA has not adequately analyzed the costs of imposing the proposed rule. As one expert concluded, the agencies have underestimated the costs because of the flawed methodology the agencies used to determine the extent of acreage that the proposed rule would regulate, and because the agencies failed to consider the costs and increased number of required permitting actions.⁹⁹ (p. 19)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11.3.1 (Costs) and 11.4 (Other CWA Programs)

Uintah County, Utah (Doc. #12720)

11.1.154 C. **Regularity Flexibility Act** - The Agencies' characterization of this aspect of the proposed rule is highly questionable.

Uintah County, Utah qualifies as a small governmental jurisdiction with a population of less than 50,000. The County, like numerous others in the United States, relies heavily upon extractive industries and agriculture for its tax base. The proposed rule has the potential to significantly impact small governments and small businesses. The reason there is potential for significant impact is because the proposed rule does not disclose the actual impact of implementing the rule.

It is troubling to the County that the Agencies are failing to acknowledge the "significant nexus" between the definition change proposed by the rulemaking and the practical effect of its implementation. The fact that the Agencies have not completed collection and review of the "scientific information", have not stated exactly how the case-specific analysis will be conducted, and are still soliciting comments about what

⁹⁸ Id. at 12.

⁹⁹ D. Sunding, The Waters Advocacy Coalition, Review of 2014 EPA Economic Analysis of Proposed Definition of Waters of the United States (May 15, 2014). Dr. David Sunding is an economics professor at University of California, Berkeley.

should be considered in making determinations, indicate the true scope of the rule is unknown.

How can the Agencies claim the effect of the rule making is not significant when the full extent of the impacts is unknown? (p. 6)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.3.1 (Costs), and 14.1 (Site-specific).

National Association of Counties (Doc. #15081)

11.1.155 The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed “waters of the U.S.” rule.

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule could have on small entities and provide less costly options for implementation. The Small Business Administration’s (SBA) Office of Advocacy (Advocacy) oversees federal agency compliance with RFA.

As part of the rulemaking process, the agencies must “certify” the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, federal agencies must provide a “factual basis” to certify that a rule does not impact small entities. This means “at minimum... a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification.”⁵

The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. The agencies determined, incorrectly, there was “no SISNOSE”—and therefore did not provide a necessary review.

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed “waters of the U.S.” rule was “improperly certified... used an incorrect baseline for determining... obligations under the RFA... imposes costs directly on small businesses” and “will have a significant economic impact...” Advocacy requested that the agencies “withdraw the rule” and that the EPA “conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.”⁶ Since over 2,000 of our nation’s counties are considered rural and covered under SBA’s responsibility, NACo supports the SBA Office of Advocacy conclusions. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.156 Recommendations:

1. Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a “no SISNOSE” determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA
2. Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns (p. 4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Central Platte Natural Resources District (Doc. #15477)

- 11.1.157 Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. The Agencies have failed to comply with the Regulatory Flexibility Act (RFA), which sets forth procedural steps designed to safeguard small governmental jurisdictions, such as CPNRD. (p. 2)

Agency Response: All existing statutory and regulatory exemptions are unaffected by under the Clean Water Rule. For additional information on exemptions, please see the summary response developed for exemption-related comments in the implementation compendium 12.

- 11.1.158 The Agencies have failed to prepare an initial regulatory flexibility analysis (IRFA) as required by the RFA, and make it available for public review and comment simultaneously with the Agencies' publication of general notice of proposed rulemaking for the rule. The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule's impact on small entities would achieve the regulatory purpose. The Agencies must also prepare a final regulatory flexibility analysis (FRFA). The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient. (p. 7)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.159 Conclusion

The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies' goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their effort to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements. (p. 7)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Eddy County Commissioners (Doc. #15665)

11.1.160 EPA needs to comply with the Regulatory Flexibility Act. EPA should address entities affected by the proposed rule, including but not limited to, local counties, cities, towns and villages. The act, Section 553, Title 5 USC, requires the federal agency to analyze the degree of impact. EPA should also re-analyze the degree of impact of regulations. Agencies' study of the cost and impact is misleading and arbitrary and capricious, not only on cost, but a regulatory burden for the people and business. EPA has asserted that this will clarify the jurisdiction of the "Waters of the US" but the proposed definitions are inadequately explained and raises important concerns and questions, if not answered will result in further legal challenges. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit) and 11.3.1 (Costs).

Northern Counties land Use Coordinating Board (Doc. #3317)

11.1.161 3. There is a profound need to re- examine the proposed regulations in the context of scarcity, equity, and flexibility under the Regulatory Flexibility Act cited in your narrative in the Federal Register of April 21. In a region such as ours, with vast wetland complexes abutting our communities and large tracts of federal and state public lands constricting our growth corridors, we are continuously engaged in permit applications and mitigation proposals for even the most mundane projects. But taken against the acreages of water resources left undisturbed through the centuries of settlement in this region and the comparatively miniscule disturbances projected for our public and private development activities, there should be some administrative and technical flexibility regarding permit provisions and mitigation standards.

The EPA concludes that the "scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations" thereby eliminating the need to consider any adverse economic impacts on small entities and "therefore, no regulatory flexibility analysis is required."

We respectfully disagree with this EPA conclusion and assert that the proposed rule may increase the "scope" of CIA regulations, may increase the economic burden of

regulation on local governments, and should undergo regulatory flexibility analysis as required by statute. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Energy Producing States Coalition (Doc. #11552)

11.1.162 The Administration’s proposal would now sweep up untold amounts of landowners, local governments, and businesses across the country into a lengthy and expensive permitting process. According to the Waters Advocacy Coalition, the public and private sectors already spend \$1.7 billion a year to obtain Section 404 wetlands permits and securing one such permit through the Corps takes an estimated 788 days with an average cost of \$271,596 – without taking into account costs for mitigation or design changes. Expanding the definition and federal permitting requirement would also open up businesses, farmers, local governments, and landowners to citizen suits and legal liability as EPA and the Corps pick and choose when an action is deemed jurisdictional through a “significant nexus” determination. Even the independent Office of Advocacy within the Small Business Administration has recognized the undue burdens to come and has correctly urged with withdrawal of the rule, “under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.”¹⁰⁰ (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

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

11.1.163 *Overarching Concerns with the Rulemaking Process*

While we appreciate the willingness of EPA and the Corps to engage state and organizations in a voluntary consultation process prior to the proposed rule's publication, we concerned that the direct and indirect impacts of the proposed rule on state and local governments have not been thoroughly examined because three key opportunities that would have provided a greater understanding of these impacts were missed:

1. Additional analysis under the Regulatory Flexibility Act, which examines economic impacts on small entities, including cities and counties;
2. State and local government consultation under Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns; and

¹⁰⁰ Dr. Winslow Sargeant, Chief Counsel for Advocacy, Small Business Administration. October 1, 2014. <http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

3. The agencies' economic analysis of the proposed rule, which did not thoroughly examine impacts beyond the CWA 404 permit program and relied on incomplete and inadequate data. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see Section 9 of the final rule EA and summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

11.1.1641. The Regulatory Flexibility Act (RFA) requires federal agencies that promulgate rules to consider the impact of their proposed rule on small entities, which under the definition includes cities, counties, school districts, and special districts of less than 50,000 people. RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, requires agencies to make available at the time of the proposed rule is published, an initial regulatory flexibility analysis on how the proposed rule impacts these small entities. The analysis must certify that the rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. The RFA process was not undertaken for this rule.

Based on analysis by our cities and counties, the proposed rule will have a significant impact on all local governments, but on small communities particularly. Most of our nation's cities and counties – more than 18,000 cities and 2,000 counties – have populations less than 50,000. The RFA SISNOSE analysis would be of significant value to these governments. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.165 Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act. (p. 4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

New Mexico Association of Commerce and Industry (Doc. # 5610)

11.1.166 The EPA and the Corps have continued to pursue this course of actions despite failing to 1) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA)... (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Water Advocacy Coalition (Doc. #7981)

11.1.167 Throughout this rulemaking process, the Agencies have failed to engage with the States, as required by Executive Order 13,132 (Federalism), or the small business

community, as required by the Regulatory Flexibility Act (RFA). Instead, the Agencies certified, without any supporting analysis, that "this proposed rule will not have a significant impact on a substantial number of small entities" and "will not have a substantial direct effect on the states..." Of course, even a cursory analysis indicates that the revised definition would have a significant economic impact on a substantial number of small entities and on the States.

After largely ignoring States and small entities throughout this rulemaking process, EPA has now invited select small entities to participate in a meeting, to be held just over a week before the comment deadline, to "provide input" on the proposed rule. This is too little too late. As in the past,¹⁰¹ invitations for this meeting were sent to a very limited list of small entity participants. The meeting is not open to the public. Ultimately, this meeting is a feeble attempt by the Agencies to give the *appearance* of engaging with small entities – it is no more than window dressing. It in no way satisfies the Agencies' obligations to consider impacts to small businesses.¹⁰² (p. 8)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Arizona Chamber of Commerce and Energy (Doc. #14639)

11.1.168 We are concerned that the EPA cannot factually certify that the proposed rule would not impose a major economic impact on a substantial number of small governments, organizations, and businesses, when the rule would subject vast areas to federal jurisdiction under the Clean Water Act for the first time. Despite the obvious additional burdens, the U.S. Chamber has raised additional concerns that EPA didn't gather feedback from small businesses and communities who would be affected by the regulations as required by the Regulatory Flexibility Act. The EPA simply deemed that the proposed rule will "not have a significant economic impact" on them. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

Golf Course Superintendent's Association of America, et al. (Doc. #14902)

11.1.169 C. WOTUS Rule Devastates Golf Industry

The proposed revisions to the WOTUS regulations, as presently proposed, would likely have a devastating economic impact on the golf course industry. Golf facilities, which are 95% small businesses, would find themselves economically burdened, if not unable to operate profitably, should these regulations be enacted. Under the proposed regulations, almost every river, stream, creek, wetland, pond, and ditch in the United

¹⁰¹ As explained in EPA's "Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of Waters of the United States," EPA held one small entity outreach meeting to discuss the 2011 Draft Guidance. The 2011 meeting was open to only a limited number of participants and EPA has wholly ignored the feedback it received from small business entities during that meeting.

¹⁰² When a rule will have a significant economic impact on a substantial number of small entities, the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires EPA to convene a, at 52 (May 2012), available at http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.

States would fall under the jurisdiction of the CWA. Golf courses that have newly regulated waters on or near them would be required to obtain costly, federal permits for many land management activities or land use decisions. And there is no guarantee that permits would be granted, which would halt operations on golf courses or even cause them to shut down altogether. Further, notwithstanding the statements of EPA, the rule is neither needed in its present form, nor authorized by law. No environmental benefit will be achieved by this legal overreach, but it could substantially disrupt the employment of the 2 million Americans working in the industry if the rule is ultimately adopted.¹⁰³

Because of the likely adverse impacts of WOTUS on small business golf courses, the golf industry agrees and joins with, the recommendations of the SBA Chief Counsel for Advocacy, Dr. Winslow Sargeant, in his letter, dated October 1, 2014, to EPA Administrator McCarthy, and Corps Deputy Commanding General Peabody. In that letter, Chief Advocate Sargeant stated, “Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.” (p. 2-3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Mountain States Legal Foundation (Doc. #15113)

11.1.170 III. THE PROPOSED RULE FAILS TO APPROPRIATELY ACCOUNT FOR ITS IMPACT ON SMALL ENTITIES, AS REQUIRED UNDER THE REGULATORY FLEXIBILITY ACT.

The Regulatory Flexibility Act ("RFA), Pub. L. 96-354, 94 Stat. 1164 (1980), seeks "to improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities, and for other purposes." Id. at 1164. To accomplish this task, the RFA requires agencies, publishing a notice of proposed rulemaking, to "prepare and make available for public comment an initial regulatory flexibility analysis [,]" 5 U.S.C. 5 603(a), unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Id. 5 605(b). An initial regulatory flexibility analysis "describe[s] the impact of the proposed rule on small entities." ¹⁰⁴ 5 U.S.C. § 603(a). If the agency certifies that the proposed rule will not have a significant economic impact, then the certification must provide a factual basis and be published in the Federal

¹⁰³ The golf industry may well face the ruinous costs faced by the Sackett family, when they sought, ultimately successfully, to challenge an EPA compliance order on the use of their property. See, *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

¹⁰⁴ The RFA's definition of "small entity" is the same as the definition of "small business concern" under the Small Business Act, which generally includes but is not limited to

[Enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation: Provided, That notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.

Register. Id. 5 605(b); see generally, *Nw. Min. Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 14-15 (D.D.C. 1998).

The agencies certified that the Proposed Rule will not have a significant economic impact on a substantial number of small entities. 79 Fed. Reg. at 22,220; see 5 U.S.C. 5 605(b). The agencies base their certification on their opinion that "fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under existing regulations[,] which means "this action will not affect small entities to a greater degree than the existing regulations." 79 Fed. Reg. at 22,220.

The agencies' certification is flawed. First, it is unclear how the agencies determined the Proposed Rule does not exert any greater jurisdiction over waters, than the existing regulation. For instance, the agencies posit that the Proposed Rule subjects fewer waters to CWA jurisdiction, *id.*, but this statement is contradictory. In the agencies' economic analysis, the agencies found that "the proposed rule increases overall jurisdiction under the CWA by 2.7 percent . . . or roughly 3 percent, over current field practices." Economic Analysis at 2, 12; *id.* at 18 (anticipating increased permitting under Proposed Rule); *id.* (expecting an increase in waters the agencies consider jurisdictional). This is problematic because the basis of the certification is that the Proposed Rule does not have a significant economic impact on small entities. Yet, there would be a 3 percent increase in jurisdiction under the Proposed Rule and this comparison only involved CWA 404 permitting from 2009 to 2010. *Id.* At the very least, the agencies' certification should provide a better factual basis that incorporates this comparison and sets forth why it is not significant.

Second, the agencies' economic analysis demonstrates that the Proposed Rule would have a significant economic impact on a substantial number of small entities. Economic Analysis at 14 (recognizing that impact avoidance and minimization costs can be significant for some permit applicants); *id.* at 17 (estimating additional compensatory mitigation is likely); *id.* at 19 (increase in permitting could lead to more consultations under the Endangered Species Act and the National Historic Preservation Act). There is simply no doubt that the Proposed Rule's increased jurisdiction will have a significant economic impact on small entities. Again, the agencies' certification does not directly address the expected increase in jurisdiction under the CWA, its associated costs, and why it is not significant.

In conclusion, the disparity between the economic analysis and the agencies' certification is deeply concerning. It is evident from the economic analysis that the Proposed Rule will have a significant economic impact on small entities, like farming and ranching operations. The agencies should withdraw the Proposed Rule and provide a better certification, or complete an initial regulatory flexibility analysis. (p. 13-15)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

National Association of Convenience Stores, et al. (Doc. #15242)

11.1.171 The Agencies also improperly certified this Proposed Rule by erroneously assessing the Proposal's impact on small businesses and for failing to assemble a Small Business

Advocacy Review (“SBAR”) panel. The Regulatory Flexibility Act (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), requires federal agencies to consider how a proposed rule would impact small businesses and adopt the least burdensome alternative for small businesses.¹⁰⁵ EPA, in particular, must assemble a SBAR panel when it cannot certify that a rule will not pose a significant economic impact to a substantial number of small entities.¹⁰⁶

Here, the Agencies improperly certified that the Proposal would not significantly affect small businesses by noting that “fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under existing regulations”—yet to reach this conclusion the used outdated data, rendering the findings inaccurate.¹⁰⁷ Moreover, the EPA’s economic analysis limits its estimates to costs associated with CWA Section 404 permits. It does not consider possible costs associated with other CWA programs, including Section 311 (SPCC requirements) or Section 402 (discharge requirements).¹⁰⁸ Thus, the economic analysis substantially underestimates the real costs that would arise under the Proposal. Despite the costs associated with the proposal, at no point did EPA assemble an SBAR panel as required by law. (p. 5-6)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

International Brotherhood of Boilermakers, et al. (Doc. #15373)

11.1.172 III. The Agencies Should Perform a Full Analysis of Impacts to Small Businesses Consistent with Small Business Regulatory Enforcement Fairness Act

As part of its Proposed Rule, the Agencies concluded that a Small Business Regulatory Enforcement Fairness Act (SBREFA) analysis of the economic impacts of the Proposed Rule on small businesses is not required because “this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities and therefore no regulatory flexibility analysis is required.”¹⁰⁹ The Proposed Rule is redefining jurisdictional waters throughout the nation, which will undoubtedly have a “significant impact on a number of small entities.” These impacts include timing and permitting delays; risks to capital and carrying costs; employment considerations; and having to hire additional employees to maintain regulatory compliance. Therefore, prior

¹⁰⁵ Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C. §601 et seq.). In the event that a proposal is projected to impose a “significant economic impact on a substantial number of small entities,” a federal agency must assess that impact and consider regulatory alternatives that would minimize the impact to small businesses. 5 U.S.C. § 603, 605. Furthermore, Executive Order 13563 demands that an agency “tailor its regulations to impose the least burden on society.” Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan.18, 2011).

¹⁰⁶ 5 U.S.C. § 609(b).

¹⁰⁷ 79 Fed. Reg., at 22,220, 22,189. In determining that there will be no “significant adverse economic impact” on small businesses, the Agencies utilized an outdated rule from 1986 as the baseline for defining the scope of WOTUS.

¹⁰⁸ EPA and Corps, Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014).

¹⁰⁹ 79 Fed. Reg. at 22,220.

to any final rule, the Agencies should undertake a SBREFA analysis (including notice and comment on such analysis) to ensure that any final rule takes into consideration impacts on small businesses. (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Coalition of Local Governments (Doc. #15516)

11.1.173 V. Regulatory Flexibility Act

The EPA and Corps conclude that this Proposed Rule will not have significant economic impact on a substantial number of small entities. 79 Fed. Reg. at 22220. The Proposed Rule also states that “the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations.” Id. at 22189. See also id. at 22192, 22212, 22220. However, the EPA and Corps then admit in the economic analysis that “the outcome of the proposed rule will be an approximate 3 percent increase in assertion of jurisdiction when compared to 2009-2010 field practices.” EPA and Corps, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 2 (Mar. 2014) (hereinafter “Economic Analysis”). See id. at 5, 12-14, 17-19, 43. The expansion of the EPA and Corps’ jurisdiction over “waters of the United States” to include entire watersheds, ditches, canals, and intermittent and ephemeral streams will require small businesses, such as livestock operators and farmers, to obtain a Section 404 permit for activities that never before required one. This will greatly increase the cost to small businesses and subject them to potential liability. Therefore, the EPA and Corps must prepare a regulatory flexibility analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§601 et seq.

The agricultural business will see an increase in costs for obtaining permits on everyday farming and ranching activities, such as weed control and fertilizer applications, tree and stump removals, development of trails to facilitate livestock movements, and building of livestock shelters. The expanded definition of tributaries and waters considered to be adjacent to the “waters of the United States” will bring within the EPA’s jurisdiction a number of ditches, canals, and ponds that were never before considered “waters of the United States.” There is also a long wait time in receiving approval of Section 404 permits, which adds to the costs and hinders the operations of farmers and ranchers. Finally, the farming exclusions and exemptions do not apply to Section 402 National Pollutant Discharge Elimination System (NPDES) permitting so any expansion of the definition of waters that fall within EPA’s jurisdiction will also lead to more occurrences of having to comply with Section 402 permitting.

The oil and gas industry would also see an increase in costs and more delays in obtaining Section 404 permits. Not only will companies be required to obtain Section 404 permits for development and drilling activities that affect all the waters now included within the definition of “waters of the United States,” but they may also be required to obtain a permit when obtaining right-of-way access rights over public, state, and private land. The new definition for tributaries will include roadside drainage ditches that do not fall within the exclusion. Any maintenance or upgrading of the rights-of-way to support the oil and gas industry traffic will require Section 404

permitting, with extra cost and delay placed on the companies and/or the Counties. Similar impacts would occur for the development of transmission lines, which is presently occurring in Wyoming and other western states. (p. 14-15)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Federal Water Quality Coalition (Doc. #15822)

11.1.174B. The Proposed Rule Fails To Comply With the Regulatory Flexibility Act.

On October 1, 2014, Dr. Winslow Sargeant, Small Business Administration, Chief Counsel for Advocacy, filed comments on the proposed rule asserting that the agencies failed to comply with the Regulatory Flexibility Act, which requires consideration of small business impacts.¹¹⁰ In the proposed rule, the agencies certified that the rule would not have a significant impact on small businesses.¹¹¹ The SBA Office of Advocacy disagrees, saying: “Advocacy believes that the agencies have improperly certified this rule,” noting significant direct impacts on small businesses. Accordingly, the SBA Office of Advocacy urges EPA to withdraw the proposed rule and comply with the Regulatory Flexibility Act. We agree. (p. 61)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA.

Water Advocacy Coalition (Doc. #17921)

11.1.175F. The Agencies Have Not Complied with the Regulatory Flexibility Act.

The proposed rule has not been conducted in compliance with the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-612. The Office of Advocacy of the U.S. Small Business Administration (“SBA”), which was established to represent the views of small entities before federal agencies and Congress, submitted comments that detail the agencies’ failure to comply with their RFA obligations for the proposed rule.¹¹² The RFA was developed in recognition of the economic importance of small businesses, and it attempts to ensure that regulations be promulgated with these entities in mind. Thus, the RFA requires agencies to analyze the impact a rule may have on small business, and, if that impact is substantial, the agency must seek a less burdensome alternative. *Id.* § 604(a). If the agency has performed an analysis and developed enough information to support a determination of no- or low-impact for small entities, the agency can certify that there would not be a “significant economic impact on a substantial number of small entities.” *Id.* § 605(b). Importantly, if an agency does not have the factual data to support a certification, it cannot certify and must comply with detailed RFA impact analysis requirements, including the identification of alternatives that minimize the

¹¹⁰ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

¹¹¹ 79 Fed. Reg. at 22220.

¹¹² U.S. Small Business Administration, Office of Advocacy, Comments on Definition of “Waters of the United States” under the Clean Water Act (Oct. 1, 2014) (“SBA Comments”).

increase in cost for small businesses. *Id.* § 603. This assessment of less burdensome alternatives is at the heart of the protections afforded under the RFA.

For the proposed rule, the agencies did not publish an initial regulatory flexibility analysis as required by the RFA. Nor does it appear that the agencies considered any alternatives to the proposed rulemaking. Instead, the agencies certified that “this proposed rule will not have a significant impact on a substantial number of small entities.” 79 Fed. Reg. at 22, 220. The agencies failed to provide any factual basis for the certification as required by the RFA despite the evident consequences for hundreds of thousands of small entities. Rather, the agencies reasoned that certification was appropriate because “[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations.” *Id.* As explained throughout these comments, we disagree with that assessment, and interpret the rule to result in a substantial increase in jurisdiction. In its comments, the SBA similarly concludes that “the agencies have improperly certified this rule.”¹¹³ The SBA points out the rule will have a significant, direct economic impact on small businesses.¹¹⁴ Coalition members estimate that the expanded regulatory definition would have widespread regulatory impacts on small businesses and small governmental jurisdictions. Many ordinary activities undertaken by small businesses and governments would immediately become subject to a wide variety of regulations and permitting requirements, all of which would impose direct costs, delays, and uncertainty in planning future activities and projects. These impacts are felt acutely by small business entities. As explained by the SBA, “Concerns raised by small businesses as well as the agencies’ own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition.”¹¹⁵ For all of these reasons, the agencies’ certification is invalid. Accordingly, the agencies are required to conduct an initial regulatory flexibility analysis as required by the RFA, including exploration of regulatory alternatives for reducing significant economic impact on small entities.

In addition, when a rule will have a significant economic impact on a substantial number of small entities, the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, requires EPA rules for which an initial regulatory flexibility analysis is required. 5 U.S.C. § 609. Panel outreach must take place before the publication of the proposed rule.¹¹⁶ With a SBREFA panel, the agency solicits information and advice from representatives of small entities that are affected by the proposal, and issues a final panel report that is included in the rulemaking docket. 5 U.S.C. § 609.

But the agencies have not conducted a SBREFA panel for this proposed rule, and have not given the small business community or local governments a real, meaningful opportunity to discuss the burdens of the proposed rule as the RFA requires. The agencies’ response to the concerns of small entities has been dismal. The agencies have disregarded calls from the SBA and the U.S. House of Representatives Committee on Small Business to hold SBREFA panels and to comply with other requirements of the

¹¹³ SBA Comments at 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 9.

¹¹⁶ Small Business Administration, RFA Guide for Government Agencies, at 52 (May 2012), available at http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.

RFA. In the docket for the proposed rule, EPA has provided a “Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of ‘Waters of the United States,’” which details an outreach meeting that the EPA held in 2011 to discuss the 2011 Draft Guidance. This meeting should in no way be seen as a substitute for a SBREFA panel on the proposed rule. The 2011 meeting was open to only a limited number of participants, and the topic of the meeting was not the proposed rule but a previous draft guidance. As evidenced by the content of the proposed rule, which is very similar to the 2011 Draft Guidance, the agencies have wholly ignored all of the feedback from small business entities, including those who were able to participate in the meeting on the 2011 Draft Guidance.

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

Moreover, the proposed rule does not comply with the President’s January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which reiterates the RFA’s provisions for providing regulatory flexibility and emphasizes the important role small businesses play in the American economy.²³² With this proposed rule, the agencies have not satisfied their obligations with respect to small businesses and governments. The agencies should withdraw the proposed rule, conduct an initial regulatory flexibility analysis, hold a SBREFA panel, and explore ways that the proposed rule could be modified to minimize impacts to small entities. The SBA has also advised the agencies to withdraw the rule and conduct a panel prior to promulgating any further rule on this issue.¹¹⁷ (p. 91-94)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Pinnacle Construction & Development Corp. (Doc. #1807)

11.1.176 Finally, as a business owner, I take great issue with the EPA declaration that this new regulation will not have a significant economic impact on a substantial number of small business entities. This declaration, which allows the EPA to avoid the Regulatory Flexibility Act, could not be further from the truth in Charlottesville, Virginia. This will significantly impact small business and I encourage the EPA to reconsider their declaration to the contrary. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

¹¹⁷ SBA Comments at 9.

Construction Industry Roundtable (Doc. #8378)

11.1.177 Rule-Making Without Fulfilling Statutory Obligations: It is widely known that Congressional members, with jurisdiction over these matters, have been extremely critical and/or cynical of the rule-making; especially given it has failed to conduct statutorily required assessments. Simply stated, the agencies have failed to properly assess the economic impact on small businesses; neglecting to fulfill their obligations under the Regulatory Flexibility Act (RFA).¹¹⁸ These statutes are in place to constrain unreasonable and overly broad expansion of regulatory authority by federal agencies - *FAILURE* to comply with statutory requirements undercuts and invalidates the proposed rule-making. (p.5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit) and 11.3.1 (Costs).

National Ready Mix Concrete Association (Doc. #13956)

11.1.178 Small Business Regulatory Enforcement Fairness Act:

Additionally, the agencies certified that this rule would not have a significant economic impact on small entities. This is simply not the case. Since releasing the proposed rule there has been substantial evidence that small entities believe the rule will harm them, including multiple House Committee hearings and a U.S. Small Business Administration roundtable.¹¹⁹ The U.S. Small Business Administration's Office of Advocacy agreed with this conclusion, publicly advising the agencies that they improperly certified the WOTUS proposal under the Regulatory Flexibility Act.¹²⁰ Failure to take into account impacts to small entities is incredibly concerning and by not calling a small business advocacy review panel, the agencies have missed valuable input from small entities, like ready mixed concrete producers; 85% of which are small entities. NRMCA believes a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is needed to provide more complete, accurate, timely and relevant information on how small businesses will be affected by the proposal. The agencies must do this outreach before moving forward with this proposed rulemaking in order to better assess the impacts on and reduce the impacts to small entities. (p. 13-14)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

¹¹⁸ Notwithstanding their denials of "over-reaching" to the contrary, EPA estimates the proposed rule would expand federal jurisdiction by some "60 percent of stream miles in the U.S." because right now they "only flow seasonally or after rain" but would be subject to federal regulation under the proposal. [See, 79 Fed. Reg. 22,190 (April 21, 2014)]

¹¹⁹ List all the hearings/round table date

¹²⁰ Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of "Waters of the United States" Under the Clean Water Act. (October 1, 2014)

CalPortland Company (Doc. #14590)

11.1.179 EPA should undertake a full evaluation of the effects this rule will have on businesses. The proposed rule will put even small businesses at risk of fines of up to \$37,500 per day if a permit is required and not obtained. This could wipe out a business that did not realize a permit was needed for work far from “navigable” water. This is especially true in the arid West, where ephemeral streams and “other waters” can be a considerable distance from traditionally navigable waters. We feel that EPA is required to comply with the Regulatory Flexibility Act and must seek input from small businesses before proposing a rule.

EPA’s economic analysis of this rule does not accurately show what businesses like ours will end up paying if this rule is finalized. It is not even close. To conduct the additional mitigation of a stream required under this rule could cost more than \$100,000 for a single site. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Teichart Materials (Doc. #18866)

11.1.180 EPA's economic analysis does not take into account the real costs of permitting and mitigation and must be redone. EPA and the Corps must also convene a Small Business Regulatory Flexibility Act panel as required by law to assess the impacts on small businesses that make up 70 % of NSSGA's membership. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

National Association of Home Builders (Doc. #19540)

11.1.181 b. The Agencies Failed to Comply with the Regulatory Flexibility Act.

Recognizing that small businesses are frequently disproportionately impacted by federal regulations, Congress enacted the Regulatory Flexibility Act (RFA) in 1980. The RFA requires federal agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, including small businesses, small non-profit enterprises, and small local governments.¹²¹ The RFA applies to any rule subject to notice and comment rulemaking under Section 553(b) of the Administrative Procedure Act (APA) or any other law. When an agency issues a rulemaking proposal, the IRFA requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) or certify the proposal will not have a significant impact on a substantial number of small entities. The Agencies have erroneously certified the proposed rule. (p. 155)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

¹²¹ 5 U.S.C. 9 601-612.

11.1.182i. The Agencies' Certification that the Proposed Rule Will not have a Significant Economic Impact on a Substantial Number of Small Entities Lacks a Sufficient "Factual Basis."

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.¹²² A certification must include, at a minimum, a description of the affected entities and an estimate of the cost of the impacts that clearly justifies the "no impact" certification.

In addition, under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act ("SBREFA")¹²³ each covered agency that is required to prepare an IRFA must first notify the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) and provide information on the proposal's potential impacts on small entities and the type of small entities that may be affected. Under SBREFA, EPA must analyze proposed regulations for significant impacts on a substantial number of small entities ("SISNOSE"). If EPA concludes that the proposed rule has no SISNOSE, then it does not need to conduct a SBREFA/RFA analysis. If it does not conduct a SBREFA/RFA analysis, then it must publish a certification and its justification in the Federal Register.

Regrettably, the Agencies have bypassed the safeguards of the RFA by certifying that no SISNOSE will occur with the proposed rule to define waters of the U.S. under the Clean Water Act.¹²⁴ When certifying no SISNOSE, SBREFA requires the Agencies to include the factual basis for the certification, which is subject to judicial review under an arbitrary and capricious standard.¹²⁵ According to SBA guidance, an adequate "factual basis" for a "no SISNOSE" certification should include, at a minimum:

1. Description and number of affected entities under the rule;
2. The estimated economic impacts on small entities subject to the rule;
3. Criteria for determining whether the estimated impacts will be "significant" (e.g., results in insolvency or has a disproportionate effect on small businesses);
4. Criteria for determining whether any estimated significant impacts will affect a "substantial" number of small entities (e.g., small businesses as a percentage of entities significantly affected or total number of affected small businesses);
5. A description of the assumptions and uncertainties used in the economic impacts analysis; and
6. A clear certification statement.¹²⁶

¹²² 5 U.S.C. 5 605.

¹²³ 5 U.S.C. 6 609.

¹²⁴ 79 Fed. Reg. at 22,220.

¹²⁵ *Southern Offshore Fishing Ass'n v. Daley*, 55 F.Supp. 2d 1336 (M.D. Fla. 1999).

¹²⁶ SBA Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (May 2003) ("SBA RFA Guidance") at 8-10.

Rather than complete this exercise and properly analyze all six factors, the Agencies attempt to justify their SISNOSE by stating, “The scope of regulatory jurisdiction in this proposed rule is narrower than that under existing regulations . . . Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.”¹²⁷ The Agencies then apparently use this “fact” as evidence as to why no further inquiry regarding the required six factors is included. NAHB disagrees, as the “factual basis” for supporting this certification is sorely lacking.

For example, there is little evidence that the Agencies even considered, much less conducted any analysis regarding impacts to small businesses specific to this rulemaking. In developing the robust factual basis for a no SISNOSE certification, one determination (numbers 3 and 4 above) is whether the estimated impacts will be "significant" and if they will affect a "substantial" number of small entities. In doing so, EPA guidance suggests that SISNOSE clearly exists when the EPA rule creates compliance costs equal to or greater than 3% of sales¹²⁸ or 1000 small business entities or for greater than 20% of the regulated industry. Conversely, EPA guidance suggests that clearly no SISNOSE exists if the rule creates compliance costs below 1% of sales for 100 small business entities or for less than 20% of the regulated industry. Rules with impacts falling between these clear extremes may require further analysis before they can be certified as having or not having SISNOSE. Such further analyses include, for example, analyzing cost pass-through, examining profits or profit margins, measuring the financial health of entities, and comparing relative impacts on small entities versus large entities.¹²⁹ The Agencies have produced no evidence of having performed any of these tests or analyzed any of these outcomes, yet have certified that this rule will have no significant economic impact on a substantial number of small entities absent any factual data and amid significant evidence to the contrary.

NAHB is not alone in its sentiments regarding the Agencies' wrongful certification. Indeed, the U.S. Small Business Administration (SBA) Office of Advocacy (Advocacy), the independent voice for small businesses and the watchdog for the RFA, believes "EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act. . . because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that EPA conduct a [SBAR] panel before proceeding any further with this rulemaking."¹³⁰ (p. 155-157)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA.

¹²⁷ 79 Fed. Reg. at 22,220.

¹²⁸ Percent revenue can be used as an alternative to sales, where sales data are not available. Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (November 2006) (hereinafter, RFA Guidance for EPA Rulewriters) Table 2 at 24.

¹²⁹ Id. at 29-30,32; see also SBA RFA Guidance at 17.

¹³⁰ Small Business Administration Office of Advocacy Comment on "Definition of 'Waters of the United States' Under the Clean Water Act" Proposed Rule (October 1,2014) at 1.

11.1.183 ii. Completing an Initial Regulatory Flexibility Analysis would have Revealed Significant Impacts and Triggered a Small Business Advocacy Review Panel.

When an agency issues a rulemaking proposal, the RFA requires it to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) which will "describe the impact of the proposed rule on small entities."¹³¹ Specifically, the IRFA is to address the reasons then agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.

Given the vast impacts stemming from the revised definition of waters of the United States, it is clear the Agencies should have conducted an IRFA to truly assess the impact this rule will have on small business entities. A more thorough analysis of the proposal would have revealed the disproportionate burdens that this rule places on small entities, including small home builders, and would have triggered the requirement to convene a Small Business Advocacy Review (SBAR) panel.

The home building industry is largely dominated by small businesses, with our average builder member employing 11 employees. Because the nature of the home building industry involves substantial earth-moving activities and because EPA and the Corps have historically asserted such broad jurisdiction over "waters of the United States," NAHB members must often obtain CWA Section 402 permits and meet state Section 303(d) requirements to be allowed to discharge stormwater into a "water of the United States" and Section 404 dredge and fill permits for their home building projects. Under the expanded "waters of the United States" definition in the proposed rule, the number of permits home builders need to obtain will increase substantially, along with associated permit fees, costly project delays, and expensive mitigation and avoidance costs. Unfortunately, the compliance burdens these new requirements will impose will be significantly greater for small businesses. It was the recognition of these disproportional impacts that led Congress to enact the RFA in the first place, including the requirement to obtain input from small businesses prior to publishing a proposed rule.

Importantly, if an agency completes an IRFA, it must also convene a Small Business Advocacy Review (SBAR) panel, made up of representatives from EPA, Advocacy, Office of Management and Budget, and small entities. The purpose of the SBAR panel process is to collect information and feedback from the small entity representatives (SERs) on different regulatory approaches being considered by the agency so that the agency can find less onerous ways to regulate small entities while still achieving the goal of its regulation. A report of the panel's findings is issued. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required if the panel report warrants any change.¹³²

¹³¹ 5 U.S.C. § 603(a).

¹³² 5 U.S.C. 5 609(b) (I) through (6)

For a rule of this magnitude, the small business voice must be heard, yet the Agencies have failed to provide that platform. Indeed, after largely ignoring small entities throughout this rulemaking process, EPA invited selected small entity representatives to participate in a meeting, that was held just one week before the then-October 20th comment deadline, to "provide input" on the proposed rule. The meeting was held October 15, 2014, at EPA headquarters, but without Corps staff present. This was too little too late. As in the past,¹³³ invitations to this meeting were sent to a very limited list of small entity participants. What's more, the meeting was not open to the public. Ultimately, the meeting was a feeble attempt by the Agencies to give the appearance of engaging with small entities – it was no more than window dressing. In no way does it satisfy the Agencies' obligations under SBREFA to consider impacts of the proposed rule on small businesses or to obtain input on a number of options.

NAHB asks the Agencies, in light of their wrongful certification of the proposed rule under the RFA, to: 1) acknowledge the proposed rule will have significant adverse economic impacts on a substantial number of small entities; 2) withdraw the proposed rule; 3) conduct an initial regulatory flexibility analysis and associated Small Business Advocacy Review panel; and 4) consider a less burdensome alternative interpretation of the definition of "water of the United States" before proposing a new rule. (p. 157-159)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

RiverStone Group, Inc. (Doc. #10742)

11.1.184 EPA's economic analysis does not take into account the real costs of permitting and mitigation and must be redone. EPA and the Corps must also convene a Small Business Regulatory Flexibility Act panel as required by law to assess the impacts on small businesses that make up 70% of NSSGA's membership. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

Pennsylvania Coal Alliance (Doc. #13074)

11.1.185 **The Proposed Rule should undergo review under the Regulatory Flexibility Act.**

The PCA's members include many small businesses. Accordingly, the PCA is troubled that a regulatory flexibility analysis of the Proposed Rule was not conducted under the Regulatory Flexibility Act (RFA). Rather, the agencies certified that the Proposed Rule would not have a significant economic impact on a substantial number of small entities, including small businesses.¹³⁴ The PCA strongly disagrees with this conclusion and supports the comments submitted by the Office of Advocacy of the U.S. Small Business Administration on October 1, 2014. Among its other comments, the SBA stated that it believes the Proposed Rule has been improperly certified, stating that (1) the agencies

¹³³ As explained in EPA's "Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of 'Waters of the United States,'" EPA held one small entity outreach meeting to discuss the 201 1 Draft Guidance. The 201 1 meeting was open to only a limited number of participants and EPA has wholly ignored the feedback it received from small business entities during that meeting.

¹³⁴ 76 Fed Reg. 22220.

used an incorrect baseline for determining their obligations under the RFA, (2) the Proposed Rule would impose costs directly on small businesses, and (3) the Proposed Rule would have a significant impact on small businesses. The Proposed Rule would be expected to have significant effects on the PCA's small business members by increasing costs, delays and regulatory uncertainties, as described further in these comments. (p. 13-14)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

American Exploration & Mining Association (Doc. #13616)

11.1.186 The Agencies did not follow these requirements, however. There is no evidence that any screening analysis was conducted at all. Instead, the Agencies published an RFA certification that simply asserts, without supporting facts, that "[the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations...this action will not affect small entities to a greater degree than the existing regulation . . . [the proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden." The Agencies cite several cases, including *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Mid-Tex Elec. Co-op, Inc.* 11. *FERC*, 773 F.2d 327 (D.C. Cir. 1985), and *American Trucking Association v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). The Agencies cite these cases to support their argument that because the revised WOTUS definition does not directly regulate small entities, they may properly certify the rule.

As discussed herein and in the comments of WAC and the U.S. Chamber, the Agencies' certification statement is not factually accurate. The proposed WOTUS definition rule would in fact have a significant negative effect on a wide variety of small entities. Because the Agencies lack any factual basis to support their RFA certification, the certification is invalid and the rulemaking is procedurally defective. Even if the Agencies originally believed in good faith that the proposed rule would not have a significant economic impact on a substantial number of small entities, they subsequently received more than ample evidence that small entities believe the rule will harm them:

- Small business representatives from the ranching, homebuilding, and stone and gravel industries testified before the House Small Business Committee on May 29, 2014, and expressed their concerns about specific impacts of the rule.
- Small businesses and small governments testified in front of the House Transportation and Infrastructure Committee on June 11, 2014, and echoed these concerns.
- The Office of Advocacy held a Roundtable on July 21, 2014, at which the Agencies heard firsthand the concerns of small businesses and their frustration that EPA would not withdraw the rule and fully comply with the RFA.
- EPA conducted a small entity outreach meeting on October 15, 2014, which the Corps did not attend. EPA was unable to answer questions presented by small business representatives attending the meeting. EPA acknowledged that this meeting did not meet the requirements of an SBAR Panel.

In light of the available evidence that the proposed WOTUS rule will in fact impose significant impacts on small entities, AEMA believes the Agencies have incorrectly certified the proposed rule. In making this certification, the Agencies avoided their RFA responsibility to (1) investigate the impacts the revised definition would directly impose on small entities and (2) to consider less burdensome regulatory alternatives. More importantly, the Small Business Administration Office of Advocacy (Advocacy) believes the proposed rule has been certified in error. See Advocacy Comments dated October 1, 2014, hereby incorporated by reference. Congress has designated the Chief Counsel of Advocacy to monitor agency compliance with the RFA and will be given deference in the interpretation of the RFA, including when an SBAR panel is required.

As demonstrated in these comments, and the comments of the SBA Office of Advocacy, the Waters Advocacy Coalition, the U.S. Chamber of Commerce and the National Mining Association, the proposed rule will have an adverse economic impact of significantly more than \$100 million. And, that impact will be felt by a substantial number of small entities across multiple industries, including but not limited to mining, agriculture, home building, road building, electrical generation, oil & gas, ranching, commercial construction and golf course construction and operation. Thus, an initial regulatory flexibility analysis and an SBAR panel are required.

The RFA requires that each IRFA contain:

1. a description of the reasons why action by the agency is being considered;
2. a succinct statement of the objectives of, and legal basis for, the proposed action;
3. a description of and, where feasible, an estimate of the number of small entities to which the proposed action will apply;
4. a description of the projected reporting, record keeping and other compliance requirements of the proposed action, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.

Each IRFA also shall contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as:

1. the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
2. the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
3. the use of performance rather than design standards; and,
4. an exemption from coverage of the rule, or any part thereof, for such small entities.

With respect to EPA and OSHA, SBREFA also requires the convening of a Small Business Advocacy Review (SBAR) Panel, 5 U.S.C. §609(c), when the agencies are unable to certify that a rule will not have a significant economic impact on a substantial number of small entities.

The RFA further requires a final regulatory flexibility analysis (FRFA) when an agency promulgates a final rule. Each FRFA is required to contain:

1. A succinct statement of the need for, and objectives of, the rule;
2. A summary of the significant issues raised by the public comments and response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
3. A description of and an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available;
4. A description of the projected reporting, record keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and,
5. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

SBREFA also provides for judicial review of an agency's final decision under the RFA. In addition, the judicial review provisions of the RFA now include review by a court of the certification by the head of an agency that the final rule will not, if promulgated, have a significant impact on a substantial number of small entities. The SBREFA amendments provide that an agency's compliance with the RFA is judicially reviewable and that a court may remand a rule to the agency and defer enforcement. See, *Northwest Mining Association v Babbitt*, 5 F.Supp.2d 9 (DDC 1998).

It is clear that EPA has made no effort to comply with the requirements of the RFA as amended by SBREFA. AEMA submits that the RFA requires EPA to, at the very least, withdraw the proposed rule, prepare an IRFA and convene an SBAR panel before re-proposing a definition of waters of the U.S. rule together with the IRFA, and seek public comments as required by law. EPA also is required to transmit a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration.

It is legally indefensible for EPA to issue a proposed rule in this matter without complying with the requirements of the RFA. AEMA further submits that EPA's failure to convene an SBAR panel and prepare and publish an IRFA are fatal legal flaws in the rulemaking process and grounds upon which a court can and will invalidate a final rule.

In light of the proposed rule's numerous ambiguities, inconsistencies, and failure to comply with the requirements of the FWA, the *agencies must withdraw the proposed rule*, convene an SBAR panel, prepare and publish an IRFA, and engage in cooperative federalism discussions with the states as well as discussions stakeholders to develop a revised proposed rule that is more consistent with the available science and with the limits established by Congress and recognized by the Supreme Court. (p. 10-13)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

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

11.1.187 V. EPA AND THE CORPS VIOLATED THE REGULATORY FLEXIBILITY ACT BY FAILING TO DO A REGULATORY FLEXIBILITY ANALYSIS. THAT VIOLATION HARMS NSSGA MEMBER COMPANIES, MANY OF WHICH ARE SMALL FAMILY OWNED BUSINESSES.

NSSGA strongly disagrees with the agencies conclusion that the Regulatory Flexibility Act, 5 U.S.C. 601-12 does not apply because they concluded that the "scope of regulatory jurisdiction ... is narrower than under the existing regulations ... [so that] this action will not affect small entities to a greater degree than under the existing regulations." 79 Fed. Reg. at 22220. As discussed above, the proposal's "jurisdiction by rule " sweeping in any tributary that has an OHWM along with adjacent "waters and wetlands" based on vague criteria will clearly expand reach of CWA regulation by eliminating the need for detailed site specific evidence in favor of desktop studies aggregating vast areas of the landscape. Further, the agencies are being disingenuous in claiming that eliminating the Commerce Clause basis of jurisdiction under the current rule means that the proposed rule is "less inclusive." Rather, dropping the Commerce Clause basis of jurisdiction, will likely result in regulating many isolated and ephemeral waters that might otherwise be excluded. Further, as University of California at Berkeley Professor Sunding's recent critique of EPA's economic analysis demonstrates, the agencies have severely understated the jurisdictional increase and additional costs by inaccurately charactering all the impacts of the proposed rule as "indirect" and understating the proposal's impacts on other CWA requirements such as section 402 NPDES permitting for stormwater impacts.¹³⁵

Indeed, on October 1, 2014, the Small Business Administration's (SBA) Office of Advocacy released a strongly worded letter stating, "EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking [noting that the agencies]...certification of no small business impact is inappropriate in light of [information that] the rule will have a direct and potentially costly impact on small businesses."¹³⁶ The SBA's finding is

¹³⁵ Dr. David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States" for the Waters Advocacy Coalition (May 15, 2014)

¹³⁶ Letter from Winslow Sargeant, Chief Counsel for Advocacy, Small Business Administration Office of Advocacy to the Hon. Gina McCarthy EPA Administrator and Maj. Gen. John Peabody, Deputy Commanding General U.S. Army Corps of Engineers, available at <http://www.sba.gov/advocacy/1012014-definition-waters-united-statesunder-clean-water-act>

critical. Compliance with the RFA is not merely a procedural formality, it is an important tool for carefully analyzing the effects of a proposed rule on small business, which constitutes a major segment of our economy.¹³⁷

The agencies failure to comply with RFA especially impacts the aggregate industry. Seventy percent of NSSGA members are small businesses. These companies do not have the resources to comply with the increased permitting and mitigation costs triggered by the proposed rules' expansion of jurisdiction. The proposed rule may force small aggregate companies to delay or even drop plans to expand mining in areas where reserves are located. That could have a major ripple effect on the ability of these operators to meet the needs of their customers, potentially affecting many programs such as highways, home building, flood control, and environmental restoration. Many of these operators provide materials for rural areas, thus affecting other small businesses such as farmers and ranchers. These reasons underscore the critical need for the agencies to conduct the required regulatory flexibility analysis.

Furthermore, a SBRFA analysis would include an evaluation of the need for this rule and any alternatives. EPA has not stated a need for this sweeping expansion other than the general protection of the entire aquatic ecosystem "to clear up the confusion" from the Supreme Court's Rapanos and SWANCC decisions and to protect the aquatic system. In fact, this confusing rule does the exact opposite: it imposes a major burden on the aggregate industry, especially small producers, and categorically regulates so-called "waters." A SBRFA analysis is absolutely necessary to assess the impact of such broad regulation on small producers already facing many other federal mandates. (p. 47-49)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Lyman-Richey Corporation (Doc. #14420)

11.1.1885. The Agencies have violated laws and policies Congress enacted and the President implemented specifically to protect small business.

“The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today.”¹³⁸ Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard those affected from overzealous regulation. The RFA requires the Agencies to review the Proposed Rule to determine if it will have a “significant economic impact on a substantial number of small entities.” Unless the Agencies can certify the Proposed Rule will not, if promulgated, have such an impact, the Agencies must prepare an initial regulatory flexibility analysis (“IRFA”) and make it available for public review and comment. The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule’s impact on small entities would

¹³⁷ 5 U.S.C. 609(a) (Panel comprised of representatives of EPA and the SBA's Office of Chief Counsel for Advocacy as well as a representative from OMB).

¹³⁸ April 9, 2014 Letter from members of the Senate Committee on Environment and Public Works to the President (Exhibit E).

achieve the regulatory purpose. If the Agencies cannot certify that they must prepare a final regulatory flexibility analysis (“FRFA”). The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.

In part because so many proposed rules were subjected to meaningless “rubber stamp” certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”). The SBREFA amended section 611 of the RFA to allow small entities to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement. The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include representatives from the Small Business Administration’s Office of Advocacy, the Office of Management and Budget’s Office of Information and Regulatory Affairs, and the agency proposing the rule. Small entity representatives who will be affected by the rule advise the panel members on probable real-world impacts and potential regulatory alternatives. The panel would prepare a report containing recommended alternatives to the Agencies and the panel’s recommendations could be incorporated into the Proposed Rule.¹³⁹ (p. 8-9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Montana Mining Association (Doc. #14763)

11.1.189 The Agencies Have Failed to Comply with the Requirements of the Regulatory Flexibility Act (RFA)

Congress passed the Regulatory Flexibility Act (RFA) in 1980 to address the failure of federal government agencies to recognize differences in the scale and resources of regulated entities has adversely affected competition in the marketplace, discouraged innovation, restricted improvements and productivity, and discourage entrepreneurship. Congress also found that treating all entities equally led to inefficient use of regulatory agency resources, enforcement problems, and actions that were inconsistent with legislative intent. Congress decided that agencies should be required to solicit comments from small entities, examine the impact of the proposed and existing rules on small entities, examine regulatory alternatives that achieve the same purposes while minimizing small business impacts, and review the continued need for existing rules.

The RFA requires federal agencies to prepare and publish a regulatory flexibility analysis "whenever an agency is required by Section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, ..." The RFA also requires a final regulatory flexibility analysis when issuing a final rule for each rule that will have a significant economic impact on a substantial number of small entities. There is no

¹³⁹ The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13272. This Executive Order requires the Agencies to consider the Small Business Administration’s Office of Advocacy’s written comments on proposed rules and include a response to those comments in the final rule.

question the proposed rule meets this standard and EPA must prepare an initial regulatory flexibility analysis (IRFA), convene a small business advocacy review panel (SBAR) and include a final regulatory flexibility analysis (FRFA) in any final rule.

The RFA defines small entity to have the same meaning as small business, small organization and small governmental jurisdiction. Small governmental jurisdiction means governments of cities, counties, towns, townships, villages, school districts or special districts, with a population of less than 50,000. Small organization is defined to mean any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Small business is defined to have the same meaning as the term small business concern under Section 3 of the Small Business Act. The RFA provides that an agency, after consultation with the Office of Advocacy of the Small Business Administration and after the opportunity for public comment may establish a different definition for each of those terms which are appropriate to the activities of the agency and publishes such definitions in the Federal Register.

The original RFA exempted an agency from these requirements if the agency certified that the rule will t, if promulgated, have a significant economic impact on a substantial number of small entities. Note at this is the exception, not the rule. However, Congress found that many agencies simply ignored the FA by relying on the certification of "no significant economic impact" in order to avoid a full regulatory flexibility analysis. Since agency compliance with the RFA was not judicially reviewable, agencies could not be held accountable for their non- compliance with the statute. Thus, recognizing widespread agency indifference, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act (SBREFA).

SBREFA requires agencies to provide a statement of the factual basis for a certification of "no significant economic impact." It is clear that Congress intended that the factual basis requirement would provide a record upon which a court may review the agencies actions. Thus, an analysis is required in order to provide a factual basis. Before formally proposing a new rule, an agency must identify small entities that are likely to be impacted by the rule and estimate the magnitude of the impact. If this screening analysis indicates limited impacts to small entities, the RFA allows the agency to certify that there will not be "a significant economic impact on a substantial number of small entities." Significantly, if an agency lacks the factual data to support a certification, it may not certify the rule and must perform a detailed small entity impact analysis.

The Agencies did not follow these requirements, however. There is no evidence that any screening analysis was conducted at all. Instead, the Agencies published an RFA certification that simply asserts, without supporting facts, that "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. . . .this action will not affect small entities to a greater degree than the existing regulation. . . . [t]he proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden." The Agencies cite several cases, including *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 198S), and *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). The Agencies cite these cases to support their argument that because the revised WOTUS definition does not directly regulate small entities, they may properly certify the rule.

As discussed herein and in the comments of WAC and the U.S. Chamber, the Agencies' certification statement is not factually accurate. The proposed WOTUS definition rule would in fact have a significant negative effect on a wide variety of small entities. Because the Agencies lack any factual basis to support their RFA certification, the certification is invalid and the rulemaking is procedurally defective. Even if the Agencies originally believed in good faith that the proposed rule would not have a significant economic impact on a substantial number of small entities, they subsequently received more than ample evidence that small entities believe the rule will harm them:

Small business representatives from the ranching, homebuilding, and stone and gravel industries testified before the House Small Business Committee on May 29, 2014, and expressed their concerns about specific impacts of the rule.

Small businesses and small governments testified in front of the House Transportation and Infrastructure Committee on June 11, 2014, and echoed these concerns.

The Office of Advocacy held a Roundtable on July 21, 2014, at which the Agencies heard firsthand the concerns of small businesses and their frustration that EPA would not withdraw the rule and fully comply with the RFA.

EPA conducted a small entity outreach meeting on October 15, 2014, which the Corps did not attend. EPA was unable to answer questions presented by small business representatives attending the meeting. EPA acknowledged that this meeting did not meet the requirements of an SBAR Panel. In light of the available evidence that the proposed WOTUS rule will in fact impose significant impacts on small entities, AEMA believes the Agencies have incorrectly certified the proposed rule. In making this certification, the Agencies avoided their RFA responsibility to (1) investigate the impacts the revised definition would directly impose on small entities and (2) to consider less burdensome regulatory alternatives

More importantly, the Small Business Administration Office of Advocacy (Advocacy) believes the proposed rule has been certified in error. See Advocacy Comments dated October 1, 2014, hereby incorporated by reference. Congress has designated the Chief Counsel of Advocacy to monitor agency compliance with the RFA and will be given deference in the interpretation of the RFA, including when an SBAR panel is required.

As demonstrated in these comments, and the comments of the SBA Office of Advocacy, the Waters Advocacy Coalition, the U.S. Chamber of Commerce and the National Mining Association, the proposed rule will have an adverse economic impact of significantly more than \$100 million. And, that impact will be felt by a substantial number of small entities across multiple industries, including but not limited to lining, agriculture, home building, road building, electrical generation, oil & gas, ranching, commercial construction and golf course construction and operation. Thus, an initial regulatory flexibility analysis and an SBAR panel are required.

The RFA requires that each IRFA contain:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed action;
- A description of and, where feasible, an estimate of the number of small entities to which the proposed action will apply;

- A description of the projected reporting, record keeping and other compliance requirements of the proposed action, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.

Each RFA also shall contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
- The use of performance rather than design standards; and,
- An exemption from coverage of the rule, or any part thereof, for such small entities.

With respect to EPA and OSHA, SBREFA also requires the convening of a Small Business Advocacy Review, (BAR) Panel, 5 U.S.C. 6 609(c), when the agencies are unable to certify that a rule will not have a significant economic impact on a substantial number of small entities.

The RFA further requires a final regulatory flexibility analysis (FRFA) when an agency promulgates a final rule. Each RFA is required to contain:

- A succinct statement of the need for, and objectives of, the rule;
- A summary of the significant issues raised by the public comments and response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; A description of and an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available;
- A description of the projected reporting, record keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and,
- A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

SBREFA also provides for judicial review of an agency's final decision under the RFA. In addition, the judicial review provisions of the RFA now include review by a court of the certification by the head of an agency that the final rule will not, if promulgated, have

a significant impact on a substantial number of small entities. The SBREFA amendments provide that an agency's compliance with the RFA is judicially reviewable and that a court may remand a rule to the agency and defer enforcement. See, *Northwest Mining Association v Babbitt*, 5 F.Supp.2d 9 (DDC 1998).

It is clear that EPA has made no effort to comply with the requirements of the RFA as amended by SBREFA. AEMA submits that the RFA requires EPA to, at the very least, withdraw the proposed rule, prepare an IRFA and convene an SBAR panel before re-proposing a definition of waters of the U.S. rule together with the IRFA, and seek public comments as required by law. EPA also is required to transmit a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration.

It is legally indefensible for EPA to issue a proposed rule in this matter without complying with the requirements of the RFA. AEMA further submits that EPA's failure to convene an SBAR panel and prepare and publish an IRFA are fatal legal flaws in the rulemaking process and grounds upon which a court can and will invalidate a final rule. (p. 9-12)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Waterton Global Mining Company (Doc. #14784)

11.1.190 In addition, in light of the significant economic impact the proposed rule will have on a substantial number of small entities, it appears the Agencies have violated the requirements under the Regulatory Flexibility Act¹⁴⁰ ("RFA") by having failed to (1) prepare and publish an initial regulatory flexibility analysis ("IRFA") for the proposed rule; (ii) convene a small business advocacy review panel ("SBAR"); or (iii) include a final regulatory flexibility analysis in any final rule. The Agencies instead have published an RFA certification that the scope of the regulatory jurisdiction in the proposed rule is "narrower than under the existing regulations" and, therefore, will not affect small entities to a greater degree than the existing regulation and is not designed to "subject" any entities to any specific regulatory burden. Significant factual data contradicts this conclusion,¹⁴¹ rendering this certification factually baseless and invalid. Consequently, a detailed small entity impact analysis should have been performed.

Comments of others suggest the proposed rule will have an adverse economic impact in excess of \$100 million. EPA itself has developed maps that indicate vastly expanded CWA jurisdiction under the proposed rule suggesting more than 8.1 million miles of rivers and streams across the 50 states could be included within the revised WOTUS definition (up from an estimated 3.5 million miles of rivers and streams under the existing rule as of 2009). These maps are based on the proposal to define "ephemeral" streams which only flow after rains (and sometimes only once every few years) as waters of the U.S. (most of which already are currently regulated

¹⁴⁰ 5 U.S.C. 601-612.

¹⁴¹ See e.g., Comments of American Exploration and Mining Association (submitted Nov. 10, 2014) at 11 (citing numerous examples of evidence available demonstrating the harm small entities believe the rule will cause them).

in the majority of states as "waters of the State.") Such an impact, without the required analysis under the RFA renders the rulemaking procedurally defective. The EPA should withdraw the proposed rule, prepare an IFRA and convene an SBAR panel before re-proposing a definition of waters of the U.S. rule together with the IFRA to seek public comment.

Given the legal and procedural defects in the currently proposed rule, Waterton and its portfolio companies join in the suggestion of many other commenters who request the Agencies withdraw the proposed rule, conduct the necessary steps required under the RFA and engage in a cooperative discussion with the states (which already have a significant regulatory system in place over the additional "waters" covered by the proposed rule) to develop a proposed rule consistent with available science and the jurisdictional limits established by Congress as interpreted and enforced by the Supreme Court. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Cooperative Network (Doc. #15184)

11.1.191 Finally, we are very concerned the federal agencies did not consider and evaluate the impacts of the proposed rule on small businesses. The magnitude of costs to comply with the agencies' proposal is considerable and merits convening a small business advocacy review panel to complete a thorough Regulatory Flexibility Act analysis prior to further rulemaking activity. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Twin State Sand & Gravel Co., Inc. (Doc. #15203)

11.1.192 Our operations are already regulated by numerous State and Local rules and regulations that deal with the protection of water resources. The proposed rule will significantly expand the EPA's jurisdiction, resulting in another layer of bureaucracy, increased costs, and more time for an already burdensome permitting process. Large corporations can easily absorb these costs, we cannot. To make it clear how costly the current permitting process already is, we give you the following example: Our company is currently trying to obtain the necessary permits to build a maintenance shop within the boundaries of our quarry. It has taken over two years and has cost us \$400,000 thus far. How is any small business supposed to afford these kinds of costs and time delays? Furthermore, the EPA's economic analysis does not take into account the real costs of permitting and mitigation and must be redone. The EPA should convene a Small Business Regulatory Flexibility Act panel, as required by law, to assess the real impacts on small businesses. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.4 (Other CWA Programs), and 14.1 (Site-specific).

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

11.1.193 C. The Agencies Failed to Account for the Impacts of the Proposed Rule on Small Businesses

Many members of IOGA-WV are smaller, independent oil and gas operators. As noted above, the implications of the Proposed Rule are widespread, and will affect a number of regulatory programs that govern a broad range of industrial sectors. Nevertheless, the Agencies certified under the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., that "this proposed rule will not have a significant economic impact on a substantial number of small entities," including small businesses, small organizations, and small governmental jurisdictions. 79 Fed. Reg. at 22220. In support of this certification, the Agencies' stated that "The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining 'waters of the United States'). Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required." Id. Once again, the Agencies characterize this rulemaking as a mere "clarification" of the existing statutory scope of the CWA—indeed, they go even further by claiming, without any supporting evidence, that the Proposed Rule narrows the scope of regulatory jurisdiction—in an attempt to minimize the substantial practical impacts of their proposal. Id.

For all of the reasons discussed above, the Agencies' conclusion is simply inaccurate. The Proposed Rule is anticipated to have a significant adverse impact on small businesses—rather than "clarify," the proposal is expected to generate additional regulatory confusion and uncertainty through its many unwieldy definitions, while driving up project/operational costs and causing permitting delays by expanding, rather than narrowing, the scope of various CWA regulatory programs. The Agencies' failures under the Regulatory Flexibility Act have been recognized in comments submitted on the Proposed Rule by the United States Small Business Administration, which has urged the Agencies to withdraw the proposal. At a minimum, however, a Regulatory Impact Analysis should be completed that accurately takes into consideration the implications of the Agencies' proposal on small businesses. (p. 8-9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. One of the primary goals of the agencies' current rulemaking effort is to provide additional clarity regarding the jurisdictional scope of the Clean Water Act. In this way, the agencies seek to minimize potential confusion regarding Clean Water Act jurisdiction. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Utah Mining Association (Doc. #16349)

11.1.194 The Agencies Have Failed to Comply with the Requirements of the Regulatory Flexibility Act (RFA)

The comments of the Small Business Administration’s Office of Advocacy, the Waters Advocacy Coalition, the U.S. Chamber of Commerce, the National Mining Association, and the American Exploration & Mining Association clearly demonstrate the proposed rule will have an adverse economic impact of significantly more than \$100 million. Importantly, that impact will be felt by a substantial number of small entities across multiple industries, including but not limited to mining, agriculture, home building, road building, electrical generation, oil & gas, ranching, commercial construction and golf course construction and operation. Thus, under the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act, an initial regulatory flexibility analysis (IRFA) and a Small Business Advocacy Review (SBAR) panel are required. EPA’s failure to convene an SBAR panel and prepare and publish an IRFA are fatal legal flaws in the rulemaking process and grounds upon which a court can and will invalidate a final rule. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Members of Ohio Agri-Women (Doc. #10437)

11.1.195 Regrettably, we feel your agency did not meet your obligation under the Regulatory Flexibility Act to conduct a Small Business Advocacy Review panel when a rule will have a significant economic impact on a substantial number on small entities. There will certainly be costs directly imposed on small businesses through the permit process and other compliance requirements. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Colorado Agricultural Aviation Association (Doc. #15033)

11.1.196 The agencies have not satisfied Regulatory Flexibility Act (RFA) requirements to formally engage with small businesses, such as our nation's aerial applicators, or adequately consider their costs: In developing such a rule as this, the agencies are required by law to follow well-defined procedures to evaluate the consequences of the proposal on those who will be subject to the rule. A critically important procedural requirement involves the analysis of economic impacts on small business entities. Under the Regulatory Flexibility Act (RFA), agencies must assess the impacts of a proposed rule on small businesses like CoAAA and NAAA members. No small governmental jurisdictions and small non-profit organizations (small entities). In this evaluation if the agency determines that the proposed rule will have a "significant economic impact on a substantial number of small entities," it must prepare an "initial regulatory flexibility analysis" (IRFA). The IRFA must describe the small entities that will be affected: the impact of the proposed rule on them: the compliance burdens imposed: and consider any significant alternatives that could minimize any significant economic impacts. The RFA also requires agencies to conduct outreach to small

entities when a rule will have a "significant economic impact on a substantial number of small entities," If the agency has performed an analysis and developed enough information to support a determination of no- or low-impact for small entities, the agency can certify that there would not be a "significant economic impact on a substantial number of small entities,"

The agencies circumvented publishing an IFRA for the proposed WOTUS rule by simply certifying that "this proposed rule will not have a significant impact on a substantial number of small entities" because, in their opinion, "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations." 79 Fed. Reg. 22,220. We disagree with this statement and argue the agency's certification is invalid and based on false assumptions – that the jurisdictional scope of the proposed rule is smaller than existing regulations, all the impacts of the proposed rule will be "indirect" and such impacts on small businesses such as CoAAA and NAAA members will be insignificant. No factual basis was provided for the certification as required by the RFA despite the likely consequences for small entities nationwide. The Small Business Regulatory Enforcement Fairness Act (SBREFA) together with the RFA requires a review panel to be convened for all proposed rules for which an IRFA is required, and panel outreach must take place before the publication of the proposed rule. We strongly believe a SBREFA panel was necessary and that the agencies took extraordinary measures to avoid holding one. Had there been a SBREFA panel, the agency would have solicited in-depth information and advice from representatives of small entities that are affected by the proposal, and issued a final panel report that would be included in the rulemaking docket. Instead, the agencies held on a morning in 2011 a briefing to discuss the 2011 Draft Guidance, open to only a limited number of participants. This meeting should in no way be seen as a substitute for a SBREFA panel on the proposed rule, for the topic of the meeting was not a two-way discussion of the impacts of the proposed rule but an agency-presented Power-Point slide presentation on previous draft guidance. NAAA and the few other organizations present have been concerned that EPA has since ignored the feedback from those who were able to participate. Accordingly, the agencies have not given the small business community or local governments a real meaningful opportunity to discuss the burdens of the proposed rule as the RFA requires. For these reasons we conclude the agencies' certification is invalid and the agencies have failed to meet federal requirements for assessing impacts on small businesses. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Jefferson Mining District (Doc. #15706)

11.1.197 Likewise dubious and fraudulent, as stated prior but needing restatement, is the certification of no economic impact on small entities nation-wide for purposes of RFA or that in , light of the reach of the rule to control every conceivable drop of water "connected" "upstream"; that "fewer waters will be subject to the CWA under the proposed rule"; facially preposterous by the terms of the proposal itself.

From Rapanos, 2006, this regulatory monopoly is found to be a billion dollar industry for the federal and federal-state agencies and stakeholder parasites, just for wetland permits, Agency of which is seeking more market share, "upstream":

"The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation, or design changes. Sunding & Zilbaman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*; 42 *Natural Resources J.* 59, 74-76 (2002): "[O]ver \$1.7 billion is spent each year by the private and public doctors obtaining wetlands permits." *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep, civil fines, "on a broad range of ordinary industrial and commercial activities." *Hanousek v. United States*, 528 U. S. 1102; 4103 (2000) (Thomas, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. See *United States v. Rapanos*, 235 F3d 256, 260 (CA6 2000)." (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

Bayer CropScience (Doc. #16354)

11.1.198 The proposed rule expands the scope of the CWA: Senior officials of the agencies have repeatedly emphasized on agency websites, under oath before Congress, and in meetings across the country that the scope of CWA jurisdiction covered by the proposed rule is narrower than existing regulations, the economic impacts of the rule would be minor and indirect, and the proposal would not expand the scope of the CWA to any new types of waters not already regulated. It was on this basis that the agencies justified their certification that small business impacts of the proposed rule would be minor and that neither the Regulatory Flexibility Act (RFA) nor the Small Business Regulatory Enforcement Fairness Act (SBREFA) would apply. We strongly disagree with the agencies' certification and are convinced the proposed rule will have many adverse effects on our small-business customers (farmers, orchardists, landscape managers, aerial applicators, range managers, parks and recreation pest managers, forest and woodlot managers, mosquito control companies, and many others). (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Associated Equipment Distributors (Doc. #13665)

11.1.199 Finally, the NPRM dismisses outright the need for flexibility analysis under the Regulatory Flexibility Act.¹⁴² The RFA mandates that agencies assess the economic impact that proposed regulations will have on entities such as small businesses. In this rule, the EPA declares without substantiation that fewer waters will fall under the

¹⁴² *Id.* at 22220.

control of the agency and that “this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.”¹⁴³ This assessment is wholly inaccurate. The expanded definition of waters under the regulatory authority of the EPA directly increases the types and quantities of land under the purview of the EPA. Further, AED’s membership relies on the ability of land owners to put their property to productive economic use, which could be significantly impeded by EPA’s new authority. Mere cursory analysis by the EPA would have demonstrated such economic consequences in ours and other industries. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Albuquerque Metropolitan Arroyo Flood Control Authority (Doc. #15221)

11.1.200 **5. More Waters Will Be Jurisdictional Under the Proposed Rule**

Under Section IV.C, the proposed rule concludes that no regulatory flexibility analysis is required because the proposed rule will result in fewer waters being subject to the CWA than under existing regulations. As indicated above, however, more waters will be jurisdictional under the proposed rule, including all tributaries regardless of flow contributions. As a result, AMAFCA believes that a regulatory flexibility analysis should still be required. (p. 7)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

U.S. Chamber of Commerce (Doc. #14115)

11.1.201 ***Regulatory Flexibility Act***

Despite clear indications that their revised definition will impose widespread impacts on small entities, the Agencies certified under the Regulatory Flexibility Act (RFA)¹⁴³ that the rule would not result in a significant economic impact on a substantial number of small entities. In making this certification, the Agencies avoided their RFA responsibility to (1) investigate the impacts the revised definition would directly impose on small entities and (2) to consider less burdensome regulatory alternatives.

The RFA covers three distinct types of small entities: small businesses, small not-for-profit organizations, and small governmental jurisdictions.¹⁴⁴ Before formally proposing a new rule, an agency must identify small entities that are likely to be impacted by the rule and estimate the magnitude of the impact. If this screening analysis indicates limited impacts to small entities, the RFA allows the agency to certify that there will not be “a significant economic impact on a substantial number of small entities.”¹⁴⁵ Significantly, if

¹⁴³ 5 U.S.C. §§ 601-612.

¹⁴⁴ 5 U.S.C. §§ 601(3)-(5).

¹⁴⁵ 5 U.S.C. § 605(b).

an agency lacks the factual data to support a certification, it may not certify the rule and must perform a detailed small entity impact analysis.¹⁴⁶

The Agencies did not follow these requirements, however. There is no evidence that any screening analysis was conducted at all. Instead, the Agencies published an RFA certification that simply asserts, without supporting facts, that “[t]he scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. . . this action will not affect small entities to a greater degree than the existing regulation. . . [t]he proposed rule contemplated here is not designed to “subject” any entities of any size to any specific regulatory burden.”¹⁴⁷ The Agencies cite several cases, including *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), and *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). The Agencies cite these cases to support their argument that because the revised WOTUS definition does not directly regulate small entities, they may properly certify the rule.

As discussed in detail above, however, the Agencies’ certification statement is not factually accurate. The proposed WOTUS definition rule would in fact have a significant negative effect on a wide variety of small entities. Because the Agencies lack any factual basis to support their RFA certification, the certification is invalid and the rulemaking is procedurally defective.¹⁴⁸

Recently, the U.S. Small Business Administration’s Office of Advocacy agreed with this conclusion, publicly advising the Agencies that they improperly certified the WOTUS proposal under the RFA.¹⁴⁹ Even if the Agencies originally believed in good faith that the proposed rule would not have a significant economic impact on a substantial number of small entities, they subsequently received more than ample evidence that small entities believe the rule will harm them:¹⁵⁰

- Small business representatives from the ranching, homebuilding, and stone and gravel industries testified before the House Small Business Committee on May 29, 2014, and expressed their concerns about specific impacts of the rule.
- Small businesses and small governments testified in front of the House Transportation and Infrastructure Committee on June 11, 2014, and echoed these concerns.

¹⁴⁶ 5 U.S.C. § 603. Moreover, the EPA is specifically required by the RFA to take the additional step of conducting a Small Business Advocacy Review (SBAR) Panel, in order to more formally consider the views of affected small entities and evaluate alternative regulatory approaches that could lessen the rule’s impact while still achieving the goal of the agency. 5 U.S.C. § 609(b).

¹⁴⁷ 79 Fed. Reg. 22,220 (April 21, 2014).

¹⁴⁸ *Southern Offshore Fishing Ass’n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) (“Congress has not intended for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision.”).

¹⁴⁹ Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of “Waters of the United States” Under the Clean Water Act (October 1, 2014) at 4.

¹⁵⁰ Courts have held that an agency must account for the public comments it receives that challenge the agency’s initial determination that no significant economic impact on small entities is likely. See *Northwest Mining Ass’n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998).

- The Office of Advocacy held a Roundtable on July 21, 2014, at which the Agencies heard firsthand the concerns of small businesses and their frustration that EPA would not withdraw the rule and fully comply with the RFA.
- EPA conducted a small entity outreach meeting on October 15, 2014, which the Corps did not attend. EPA was unable to answer questions presented by small business representatives attending the meeting.

In light of the available evidence that the proposed WOTUS rule will in fact impose significant impacts on small entities, the Agencies need to withdraw the rule and start over. The Agencies' public outreach efforts are not legally or functionally equivalent to the steps required of the Agencies under the RFA. To make matters worse, concerns about the proposal expressed in good faith by small entities have either been ignored by the Agencies or dismissed as "silly" and "ludicrous."¹⁵¹

The Agencies have ample time to start again and write a rule that is clear, transparent, and narrowly tailored to accomplish its objective without causing collateral damage to small entities. Because the Agencies' certification is not valid, the Agencies remain obligated to comply with the RFA before the proposed WOTUS rule can be finalized. (p. 37-39)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Southern Illinois Power Cooperative (Doc. #14402)

11.1.202(...) The Agencies must fully comply with the RFA and take into account the impacts and concerns of small businesses. They should withdraw the proposal, convene an SBAR panel and complete a thorough RFA analysis prior to release of any new proposal. (p. 11)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Georgia Chamber of Commerce (Doc. #14430)

11.1.203 EPA's Management of the Process

The Chamber's concern with EPA's rulemaking processes is shared by a recently released report from The Office of Advocacy of the U.S. Small Business Administration (See Attachment 3.) that criticizes EPA's assessment and analysis of the impact of this draft Rule on small businesses and advised that:

"Advocacy believes that the agencies have improperly certified this rule. Advocacy, and the small businesses we have spoken to, believe that:

- The agencies used an incorrect baseline for determining their obligations under the RFA;
- The rule imposes costs directly on small businesses; and

¹⁵¹ See Comments of Gina McCarthy, EPA Administrator, reported in The Hill online (July 8, 2014), available at: www.thehill.com/policy/energy-environment/211548-epa-promoting-water-rule-to-farmers-in-mo.

- The rule will have a significant economic impact on small businesses.

The Office of Advocacy of the U.S. Small Business Administration concluded that:

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.

Small businesses make an enormous contribution to the economic and social vibrancy of the nation. They are critical to Georgia’s development through their business tenacity, innovation, employment base and support for their local community’s well-being. The Chamber believes that it is unconscionable for any government agency, state or federal, to propose rulemaking that is so poorly defined that it will: build anxiety and uncertainty; add to operating costs; reduce profits; do nothing for investment and employment growth; and, in all likelihood, deliver at best marginal environmental benefits.

The Chamber supports the position expressed by The Office of Advocacy of the U.S. Small Business Administration and commends it for vigorously pursuing the interests of the nation’s small business sector. (p. 9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Hoosier Energy REC, Inc. (Doc. #14561)

11.1.204 As a small business, we concur with the finding of the Small Business Administration's Office of Advocacy that the rule has been improperly certified as not posing a significant economic impact on a substantial number of small entities. The agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. Furthermore, EPA erred in not conducting a small business advocacy review (SBAR) panel in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The proposed rule should be withdrawn until these requirements are met. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

American Public Power Association (Doc. #15008)

11.1.205B. Agencies Fail to Comply with the Regulatory Flexibility Act (RFA).

Since the proposed WOTUS rule would certainly have a significant economic impact on a substantial number of APPA’s small member utilities, the agencies were required pursuant to the RFA, 5 U.S.C. § 601 et seq., to convene a Small Business Advocacy Review Panel (SBAR) or Small Entity Review panel to thoroughly evaluate the impact of the proposed rule on public power utilities that qualify as small entities. APPA wants to stress that the EPA meeting entitled “Small Entities Meeting on the Waters of exempted from these requirements if it “certifies that the rule will not, if promulgated, have a

significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b); RFA § 605(b).

The agencies proposed the rule to “clarify” which waters are federally regulated and which waters remain under the jurisdiction of their respective states. The agencies assert, “Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations.” Fed. Reg. at 22,220. APPA believes the agencies have dramatically underestimated the impact of the proposed rule on small business entities. Because of the concerns outlined above, APPA believes that the agencies’ proposal dramatically expands their jurisdiction beyond historical interpretations and negatively impacts all CWA programs crucial to small entities.

Therefore, the agencies have bypassed the safeguards of the RFA by certifying the proposed rule. Under the RFA, Congress clearly intends for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses. APPA believes that the agencies should have conducted an initial regulatory review through a Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) panel. More than ninety percent of public power utilities meet the SBREFA definition of a small business. APPA asserts that a more thorough, small business-focused analysis of the proposed requirements would have revealed the disproportionate burdens that the rule would place on small businesses.

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) raised similar concerns in a letter to the agencies. Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the Small Business Administration. Advocacy argues in their letter¹⁵²:

“Concerns raised by small businesses as well as the agencies’ own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition. The EPA and the Corps have obligations under OMB guidance, and the RFA to measure and communicate this increase. Their certification of no small business impact is inappropriate in light of this information. Because of this probable small business impact, the RFA requires the agencies to complete an IRFA and a SBAR panel.

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact.

Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.” (p. 13-14)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

¹⁵² http://www.sba.gov/sites/default/files/Final_WOTUS%20Comment%20Letter.pdf

Association of Illinois Electric Cooperatives (Doc. #16168)

11.1.206 **VI. Concerns with the Proposed Rule Relating to Small Business**

The AIEC believes the proposed rule would impose significant costs and have a significant adverse economic impact on its member cooperatives, all of which are considered small businesses. The AIEC concurs with the findings of the Small Business Administration Office of Advocacy (SBA Advocacy) that EPA and the Army Corps of Engineers improperly certified the rule as not posing a significant economic impact on a substantial number of small entities.

The AIEC agrees with SBA Advocacy that the agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. Furthermore, EPA erred in not conducting a small business advocacy review (SBAR) panel in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA). (p. 7)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

National Agricultural Aviation Association (Doc. #19497)

11.1.207 The agencies have not satisfied Regulatory Flexibility Act (RFA) requirements to formally engage with small businesses, such as our nation’s aerial applicators, or adequately consider their costs: In developing such a rule as this, the agencies are required by law to follow well-defined procedures to evaluate the consequences of the proposal on those who will be subject to the rule. A critically important procedural requirement involves the analysis of economic impacts on small business entities. Under the Regulatory Flexibility Act (RFA), agencies must assess the impacts of a proposed rule on small businesses like NAAA members, small governmental jurisdictions and small non-profit organizations (small entities). In this evaluation it the agency determines that the proposed rule will have a “significant economic impact on a substantial number of small entities,” it must prepare an “initial regulatory flexibility analysis” (IRFA). The IRFA must describe the small entities that will be affected; the impact of the proposed rule on them; the compliance burdens imposed; and consider any significant alternatives that could minimize any significant economic impacts. The RFA also requires agencies to conduct outreach to small entities when a rule will have a “significant economic impact on a substantial number of small entities.” If the agency has performed an analysis and developed enough information to support a determination of no- or low-impact for small entities, the agency can certify that there would not be a “significant economic impact on a substantial number of small entities.”

The agencies circumvented publishing an IFRA for the proposed WOTUS rule by simply certifying that “this proposed rule will not have a significant impact on a substantial number of small entities” because, in their opinion, “[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations.” 79 Fed. Reg.

22,220. We disagree with this statement and argue the agency’s certification is invalid and based on false assumptions – that the jurisdictional scope of the proposed rule is smaller than existing regulations, all the impacts of the proposed rule will be “indirect,” and such impacts on small businesses such as NAAA members will be insignificant. No factual basis was provided for the certification as required by the RFA despite the likely consequences for small entities nationwide. The Small Business Regulatory Enforcement Fairness Act (SBREFA) together with the RFA requires a review panel to be convened for all proposed rules for which an IRFA is required, and panel outreach must take place before the publication of the proposed rule. We strongly believe a SBREFA panel was necessary and that the agencies took extraordinary measures to avoid holding one. Had there been a SBREFA panel, the agency would have solicited in-depth information and advice from representatives of small entities that are affected by the proposal, and issued a final panel report that would be included in the rulemaking docket. Instead, the agencies held on a morning in 2011 a briefing to discuss the 2011 Draft Guidance, open to only a limited number of participants. This meeting should in no way be seen as a substitute for a SBREFA panel on the proposed rule, for the topic of the meeting was not a two-way discussion of the impacts of the proposed rule but an agency-presented Power-Point slide presentation on previous draft guidance. NAAA and the few other organizations present have been concerned that EPA has since ignored the feedback from those who were able to participate. Accordingly, the agencies have not given the small business community or local governments a real, meaningful opportunity to discuss the burdens of the proposed rule as the RFA requires. For these reasons, we conclude the agencies’ certification is invalid and the agencies have failed to meet federal requirements for assessing impacts on small businesses. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

National Federation of Independent Business (Doc. #1653)

11.1.208 In addition, the NFIB Legal Center has filed a Freedom of Information Act (FOIA) request to the Agencies for critical information we need in order to adequately comment on the Agencies’ certification that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA). In order to sufficiently raise concerns with what the small business community believes is an improper RFA certification, the NFIB Legal Center needs to access and review the requested documents. (p. 1-2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

National Federation of Independent Business (Doc. #8319)

11.1.209 The Proposed Regulation purports to expand federal jurisdiction under the Clean Water Act (CWA). This should raise serious concerns for three reasons: (1) the Proposed Regulation will require the Agencies to assert CWA jurisdiction over many thousands of properties, which will therein impose heavy economic costs on property owners seeking to develop their properties, or will entirely discourage economic development; (2) the Proposed Regulation-in expanding CWA jurisdiction-will place a

cloud upon the title of countless other properties, therein chilling economic development and greatly devaluing property values; and (3) federal implementation of the Proposed Regulation will result in tremendous new liabilities for the federal government and the national budget.

These comments explicitly address the Agencies' expansion of federal jurisdiction. NFIB has concurrently filed separate comments explaining how the agencies failed to meet the requirements of the Regulatory Flexibility Act. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.210 As we explain in further detail; the economic impact from the Proposed Regulation's jurisdictional expansion will be severe. A landowner of modest means--especially small business owners and ordinary individuals--will be hardest hit because they lack the financial resources to challenge jurisdictional assessments and or to seek necessary permits. And it is important to remember that the assertion of jurisdiction is a virtual death-knell for an individual or small business owner wishing to make reasonable use of the property in question because the required permits are prohibitively expensive. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

11.1.211 The Proposed Regulation Will Impose Heavy Economic Costs on Development for Newly Regulated Properties All Across the Country.

As explained more fully in the previous section, the Proposed Regulation should be rejected because it improperly requires assertions of jurisdiction in contravention of Supreme Court precedent. But, our concern is over the real-world impacts that the Proposed Regulation will have on countless landowners across the country. Because the Proposed Regulation so greatly expands CWA jurisdiction, it will have severe practical and financial implications for many affected landowners.

If a portion of a property is deemed jurisdictional wetland, the owner cannot make use of segment of his or her property. Indeed, the owner will face devastating fines of up to \$37,500 per day if he or she begins to develop. As a result, most landowners--especially individuals of modest means and average small businesses will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive and economically beneficial use of the property.

In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. As of 2002, the average permit cost over \$270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses and individuals of modest means are without recourse. Usually their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses and individuals suffer greatly because they have usually tied up much of their assets into their real estate investments and they can neither afford necessary permits or legal representation to challenge improper jurisdictional assertions. (p. 7)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

11.1.212 The Proposed Regulation Will Chill Development and Devalue Countless Other Properties.

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the Proposed Regulation is finalized. Landowners are already aware that the Agencies have taken an aggressive posture in making jurisdictional assertions in recent years; however, the regulated community is greatly concerned that the Proposed Regulation – if approved-signals a dramatic shift toward an even more aggressive jurisdictional reach. As a result, landowners are understandably concerned about the potential for the Agencies to use the Proposed Regulation to justify jurisdictional assertions.

The NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the Proposed Regulation is finalized in its current form. Indeed, if any amount of water rests or flows over a property - at any point during the year – the owner may have cause for concern that the Agencies might assert CWA jurisdiction.

Unfortunately the Proposed Regulations will do little to make CWA jurisdiction clearer for these property owners. It is true that the Proposed Regulation offers a veneer of simplicity in asserting categorical jurisdiction over many waters. But many landowners will question whether the agency is overreaching in applying these *per se* rules. And of course, the Proposed Regulation does nothing to clear up confusion with regard to "other waters," which will still be assessed on a case-by-case basis. Further, the Proposed Regulation is still extremely complicated-so much so that landowners will still have to retain experts in many cases in order to determine whether a property may be developed.

Importantly, properties swept into the CWA's jurisdictional net will depreciate greatly in value under the Proposed Regulation. Even in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might potentially be viewed as jurisdictional. And that is a risk that most reasonable individuals would be unwilling to take. Indeed, they face fines of up to \$37,500 per day if they are mistaken. And for this reason any property that might be viewed as containing a jurisdictional wetland is greatly devalued. (p. 8)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. The agencies do not collect information on property values as a part of making jurisdictional determinations. These determinations are made consistent with science and the law.

11.1.213 Implementation of the Proposed Regulation Will Result in New Federal Liabilities.

Finally, we must stress the importance of avoiding unnecessary liabilities. The federal government cannot afford to exacerbate its budgetary problems by adopting the Proposed Regulation because it will result in incalculable litigation costs and inverse condemnation liabilities. Not only will the Proposed Regulation result in lost economic opportunities – for reasons explained in the previous section - but it will result in a tremendous amount of litigation.

Since the Proposed Regulation requires the Agencies to make expansive assertions of jurisdiction, litigants will predictably challenge their jurisdictional assessments. Moreover, these expansive jurisdictional assessments will take away the right of many landowners to make any beneficial use of their property. And the federal government will therein incur takings liability under the Fifth Amendment for these properties. (p. 9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

National Federation of Independent Business (Doc. #8319.1)

11.1.214 The Small Business Regulatory Enforcement Fairness Act (SBREFA) was passed by Congress in 1996 to give the RFA more effect. Most importantly for the present case, the EPA is required to convene Small Business Advocacy Review (SBAR) panels of small entity representatives when 'an IRFA is necessary.

Unfortunately, the Agencies have certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. This decision prevented the Agencies from getting quality input on the proposed rule from small businesses before it was published. Given the controversial nature of the rule, NFIB believes the Agencies would have benefitted from the IRFA and SBAR process.

The agencies did a minimal amount of outreach to small businesses before publishing the proposed rule, but this outreach in no way meets the requirements of the RFA. Further, the Agencies' dismissive response to small business concerns is troubling. If anything, the Agencies should have taken small business concerns more seriously after noting that: "[t]he national industry associations in attendance feel strongly that the EPA should complete a regulatory flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel..." But instead the Agencies swept those concerns aside and concluded that the proposed rule will not impose substantial adverse economic impacts.

NFIB believes that this certification is improper. The following section will examine the Agencies' reasons for the certification and will demonstrate that they lack a factual basis.

Accordingly, NFIB believes the Agencies should (1) acknowledge that the proposed rule will have a significant adverse impact on a substantial number of small businesses; (2) withdraw the proposed rule; and (3) wait to propose a new rule until the Agencies have considered less burdensome alternative interpretations of the pertinent CWA jurisdictional provisions. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.215 The Agencies' Certification Lacks a 'Factual Basis'

NFIB believes that the Agencies' certification lacks a factual basis as required by the RFA. The Agencies have pinned their justification for the certification on three arguments: (1) the proposed rule is merely a definitional change having no direct impact on any entity; (2) the proposed rule adds clarity for small businesses and other entities that will make determinations easier-therein reducing burdens on the regulated community; and (3) the proposed rule narrows CWA jurisdiction-therein reducing burdens on small entities.

However, these cited justifications are plainly strained efforts to avoid a full RFA analysis; they represent either a poorly conceived effort to contort reality or a severe disconnection with the real world implications of the propose rule. The proposed rule will dramatically expand CWA jurisdiction beyond the limits recognized in *Rapanos v. United States* and this will necessarily have a significant adverse economic impact on a substantial number of small entities.

(1) A Definitional Change Can Have Severe Adverse Impacts on Small Businesses
The Agencies' first argument is that the proposed rule only changes the definition of "waters of the United States" and therefore has no direct impact. However, this argument ignores the clearly foreseeable direct impacts of the change. The definitional change has serious real world implications for landowners-including many small businesses and other small entities-owning properties that may now be considered jurisdictional wetlands under the CWA.

As an example, a small business may not currently need a section 404 dredge or fill permit to begin construction on a portion its property, or to make other uses of its land. But, with the new rule interpreting "waters of the United States" more broadly, the Agencies may very well assert, jurisdiction over this property *for the first time*. As such, the business would therein be immediately subject to CWA's burdensome permitting process if it should wish to make economically beneficial use of this portion of land. As discussed in more detail below, this immediately devalues the affected property and stands to impose major costs on owners seeking **5** make use of the affected portions of their property.

(2) The Agencies are Imposing Significant Adverse Economic Impacts on Small Business by Clarifying that they are Interpreting the CWA's Jurisdictional Provisions Broadly

The Agencies' second argument is that the proposed rule would bring clarity to jurisdictional questions. It may well be that the new rule brings some degree of clarity *to*

the Agencies, but the agencies cannot assert that it is giving a benefit to the regulated community by resolving a murky question of statutory construction *categorically against private property owners*. Moreover, the proposed rule is still terribly complicated-meaning that ordinary landowners, including small business landowners, will have to hire costly environmental experts, or legal counsel to determine if it is safe to use questionable portions of their property.

Indeed, several small business owners, with whom we have talked, have indicated they have no a how the proposed rule would impact them. They have expressed concerns that it vaguely worded and difficult to understand. To be sure, the 88-page proposed rule fails to offer much clarity to ordinary landowners struggling to figure out whether they have been swept-up in the new CWA regime.

Of course, given the severe financial penalties that apply when a landowner makes a mistake, many will still feel compelled to seek formal jurisdictional assessments from the Agencies before making constructive uses of their lands. As a practical matter, the proposed rule still requires a case-by-case determination that can only be done by the Agencies in many cases. As such, NFIB submits that the proposed rule does little to bring clarity here; if anything it gives small business new reasons to question whether their properties may be swept into the CWA jurisdictional regime for the first time. And to the extent the newly proposed rule "clarifies" that a property is jurisdictional, the rule necessarily *burdens* the landowner.

(3) The Proposed Rule Expands Jurisdiction-It Does Not Narrow Anything

The Agencies argue that, compared to the 1986 rule, the proposed rule actually decreases the Agencies' jurisdiction. But it is simply inappropriate to rely on the 1986 rule as a baseline because the U.S. Supreme Court has twice held that the 1986 rule interpreted waters of the United States more broadly than Congress could have intended, or than the Constitution would allow. In the most recent case, *Rapanos v. United States*, the Supreme Court set forth two tests for determining whether a property contains jurisdictional wetlands. In doing so, the Supreme Court set the law on how "waters of the United States" should be defined in 2006. Thus, the *Rapanos* tests represent the baseline against which the Agencies must judge the effect of the newly proposed rule.

Rapanos set the outer-limits of what the Agencies can reach under the CWA's jurisdictional provisions. Accordingly, the Agencies can only seriously maintain that the newly proposed rule "narrows jurisdiction" if it may be said that the Agencies are actually disavowing jurisdictional assertions from those outer-limits. But the Agencies have insisted that the new rule is consistent with the *Rapanos* tests. Of course, NFIB disagrees emphatically. In any event, it is inappropriate for the Agencies to certify that the proposed rule narrows CWA jurisdiction by reference to the 1986 rule because that rule was rendered invalid in the *Rapanos* decision. Thus the ultimate question is whether the newly proposed rule is consistent with or inconsistent with the *Rapanos* tests. NFIB maintains that the new rule extends the CWA's jurisdictional reach beyond what the

Rapanos tests allows. If that's the case the Agencies are expanding – not narrowing – CWA jurisdiction.

In light of the Agencies erroneous certification, the EPA and Army Corps should withdraw the proposed rule, perform an IRFA and convene an SBAR panel before publishing a new proposed rule. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Common Sense Nebraska (Doc. #14607)

11.1.216IV. EPA's issuance of the proposed rule has failed to properly comply with the Regulatory Flexibility Act (RFA).

The RFA requires federal agencies when publishing proposed rules to analyze the regulatory impact of the proposed rule on small entities, consider alternatives that minimize economic impact to small entities and make this analysis available to the public. 5 U.S.C. § 603. However, this analysis does not have to be completed if an agency certifies that the proposed rule will not have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). This certification must be published for the public and include a factual basis for this certification. Id.

a. EPA did not perform a thorough analysis and develop enough information for a determination of no or low impact on small entities under the RFA. Without sufficient data to support this certification it is invalid and EPA has failed to properly comply with the RFA impact analysis requirements.

The proposed rule states it is “not designed to “subject” any new entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the “waters of the United States” and that the “scope of regulatory jurisdiction in this proposed rules is narrower than under existing regulations.” (Proposed rule at 22220). As such, the EPA administrator goes on to certify a no impact to small entities under the RFA. Id.

This blanket statement is hardly a presentation of a factual basis for such a determination. Furthermore, EPA's own economic analysis of the proposed rule contradicts this statement, stating the revised definition would increase overall CWA jurisdiction by 3%. EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at 12.

As discussed previously since publication of the proposed rule it has been discovered EPA failed to disclose important technical data, USGS maps, utilized in development of the proposed rule. These maps very clearly indicate the proposed rule will NOT be “narrower” than existing regulation and greatly expands federal jurisdiction under the CWA. See <http://science.house.gov/epa-maps-state-2013>.

The examples we have provided with these comments should also call in to doubt the certification by EPA that the proposed rule will not have a significant adverse impact on small business entities. As a result, EPA's certification is invalid and the agency must comply with 5 U.S.C. § 603 and provide a full initial economic analysis under the RFA.

EPA should withdraw the proposed rule until it has conducted this statutorily required analysis. (p. 13)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Mountain States Legal Foundation (Doc. #16918)

11.1.217III. THE PROPOSED RULE FAILS TO APPROPRIATELY ACCOUNT FOR ITS IMPACT ON SMALL ENTITIES, AS REQUIRED UNDER THE REGULATORY FLEXIBILITY ACT.

The Regulatory Flexibility Act ("RFA), Pub. L. 96-354, 94 Stat. 1164 (1980), seeks "to improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities, and for other purposes." Id. at 1164. To accomplish this task, the RFA requires agencies, publishing a notice of proposed rulemaking, to "prepare and make available for public comment an initial regulatory flexibility analysis[.]" 5 U.S.C. § 603(a), unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Id. 5 605(b). An initial regulatory flexibility analysis "describe[s] the impact of the proposed rule on small entities."¹⁵³ 5 U.S.C. § 603(a). If the agency certifies that the proposed rule will not have a significant economic impact, then the certification must provide a factual basis and be published in the Federal Register. Id. § 605(b); see generally, *Nw. Min. Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 14-15 (D.D.C. 1998).

The agencies certified that the Proposed Rule will not have a significant economic impact on a substantial number of small entities. 79 Fed. Reg. at 22,220; see 5 U.S.C. 5 605(b). The agencies base their certification on their opinion that "fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under existing regulations[.]" which means "this action will not affect small entities to a greater degree than the existing regulations."¹⁵⁴ 79 Fed. Reg. at 22,220.

The agencies' certification is flawed. First, it is unclear how the agencies determined the Proposed Rule does not exert any greater jurisdiction over waters, than the existing regulation. For instance, the agencies posit that the Proposed Rule subjects fewer waters to CWA jurisdiction, id., but this statement is contradictory. In the agencies' economic analysis, the agencies found that "the proposed rule increases overall jurisdiction under the CWA by 2.7 percent . . . or roughly 3 percent, over current field practices." Economic Analysis at 2, 12; id. at 18 (anticipating increased permitting under Proposed Rule); id. (expecting an increase in waters the agencies consider jurisdictional). This is problematic because the basis of the certification is that the Proposed Rule does not have a significant

¹⁵³ The RFA's definition of "small entity" is the same as the definition of "small business concern" under the Small Business Act, which generally includes but is not limited to [Enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation: Provided, That notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.

¹⁵⁴ U.S.C.A. 3 632(a)(1).

economic impact on small entities. Yet, there would be a 3 percent increase in jurisdiction under the Proposed Rule and this comparison only involved CWA 404 permitting from 2009 to 2010. *Id.* At the very least, the agencies' certification should provide a better factual basis that incorporates this comparison and sets forth why it is not significant.

Second, the agencies' economic analysis demonstrates that the Proposed Rule would have a significant economic impact on a substantial number of small entities. Economic Analysis at 14 (recognizing that impact avoidance and minimization costs can be significant for some permit applicants); *id.* at 17 (estimating additional compensatory mitigation is likely); *id.* at 19 (increase in permitting could lead to more consultations under the Endangered Species Act and the National Historic Preservation Act). There is simply no doubt that the Proposed Rule's increased jurisdiction will have a significant economic impact on small entities. Again, the agencies' certification does not directly address the expected increase in jurisdiction under the CWA, its associated costs, and why it is not significant.

In conclusion, the disparity between the economic analysis and the agencies' certification is deeply concerning. It is evident from the economic analysis that the Proposed Rule will have a significant economic impact on small entities, like farming and ranching operations. The agencies should withdraw the Proposed Rule and provide a better certification, or complete an initial regulatory flexibility analysis. (p. 13-15)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Florida Stormwater Association (Doc. #14613)

11.1.218(...) The Economic Analysis of the Proposed Regulations be dismissed as it is based on fatally flawed assumptions, a new economic analysis be conducted and that a Small Entity Advisory Committee be created pursuant to the requirements of the Regulatory Reform Act based on the provision of the re-proposed rules; (...) (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Congress of the United States, Committee on Small Business (Doc. #1370)

11.1.219The members of the Committee on Small Business are writing to express our concern that the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the "agencies") have not fulfilled their obligations under the Regulatory Flexibility Act, 5 U.S.C. §§ 601 -1 2 (RFA), to conduct outreach to and assess the impacts of the proposed rule revising the definition of "waters of the United States" under the Clean Water Act (CWA)' on small businesses. We have conducted a preliminary review of the proposed rule and we are writing to bring our initial concerns to your attention.

We are concerned that the proposed rule could have a significant economic impact on small businesses yet the agencies have not assessed those consequences as required by the RFA. We believe the agencies should withdraw the proposed rule and conduct the required small business outreach and analysis before proceeding with the rulemaking. In the alternative, we request the public comment deadline for the proposed rule be extended by 90 additional days to ensure that small businesses have adequate time to review and provide input on this proposal.

Small businesses such as farmers and ranchers, home builders and transportation construction firms that conduct activities and projects on lands with "waters of the United States" will be directly affected. For example, permits may be required for activities such as removing debris and vegetation from a ditch, applying pesticides, building a fence, or discharging pollutants. Permitting can be a costly and time-consuming process that requires small businesses to hire attorneys and environmental consultants. In addition, the future development potential of certain land may be affected which could diminish its value. Small businesses also could be subjected to litigation under the CWA's citizen suit provisions.

By expanding the definition of "waters of the United States" to incorporate many more small bodies of water that are found on land across the United States, from farm fields and ranches to suburban neighborhoods and city centers, the agencies' proposal could have significant consequences for small businesses. The proposed definition includes a number of imprecise and broadly-defined terms such as "adjacent," "riparian area" and "floodplain" that do not clearly delineate which waters are covered. For the first time, "tributary" is defined and includes bodies of water such as manmade and natural ditches. "Other waters" also may be subject to the jurisdiction of the CWA on a case-by-case basis if there is a "significant nexus" to a traditional navigable water. The expanded jurisdiction and the imprecision of the terms used by the agencies may result in significant added legal and regulatory costs for small businesses - impacts that the agencies should have assessed under the RFA.

The agencies certified that the proposed rule would not have a significant economic impact on a substantial number of small entities, including small businesses. In doing so, the agencies failed to provide any factual basis for the certification¹⁵⁵ as required by the RFA despite the evident consequences for hundreds of thousands of small businesses. To the extent that the agencies attempted to assess the economic impact on small businesses, it did so in a manner that limited the potential costs on small businesses which is in contrast to the economic analysis performed for the regulatory impact analysis required by Executive Order 12,866. It appears to us that the agencies adopted this approach (without adequate explanation) in an effort to avoid the requirements imposed on EPA by § 609(b) of the RFA to conduct a small business advocacy review panel that would require EPA to obtain the input of small businesses before proposing a rule of such significance.

The agencies are required to comply with the RFA and EPA has additional obligations under the statute. Considering small businesses are likely to make up the greatest percentage of additional entities subject to regulation under an imprecise and expanded

¹⁵⁵ 79 Fed. Reg. at 22,220.

definition of the waters of the United States, it is absolutely critical that the agencies comply with the letter and spirit of the RFA (as directed by the President in a letter to agencies on January 18, 2011). Therefore, the agencies should withdraw the proposed rule and repropose it after undertaking an appropriate analysis of the impacts on small entities and conducting the outreach mandated by § 609(b) of the RFA. If the agencies fail to do that, then they should extend the comment period another 90 days to ensure that small entities, including small businesses, have adequate time to provide their input into the regulatory process - input that otherwise would have been made had the agencies adequately complied with the RFA in the first instance. (p. 1-2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

United States Senate, Committee on Small Business & Entrepreneurship (Doc. #4906)

11.1.220 We are writing regarding the U.S. Environmental Protection Agency's (EPA) proposed rule amending 33 CFR Part 328; Definition of "Waters of the United States" Under the Clean Water Act (EPA-HQ-OW-2011-0800; FRL-9901-47-OW), published on April 21, 2014. We respectfully request that the EPA extend the current comment period for the proposed rule to 180 days and convene a Small Business Advocacy Review (SBAR) panel to collect and consider input, before finalizing the proposed rule.

The Clean Water Act (CWA) is the primary federal law that protects the health of our nation's waters, including lakes, rivers, and coastal areas. Ensuring that water quality standards are not undermined or weakened is critical, not only to the American people, but to industries that depend on clean water in order to operate effectively. It is critical that agencies are able to issue rules and regulations under a federal statute in a timely and efficient manner. However, equally critical is the need to ensure that, in issuing regulations, agencies meet statutory requirements to evaluate the economic impact of proposed regulations on small businesses. Rules and regulations that bypass this evaluation could be subject to judicial review, which could delay their implementation. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Committee on Small Business, U.S. House of Representatives (Doc. #14751)

11.1.221 In response to the publication of the Proposed Rule, the Committee on Small Business (Committee) has held two hearings to examine concerns with the EPA and Corps' analysis of small business impacts of the Proposed Rule. On May 29, 2014, three small business representatives testified before the Committee and discussed their concerns

with the Proposed Rule.¹⁵⁶ On July 30, 2014, then EPA Deputy Administrator Bob Perciasepe testified before the Committee on the EPA's compliance with the RFA.¹⁵⁷

Based on the testimony from the hearings and the Committee staffs analysis, the Committee disagrees with the agencies' certification of the Proposed Rule. Contrary to the agencies' assertions, the Proposed Rule will increase the geographic scope of CWA jurisdiction and small entities will be directly affected. The EPA should have conducted a Small Business Advocacy Review (SBAR) panel to get input from small entities and performed an initial regulatory flexibility analysis (IRFA) assessing the impacts of the Proposed Rule on small entities as required by the RFA. Unfortunately, the agencies did not do so and instead engaged in arbitrary and capricious rulemaking.

Not surprisingly, the flawed rulemaking process has produced a flawed Proposed Rule. Instead of achieving the stated objective of providing "increased clarity regarding the CWA regulatory definition of 'waters of the United States' and associated definitions and concepts," the Proposed Rule only will increase confusion if finalized as drafted. The proposed regulatory demarcation includes a number of imprecise and vaguely defined terms that do not clearly delineate which waters are subject to the CWA's permitting and other requirements. Had the agencies complied with the RFA, they would have uncovered the flaws in the definition, developed alternatives that would have achieved the agencies' objectives, and ensured greater compliance by the regulated community. Instead, the Proposed Rule, if finalized in its current form, will lead to litigation over the definition as well as the procedures used to craft the rule. To avoid these consequences, the most sensible action would be for the agencies to withdraw the Proposed Rule and only repropose it after fully complying with the requirements of the RFA. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA.

11.1.222 V. The Agencies Failed to Comply with the RFA

The RFA, by focusing an agency's attention on the vast majority of entities subject to a rule, is designed to help the agency craft a better rule. By incorrectly certifying the Proposed Rule, the agencies prevented themselves from obtaining input needed to craft a more rational rule better suited to achieving cleaner water - their ultimate objective under responsibilities delegated to them by Congress.

A. The RFA 's Requirements

The RFA requires agencies to assess the impacts of rules on small entities. Before an agency issues a proposed rule, it must conduct a threshold analysis of the economic impact of the proposed rule. The EPA refers to this threshold analysis as "screening analysis" in its own RFA compliance guide.¹⁵⁸ The threshold analysis informs an agency whether or not it has enough information to be able to certify that a rule does not require it to prepare an IRFA.

¹⁵⁶ Fill EPA's "Waters of the United States" Rule Drown Small Businesses?: Hearing Before the H. Comm. on Small Business, 113th Cong. (2014) [hereinafter "WOTUS Hearing"].

¹⁵⁷ Regulatory Overreach: Is EPA Meeting Its Small Business Obligations?: Hearing Before the H. Comm. on Small Business, 113th Cong. (2014).

¹⁵⁸ EPA, FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT 9-30 (2006) [hereinafter "EPA RFA Guidance"], available at <http://www.epa.gov/sbrefa/documents/Guidance-RegFlexAct.pdf>

If the agency determines that the proposed rule will have a "significant economic impact on a substantial number of small entities," it must prepare an IRFA.¹⁵⁹ An IRFA must describe the small entities that will be affected, the impact of the proposed rule on small entities, the compliance burdens imposed and any significant alternatives that could minimize any significant economic impacts." If the agency determines the proposed rule will not have a "significant economic impact on a substantial number of small entities," the agency head may certify to such a conclusion and need not prepare an IRFA.¹⁶⁰ The certification statement must include a "factual basis for the certification."¹⁶¹

The RFA also requires agencies to conduct outreach to small entities when a rule will have a "significant economic impact on a substantial number of small entities." EPA has an additional outreach requirement for any proposed rule that requires preparation of an IRFA. Pursuant to 8 609(b) of the RFA, covered agencies, including EPA,¹⁶² must convene a SBAR panel¹⁶³ before the rule is proposed to receive input from small entities.¹⁶⁴ (p. 9-10)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

11.1.223B. The Agencies Incorrectly Certified the Proposed Rule

Pursuant to § 605 of the RFA, the EPA and Corps certified that the Proposed Rule would have a "significant economic impact on a substantial number of small entities."¹⁶⁵

However, the certification is incorrect and suffers from several fatal flaws, including: lack of a factual basis as required by § 605; reliance on judicial interpretations of the RFA for the agencies' conclusory certification that are inapt for the Proposed Rule; and an irrelevant conclusion, at least with respect to RFA applicability, that the Proposed Rule is size neutral and the factors cannot be scaled to a specific entity. (p. 11)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.2241. The Agencies Failed to Provide a Factual Basis for the Certification

To certify that a proposed rule will not have a significant economic impact on a substantial number of small entities, there must be an adequate factual basis for such a conclusion. In *North Carolina Fisheries Association, Inc, v. Daley* ("North Carolina Fisheries"), the court found that the National Marine Fisheries Service's statement that the

¹⁵⁹ Id. at 5 603(a)-(c).

¹⁶⁰ Id. at 5 605(b).

¹⁶¹ Id.

¹⁶² Id. at 8 609(d).

¹⁶³ The panel is comprised of a representative of the EPA, a representative of the Small Business Administration's Office of the Chief Counsel for Advocacy and a representative from the Office of Management and Budget's Office of Information and Regulatory Affairs. Id. at 5 609(b).

¹⁶⁴ Id. The panel provides small entity representatives (SERs) with a draft of the proposed rule as well as any analysis of small entity impacts and regulatory alternatives, and collects advice and recommendations from the SERs. The panel then must report on the SERs' comments and its findings. The report is made part of the rulemaking record. Id.

¹⁶⁵ 79 Fed. Reg. at 22,220.

rule in question was no different than the previous year's rule did not provide a factual basis to support the certification as required by the RFA.¹⁶⁶

In the Proposed Rule, the agencies' statements in the certification similarly fail to meet the statutory requirement. The agencies merely state that the Proposed Rule is narrower than existing regulation?¹⁶⁷ It is quite possible, that the original rule had a significant impact and the Proposed Rule while having lesser impact - still may be significant. Thus, the statement about the rule being narrower completely misses the point and fundamentally is irrelevant to the determination of whether to do an IRFA just as the assertion that a rule in 1997 was identical to a 1996 rule was irrelevant in the RFA calculus in North Carolina Fisheries.

The agencies, to bolster their certification, claim that the economic effects of the Proposed Rule are not significant in comparison to the 1986 codified rule. This rationale also is problematic because it uses a baseline that is not currently in effect since the scope of the 1986 rule has been modified by the 2003 and 2008 Guidance. The inappropriateness of using the 1986 rule is belied by the agencies failure to use that as a basis for preparing a Regulatory Impact Analysis (RIA) required by Executive Order 12,866.¹⁶⁸ In the RIA, the agencies state that using the agencies' field practice following the 2008 guidance as the baseline is "the most useful for purposes of comparing the potential outcome of the rule."¹⁶⁹ In other words, to measure costs and benefits of the rule the agencies do not use the regulatory language currently extant but rather the gloss placed on the regulation by the 2003 and 2008 Guidance. This appears to give a different estimate of costs than if the 1986 regulation was used.¹⁷⁰ Yet, in determining costs imposed by the new rule on small entities, the agencies used the existing regulation as the baseline without any explanation of why there should be a difference in the procedure used to estimate costs¹⁷¹ under the RIA and the RFA.

Presumably, the only reason the agencies adopted a different standard in their threshold RFA analysis (if it can be called that) is that the impacts of the Proposed Rule in comparison to that of the extant regulation are lower than that of the Proposed Rule compared to the 2008 Guidance. Without adequate explanation for why the agencies took this approach, the use of the existing rule to measure impacts on small entities does not

¹⁶⁶ 16 F. Supp. 2d 647,652 (E.D. Va. 1997). "A simple conclusory statement that, because the quota was the same in 1997 as it was in 1996, there would be no significant impact, is not an analysis." *Id.* at 653.

¹⁶⁷ 79 Fed. Reg. at 22,220. Of course, the Committee does not concur with the conclusion as these comments have already demonstrated.

¹⁶⁸ 58 Fed. Reg. 51,735 (Oct. 4, 1993). The Executive Order requires all executive branch agencies (which includes EPA and the Corps) to prepare a RIA for major rules. The RIA requires an assessment of costs and benefits of a rule which necessitates adopting a baseline for measuring the change. It is important to note that denomination as a major rule has no consequence on compliance with the RFA.

¹⁶⁹ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED STATES ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 2 n. 1 (2014) [herein after "Regulatory Impact Analysis" or "RIA"].

¹⁷⁰ Using field practices following issuance of the 2008 Guidance, the agencies found that CWA jurisdiction will increase by approximately three percent. *Id.* at 2.

¹⁷¹ Of course, the agencies may be under the misimpression that a cost is not a cost (with apologies to Gertrude Stein).

meet the factual basis for certification as elucidated by *North Carolina Fisheries*.¹⁷² Therefore, the certification is inadequate and, as will be shown later, constitutes arbitrary and capricious rulemaking. (p. 12-13)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

United States Senate (Doc. #19304)

11.1.225 Nearly every stakeholder I have heard from has expressed the need for greater clarity for the proposed rule's key definitions in order to provide certainty to producers, landowners, and developers. Further, I am particularly concerned about the agencies' claim that the proposed rule will not a significant impact on small businesses and he decision to skip some of the requirement of the Regulatory Flexibility Act and Small Business Regulatory Enforcement Act as was mentioned by the Small Business Administration's Office of Advocacy in its October 1, 2014, letter to the agencies. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.1. Legal Interpretation/Process

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

11.1.226 Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.227 The RFA directs Advocacy to monitor agency compliance with the RFA. To this end, Advocacy may file written comments reflecting mall business concerns about the impact of a rulemaking.¹⁷³ Because of small business concerns with the proposed rule, Advocacy held a roundtable on July 21, 2014 and has heard from numerous small entities in many industries. (p. 2)

¹⁷² Although not provable, it appears that the use of a different baseline for RFA compliance was undertaken to avoid

EPA's need to comply with the prepublication requirement to seek small entity input as required by 5 609(b) of the RFA. Use of such analysis to avoid a statutory requirement appears to be the epitome of arbitrary and capricious decisionmaking.

¹⁷³ The Small Business Jobs Act of 2010 (Pub. L. 111-240 § 1601) also requires agencies to give every appropriate consideration to Advocacy's written comments on a proposed rule. This response must be included in an explanation or discussion accompanying the final rule's publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.228 Advocacy believes that the agencies have improperly certified this rule. Advocacy, and the small businesses we have spoken to, believe that

- The agencies used an incorrect baseline for determining their obligations under the RFA;
- The rule imposes costs directly on small businesses; and
- The rule will have a significant economic impact on small businesses. (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.229 Advocacy believes that the agencies used the wrong baseline for their RFA certification. In certifying the rule, the agencies state that, "This proposed rule is narrower than that under the existing regulations fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations." On this basis the agencies conclude that, "This action will not affect small entities to a greater degree than the existing regulations."

The "existing regulations" that the agencies refer to in this reasoning is the 1986 rule defining the scope of waters of the United States. Compared to the 1986 definition, the proposed changes represent a narrowing of coverage. However, in the economic analysis accompanying the rule, the agencies assess the regulation vis-a-vis current practice and determine that the rule increases the CWA's jurisdiction by approximately 3 percent. The agencies' certification and economic analysis contradict each other.

Advocacy believes that the proper baseline from which to assess the rule's impact is current practice. Guidance from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis. It states that "The baseline should be the best assessment of the way the world would look absent the proposed action. The 1986 regulation has been abrogated by several Supreme Court cases and is no longer in use. The Corps and EPA also issued a guidance document in 2008 which sought to bring jurisdictional determinations in line with these Supreme Court cases. The 1986 regulation does not represent the current method for determining jurisdiction and has not served that purpose for more than thirteen years. Using an obsolete baseline improperly diminishes the effects of this rule. Advocacy agrees with the agencies' economic analysis that uses current practice as the appropriate baseline for evaluating the rule. (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.230 The second basis for the certification appears to be the agencies' position that the impact on small businesses will be indirect, hence not requiring an initial regulatory flexibility analysis or a SBAR panel. EPA cites *Mid-Ten Electric Cooperative, Inc., v. Federal Energy Regulatory Commission* and *American Trucking Associations, Inc., v. EPA* in support of their certification." Advocacy believes that the agencies' reliance on *Mid-Ten*

and *American Trucking* is misplaced because the proposed rule will have direct effects on small businesses.

In *Mid-Tex*, the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. Although the generating utilities were large businesses, their customers included small entities, to whom they may or may not have been able to pass on these costs through any rate changes.¹⁷⁴ The issue raised in this case was whether the agency had improperly certified the rule because it failed to consider the impact on the small business customers. The court concluded that an agency is required to file an IRFA only in cases where a regulation directly affects small businesses; if it does not, an agency may properly certify.

In *Mid-Ten*, the proposed regulation's applicability to small businesses is akin to the FERC regulation's applicability to the generating utilities themselves, not their customers, as EPA seems to believe. Generating utilities were an intervening actor between the regulatory agency and the small business customers; the utilities had a substantial amount of discretion as to whether they would pass on their construction costs to their small entity customers and, if so, how much of those costs they would pass on.

Such is not the case with this rule. First, there is no intervening regulated actor. In *Mid-Tex*, the generating utilities were the entities regulated and bound by FERC and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. Therefore they will be subject to the application of the proposed definition and the impacts arising from its application.

In *American Trucking*, the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. The basis of the EPA's certification was that the NAAQS regulated small entities indirectly through state implementation plans. The rules gave states broad discretion to determine how to achieve compliance with the NAAQS. The rules *required* EPA to approve any state plan that met the standards; it could not reject a plan based upon its view of the wisdom of a state's choices. Under these circumstances, the court concluded that EPA had properly certified because any impacts on small entities would flow from the individual states' actions and thus be indirect.

EPA's proposed rule is distinguishable from the regulations at issue in *American Trucking*. The states were intervening actors with broad discretion regarding how to implement the federal standards. The EPA rules only told the states what the goal was; the states were left to develop the plans that would implement those goals and thereby impose impacts on small businesses. In the current case, the agencies are not defining the goal nor are they authorizing any third party to determine the means and methods for reaching the goal. To the contrary, the agencies are defining the term governing the

¹⁷⁴ The generating utilities were not required to pass on the rate increases and in some cases were limited by state law in how much of the rate increase could be passed on to customers.

applicability of their own CWA programs. A change in the scope of the definition of "waters of the United States" necessarily leads to an increase in the scope and impact of the CWA since the programs there under only apply to waters that fall within this definition. The agencies, not a third party, determine whether a given body of water is within the jurisdiction of the requirements of the Clean Water Act and therefore subject to it. (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.231 Concerns raised by small businesses as well as the agencies' own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition. The EPA and the Corps have obligations under OMB guidance, and the RFA to measure and communicate this increase. Their certification of no small business impact is inappropriate in light of this information. Because of this probable small business impact, the RFA requires the agencies to complete an IRFA and a SBAR panel. (p. 9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.232 Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue. (p. 9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Construction Industry Roundtable (Doc. #8378)

11.1.233 ... (3) Rule-Making Without Fulfilling Statutory Obligations: It is widely known that Congressional members, with jurisdiction over these matters, have been extremely critical and/or cynical of the rule-making; especially given it has failed to conduct statutorily required assessments.

Simply stated, the agencies have failed to properly assess the economic impact on small businesses; neglecting to fulfill their obligations under the Regulatory Flexibility Act (RFA).¹⁷⁵ These statutes are in place to constrain unreasonable and overly broad expansion of regulatory authority by federal agencies – *FAILURE to comply with statutory requirements undercuts and invalidates the proposed rule-making.* (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

¹⁷⁵ See, House Small Business Committee, Chairman Sam Graves letter to EPA Administrator Gina McCarthy (May 2014)

Ernst Concrete Inc. (Doc. #12347)

11.1.234 Additionally, the agencies state that this rule would not have a significant economic impact on small entities. This is simply not the case. Failure to take into account impacts to small entities incredibly concerning and not calling a small business advocacy review panel, the agencies have missed valuable input from small entities, like ready mixed concrete producers; 85% of which are small entities. Ernst Concrete Inc. believes a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is needed to provide more complete, accurate, timely and relevant information on how small businesses will be affected by the proposal. The agencies must do this outreach before moving forward with this proposed rulemaking in order to better assess the impacts on and reduce the impacts to small entities. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Premium Agricultural Commodities, Inc. (Doc. #7086.1)

11.1.235 Regrettably, we feel your agency did not meet your obligation under the Regulatory Flexibility Act to conduct a Small Business Advocacy Review panel when a rule will have a significant economic impact on a substantial number of small entities. There will certainly be costs directly imposed on small businesses through the permit process and other compliance requirements.

Our members want to see Congress hold the EPA and the ACE to the original intent of the Clean Water Act and allow for a proper review panel to analyze the full impact of the rule. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Nebraska Cattlemen (Doc. #13018.1)

11.1.236 EPA's issuance of the proposed rule has failed to properly comply with the Regulatory Flexibility Act (RFA). The RFA requires federal agencies when publishing proposed rules to analyze the regulatory impact of the proposed rule on small entities, consider alternatives that minimize economic impact to small entities and make this analysis available to the public. However, this analysis does not have to be completed if an agency certifies that the proposed rule will not have a "significant economic impact on a substantial number of small entities." This certification must be published for the public and include a factual basis for this certification. Id.

a. EPA did not perform a thorough analysis and develop enough information for a determination of no or low impact on small entities under the RFA. Without sufficient data to support this certification it is invalid and EPA has failed to properly comply with the RFA impact analysis requirements.

The proposed rule states it is not designed to "subject" any new entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the United States" and that the "scope of regulatory jurisdiction in this

proposed rules is narrower than under existing regulations." As such, the EPA administrator goes on to certify a no impact to small entities under the RFA. Id.

This blanket statement is hardly a presentation of a factual basis for such a determination.

Furthermore, EPA's own economic analysis of the proposed rule contradicts this statement, stating the revised definition would increase overall CWA jurisdiction by 3%.

As discussed previously since publication of the proposed rule it has been discovered EPA failed to disclose important technical data, USGS maps, utilized in development of the proposed rule. These maps very clearly indicate the proposed rule will NOT be "narrower" than existing regulation and greatly expands federal jurisdiction under the CWA.

The examples Nebraska Cattlemen have provided with these comments should also call in to doubt the certification by EPA that the proposed rule will not have a significant adverse impact on small business entities. As a result, EPA's certification is invalid and the agency must comply with 5 U.S.C. 5 603 and provide a full initial economic analysis under the RFA. EPA should withdraw the proposed rule until it has conducted this statutorily required analysis. (p. 17)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.2. Costs/Benefits to Small Business

Small Business Association Office of Advocacy (Doc. #1766)

11.1.237 Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Advocacy has heard from several small businesses concerned with the potential effects of this rule. This is a significant proposal which will affect almost every U.S. industry and potentially every program under the Clean Water Act. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.238 Because of small business concerns with the proposed rule, Advocacy held a roundtable on July 21, 2014 and has heard from numerous small entities in many industries. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

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

11.1.239 The agencies estimate that CWA 404 permit costs would increase between \$19.8 million and \$52.0 million dollars annually, and they estimate that Section 404 mitigation costs would rise between \$59.7 million and \$113.5 million annually. These amounts do not reflect additional possible cost increases associated with other Clean Water Act programs, such as Section 402 permitting or Section 311 oil spill prevention plans. The agencies further state that the economic analysis done with respect to the 404 program increase is likely not representative of the changes that may occur with respect to 402 and 311 permitting, leaving small businesses without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs. (p. 8)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

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

11.1.240 (...) 15. If a small business has never obtained a permit under the CWA before, practically speaking how do they know if they need to get a permit?

- a. How long on average does it take the EPA/CORPS to determine if the small business needs a permit?
- b. If it is determined they do need a permit, how long would it take and what are the costs and expenses involved? Are there consultants or lawyers that are usually hired?

Agency Response: CWA section 404 and 402 permits applications are reviewed by authorized state programs or the Corps of Engineers in the great majority of circumstances. State and federal agencies work to be responsive to all permit applicants, including small business applicants. If a small business has a question regarding the need for a permit, they are encouraged to contact their state or Corps permit office. Most proposed pollutant discharges are approved under General permits that are designed to be authorized in a timely manner so that applicants are not delayed and to reduce any costs associated with the review process.

c. If a small business doesn't know that they do indeed need a permit, is there an exemption for honest mistakes?

Agency Response: The Clean Water Act is a strict liability statute and Congress did not provide within the Act an exception for honest mistakes. However, one of the primary goals of the agencies' current rulemaking effort is to provide additional clarity regarding the jurisdictional scope of the Clean Water Act. In this way, the agencies seek to minimize potential confusion regarding Clean Water Act jurisdiction. The agencies seek to proactively provide information and assistance to small businesses and other stakeholders to ensure they are aware of Clean Water Act requirements. To the extent an unauthorized discharge of pollutants does occur, the agency would consider the applicable circumstances of each case and would work with the small business to resolve the violation in an appropriate manner under one of the multiple options available.

d. Can competitors sue to challenge determinations or permits? (p. 8)

Agency Response: The Clean Water Act includes “citizen suit” provisions that allow third parties to challenge certain government actions subject to the limitations and requirements provided in Section 505 of the Act. Section 505 of the Act includes a requirement to give notice to the EPA, the state and the alleged violator. In addition, the jurisdictional requirements of federal courts, such as standing and ripeness, would apply to any citizen suit.

11.1.241 16. Many small businesses have stated that this would have a disproportionate impact on them, and have asked that a Small Business Regulatory Fairness Act (SBRFA) Panel be convened. Why have you not held a SBRFA panel? (p. 9)

Agency Response: The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As part of their “Waters of the U.S.” rulemaking, the EPA certified that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Under the RFA, the impacts of concern are significant, disproportionate adverse economic impacts on small entities subject to the rule, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives “which minimize any significant economic impact of the rule on small entities.” 5 U.S.C. 603. The scope of regulatory jurisdiction in this proposed rule is narrower than that under the agencies’ existing regulations. Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not adversely affect small entities to a greater degree than the existing regulations. The agencies’ proposed rule is not designed to “subject” any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the “waters of the United States,” consistent with Supreme Court precedent. This action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

At the same time, the agencies recognize the substantial interest in this issue by small governmental jurisdictions and other small-entity stakeholders. In light of this interest, the EPA and the Corps determined to seek early and wide input from representatives of small entities while formulating a proposed rule. This process has enabled the agencies to hear directly from these representatives, at an early stage, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The EPA has also prepared a report summarizing their small entity outreach to date, the results of this outreach, and how these results have informed the development of this proposed rule. This report is publicly available in the docket for this proposed rule. Finally, on October

15, 2014, the agencies hosted a second roundtable to facilitate input from small entities, which included participants from two small government jurisdictions. A summary of this roundtable is also available in the docket for the proposed rule.

11.1.24217. There are a number of manufacturers that have multiple facilities in different states and multiple EPA and CORPS regions. There are manufacturers that do not use storm water systems but instead use a system of ditches, impounds, and fields.

- a. How do you currently deal with this situation?
- b. Under this rule could these facilities potentially have to get NPDES permits? Is there the potential for any other types of permits? Provide a detailed legal rationale.
- c. Assuming that they do, how long it does take to obtain these permits and what are the associated costs and expenses?
- d. Where in the economic analysis did EPA study the cost of compliance if it turns out additional permits are needed?
- e. Since permits are only good for a maximum of 5 years, did the Agency consider complications that might arise when currently permitted sources are up for review again?
- f. Who bears the burden of these additional expenses? (...) (p. 9)

Agency Response: The EPA and the Corps work hard to be as consistent as possible among their regional and district offices in implementing the Clean Water Act. In some cases, a state program may have broader or more stringent requirements than required under the federal Clean Water Act, and the Clean Water Act specifically recognizes the states' prerogative to be more stringent. The final rules includes a number of exclusions from jurisdiction, including an exclusion for stormwater control features created in dry land. To the extent a particular activity may require a Clean Water Act permit, the NPDES permitting authority (typically an authorized state), or the Corps, as appropriate under section 404, could provide assistance.

As a general matter, industrial facilities must obtain coverage under an NPDES permit for stormwater discharges if they are discharged to a waters of the U.S. and the category of industrial facilities has been identified for regulation in the EPA's stormwater regulation (see 40 CFR 122.26(b)(14)) or if the stormwater discharge has been designated as needing a permit on a case-by-case basis by either an EPA Region or the State NPDES permitting authority. Section 402(p)(2) of the Clean Water Act requires NPDES permits for industrial stormwater discharges. The NPDES permit regulations at 40 CFR Parts 122, 123, and 124 detail who must obtain a permit, what requirements the permit must have, and the procedures for permit issuance. 40 CFR § 122.26 is the primary regulation governing stormwater discharges associated with industrial activity. Where the EPA issues NPDES permits, the agency provides coverage for most stormwater discharges associated with industrial activities through a multi-sector general permit. The Corps also has General permits for dredged or fill material discharges associated with certain stormwater related projects that may require CWA section 404 authorization. The agencies' regulations also include exemptions for certain stormwater related

activities, including the Section 404(f) exemptions, and the waste treatment system exclusion.

The EPA’s economic analysis for the proposed rule is based on evaluating a sample of existing Corps jurisdictional determinations that were coordinated with both EPA and the Corps under the 2008 Rapanos guidance to determine whether or not particular jurisdictional decisions would change as a result of the proposed rule. As part of their analysis, the EPA recognized that this database may not include some circumstances in which potential applicants previously considered particular waters non-jurisdictional and did not seek a jurisdictional determination. To help evaluate such circumstances, Exhibits 27 and 28 of EPAs’ draft economic analysis explore the extent to which changing the jurisdictional status of such waters would affect the results of the EPA’s analysis.¹⁷⁶

With respect to NPDES permitting and permit renewals, the EPA’s economic analysis includes an evaluation of how the proposed rule would affect the NPDES permitting program, and who would bear the burden of such costs.¹⁷⁷ As reflected in this analysis, the EPA does not believe that the *SWANCC* and *Rapanos* decisions have greatly affected traditional NPDES permits, such as those issued for municipal wastewater treatment plants or industrial facilities, and therefore anticipates few costs associated with such facilities in the future. The EPA’s economic analysis does consider permitting for construction and development stormwater, concentrated animal feeding operations (CAFOs), and pesticide application, as areas of NPDES permitting where there could be additional costs, and the economic analysis describes the likely costs that the EPA would anticipate. Such costs may include an increase in administrative costs to states (an indirect cost) and implementation costs to the applicant associated with permitting, as well as associated environmental benefits.

Colorado House of Representatives (Doc. #15031)

11.1.243 Perhaps most importantly, the proposed rule will help to protect Colorado's robust outdoor recreation economy and those communities that rely upon it. Rivers in Colorado support a multibillion dollar outdoor recreation economy that includes white-water rafting, boating, kayaking, fly fishing, birding, and hunting. In fact, this river-based recreation economy is the backbone of many of our rural and mountain communities. Rivers in Colorado generate over \$9 billion in economic activity every year, which includes supporting nearly 80,000 jobs. Additionally, according to the 2011 National Fishing, Hunting, and Wildlife-Associated Recreation Survey by the U.S. Fish and Wildlife Services, freshwater fishing expenditures totaled over \$648 million dollars in Colorado alone. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

¹⁷⁶ See http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

¹⁷⁷ See pages 26-29 of the agencies’ economic analysis.

National Association of State Departments of Agriculture (Doc. #15389)

11.1.244 The agencies did not adequately consider adverse impacts on rural communities and small agricultural producers. Notwithstanding impacts on state agriculture and water programs, the proposed rule will have dramatic impacts on farmers, ranchers, as well as the infrastructure, economies, and social networks of small rural communities where they live and work. The specter of new federal regulations for traditional stakeholder activities in and around previously-unregulated marginal conveyances, ditches or other land features on farms, ranches and rural communities speaks volumes about likely impacts on such small entities. Exposure to third-party citizen suits is another concern – whether it’s a farmer or the other business that service that farm. For example, aerial applicators are very small businesses that apply about 19 percent of all pesticides to farms (71 million acres annually). These pilots often work at night or early morning to treat farm fields where they likely could be unaware of the presence of any newly-defined WOTUS – especially if they were dry or covered by vegetation at the time. The complexity, expansiveness and vagueness of the proposed rule will cause confusion instead of clarity for producers and small businesses, and create delays that add costs as the proposed rule’s effects on Farm Bill conservation programs, fertilizer and pesticide use, permits for certain farming activities, and other factors are considered. Small businesses are the mainstay of agriculture and rural communities, and NASDA is convinced the agencies have not adequately considered small business impacts in the development of the proposal.

It appears the agencies avoided proper considerations of small business protections by simply certifying that “this proposed rule will not have a significant impact on a substantial number of small entities” because, in their opinion, “[t]he scope of regulatory jurisdiction in this proposed rule is narrower than under the existing regulations.”¹⁷⁸

There is no factual basis for this certification. It is based on several false assumptions: That the jurisdictional scope of the proposed rule is smaller than existing regulations, all the impacts of the proposed rule will be “indirect” and such impacts on farmers, ranchers and small agribusinesses will be insignificant. NASDA agrees with the recent comments of the Small Business Administration’s Office of Advocacy¹⁷⁹ that the agency’s certification is invalid, and argues that the agencies in proposing this rule have not met federal law relative to assessment and mitigation of small business impact. (p. 8-9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

State of Alaska (Doc. #19465)

11.1.245 Without adequate basis, EPA and the Corps have certified under the Regulatory Flexibility Act (RFA)¹⁸⁰ that the proposed rule would not have significant effects on

¹⁷⁸ 79 Fed. Reg. 22, 220.

¹⁷⁹ <http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

¹⁸⁰ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601, et seq.). A copy of the Office of Advocacy’s October 1, 2014 letter to EPA and the Corps is enclosed and incorporated as part of the State’s comments on the proposed rule.

small businesses. The United States Small Business Administration’s Office of Advocacy has determined that the certification was improper, and that the proposed rule will indeed have direct, significant effects on small businesses. EPA and the Corps are required to conduct a full analysis of the proposed rule’s effect on small business under the RFA, including the requirement to convene a Small Business Advocacy Review panel to facilitate the review.¹⁸¹

Even for large businesses and governmental entities sponsoring large projects, these costs serve as a drag on economic activity and job creation. The costs will only multiply with the additional waters that would become jurisdictional under the proposed rule. While transactions with mitigation banks and in-lieu fee programs are not publicly disclosed by the Corps, the state agencies involved in projects that require such mitigation are aware that credits are expensive, and often significantly reduce limited funding available for projects. Based on a preliminary review, the State paid the Conservation Fund over \$8 million for public projects (i.e., bridges, roads, and rural airport projects) between 2009 through 2015. It is not clear from EPA’s economic analysis whether EPA has considered these costs or the potential increases to such costs if the proposed rule were finalized and applied. (p. 18-19)

Agency Response: ee section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

Beaver County Commission (Doc. #9667)

11.1.246 The Agencies' bid for increased jurisdictional authority would have exponentially expanding impacts on small businesses, and these impacts will have significant adverse economic impacts on the general public, including but not limited to reduced land value and, increased costs of doing business due to regulatory burdens (e.g. having to hire consultants to prepare permits, cost of permits. project delays. restrictions on land use and the cost of complying with permitting requirements, including mitigation and failure of projects to make a profit).

Property owners, particularly farmers and ranchers and citizens in rural areas, count their land as their principal asset. Land is often used as collateral for loans and other capital purchases needed for business operations or capital improvements.

The tremendous direct and indirect adverse impacts and cumulative impacts of this proposed rule on small businesses cannot simply be dismissed as the Agencies have decided to do.

Recommendation: Withdraw the proposed rule. Should the Agencies put forth another proposed rule, the true impacts of expansion of waters under the CWA on small businesses must be fully disclosed for the public to analyze and evaluate. (p. 13)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

¹⁸¹ 5 U.S.C. §§ 603 and 605.

Washington County, Colorado, Board of Commissioners (Doc. #12340)

11.1.247 Finally the Board of County Commissioners requests you heed the advice of the Office of Advocacy within the Small Business Administration when discussing the potential impacts of the proposed rule. "The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact." (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

Morgan City Harbor and Terminal District (Doc. #14057)

11.1.248 Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

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

11.1.249 In its undated "Questions and Answers about Waters of the US" document EPA cites the economic benefit of the WOTUS Rule to be "about double the potential costs" (\$160M - \$278M). In arriving at its conclusions, EPA appears to have based its analysis upon only one Section of Clean Water Act - Section 404 - which pertains solely to Dredge and Fill operations.

By contrast and were WOTUS to be promulgated, it would impact a number of permitting and compliance programs managed by Kansas, such as CWA Section 3 19 (Nonpoint Sources), Section 401 (Wetland .Water Quality Standards), and Section 402 (NPDES Permits). To that end, please provide studies, data and information as to how EPA appropriately considered the economic impact to Kansans across all Clean Water Act Programs. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.4 (Other CWA Programs), and 14.1 (Site-specific).

Hildago Soil and water Conservation District, Lordsburg, New Mexico (Doc. #19450)

11.1.250 Costs & Benefits: The Economic Analysis describes the costs and benefits of the proposed rule; however, the Agencies make economic benefit claims that are based on data that is unavailable to the public. Small businesses bear the majority of costs, whereas the benefits are mostly environmental. EPA does not consider the costs on sectors that do not qualify for the Agricultural Exemption. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General

Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

11.1.251 Impacts to Small Businesses: EPA claims that the proposed rule will have no effect on small business. However, language pulled directly from the Economic Analysis states, “As a result of this proposed action, costs to regulated entities will likely increase for permit application expenses.” Additional analysis should be completed to assess the impacts of increased permitting to small businesses – particularly for the agriculture industries. The U.S. Small Business Administration recently wrote a comment letter to the Agencies requesting them to “withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.” (p. 2-3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Tri-County Economic Development Corporation (Doc. #8536)

11.1.252 Northern Kentucky Tri-ED respectfully requests that the proposed rule be withdrawn or otherwise amended to minimize the significant costs business will incur to develop property, which helps propel the local economy in Northern Kentucky. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.253 In one instance, a pending industrial expansion by a local company has been delayed by months and may not occur in Northern Kentucky due to the high impact of the costs to comply with the state's interpretation of this proposed rule. This company, Lyons Magnus Inc., develops and markets quality food products with innovative packaging. This Boone County company looks to grow its operation and add a 40,000 SF facility on an adjacent 17 acres. However, the environmental mitigation requirements due to the proposed rule (that Kentucky has adopted already and is implementing) are threatening this expansion project. The U.S. Army Corps of Engineers originally determined the fees to disturb streams on the 17 acres at \$470,000. After further review, the cost rose to \$560,000 due to the recent increase in fees to the available regional in-lieu fee program. At \$32,941 per acre, this is hefty burden for a small business to incur and the mitigation fees seriously threaten 50 new jobs and \$5,000,000 in capital investment. This is but one example of threatened development in Northern Kentucky.

Northern Kentucky Tri-ED applauds the October 1, 2014 attached letter from the SBA Office of Advocacy that concludes that the "The {EPA} Rule Will Have a Significant Economic Impact on Small Business" and that the SBA Office of Advocacy should "withdraw the rule and conduct a SEAR panel prior to promulgating any further rule on this issue." (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit) and 11.3.1 (Costs).

Indiana Farm Bureau et al. (Doc. #14119)

11.1.254 The problems to be addressed by this rule are not well defined. In fact, many of the purported benefits of this rule do not exist. If adopted, this rule will add significant costs and delays to normal activities, hurt economic development, negatively impact state and local government, and lead to additional litigation about what is and is not regulated. It will do little for the environment. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.3.1 (Costs), and 11.3.2 (Benefits).

Golf Course Superintendent’s Association of America, et al. (Doc. #14902)

11.1.255 While the EPA and others do not believe they are expanding jurisdiction to new waters of the U.S., an examination of how the new definitions of WOTUS are written demonstrates significant potential impact to the way golf courses are designed, built and managed. Adoption of the rule as proposed could adversely affect jobs and economic sustainability in our industry. (p. 19)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

American Foundry Society (Doc. #15148)

11.1.256 (...) Furthermore, even if a facility can secure the necessary permit approval, metalcasting operations may be required to “mitigate” potential environmental impacts with expensive restoration or prevention projects. These significant regulatory costs and burdens would be imposed on metalcasting operations with little, or no, meaningful human health and environmental benefits.

Industrial facilities such as metalcasting operations need to be aware of the potential impacts of the rule for all of their activities. Given the broad jurisdiction of the CWA in the proposed rule, metalcasting facilities will be faced with a substantial increase in regulatory requirements, numerous potential disputes over the applicability of these requirements, delays in making improvements and other changes at the facility, possible enforcement actions, and numerous legal challenges. EPA and the Corps appear to ignore the potentially debilitating regulatory burdens posed on industrial operations by the proposed regulation and continue to downplay their significance. (p. 9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

11.1.257 The proposed rule lacks clarity, is ambiguous, and would impose undue and unnecessary burdens on metalcasting operations and other landowners without providing any meaningful human health or environmental benefits. The proposal should be withdrawn so that the overly broad scope and the devastating impacts of the rule can be assessed more thoroughly, particularly with respect to small businesses. Such action is warranted because EPA and the Corps are not compelled to issue the rule by a court

order or court-issued deadline. Accordingly, the agencies can take the necessary time to redraft the rule consistent with federal statutory authority, state rights, and local land use provisions. In addition, the extra time would allow the agencies to develop a rule that is protective of human health and the environment, does not impose unnecessary burdens on law-abiding landowners, and that is clear and understandable. (p. 10)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. One of the primary goals of the agencies’ current rulemaking effort is to provide additional clarity regarding the jurisdictional scope of the Clean Water Act. In addition, see summary response Topic 11.3.1 (Costs).

National Association of Convenience Stores, et al. (Doc. #15242)

11.1.258 EPA and the Corps are proposing to expand the scope of waters covered under the CWA well beyond those currently regulated. This jurisdictional expansion would impose higher costs on NACS and SIGMA members, through additional permitting and associated regulatory requirements relating to Section 311 (oil spill liability and oil spill prevention, control and countermeasures (“SPCC”)),¹⁸² Section 402 (effluent/stormwater discharge requirements),¹⁸³ and Section 404 (dredge and fill permits).¹⁸⁴ (p. 4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

National Association of Surface Finishing (Doc. #15398)

11.1.259 VIII. The Proposed Rule Would Impose Significant Negative Impacts on Surface Finishing Operations

Those limited areas not included in the definition of “waters of the U.S.” (such as the site of surface finishing operations) are likely to conduct routine activities that could affect the surrounding “waters of the U.S.” and therefore, be subject to CWA jurisdiction. For example, moving dirt, mowing grass, applying or using chemicals, storing metals, or most any industrial activity could result in a potential discharge of a pollutant into a “water of the U.S.” and trigger the need for a federal permit. This could include water quality standards, total maximum daily loads (TMDLs), oil and spill prevention programs, NPDES permits, stormwater discharges, and dredge and fill permits.

Because the proposed rule would make most ditches into “tributaries” subject to jurisdiction under the CWA, routine maintenance and process activities in ditches, on-site ponds, and impoundments could trigger expensive federal permits. In addition, these permitting requirements could impose additional, unnecessary environmental reviews that could add years and significant costs to finalize ordinary projects at or near the facility. Furthermore, even if a facility can secure the necessary permit approval, surface

¹⁸² Spill Prevention, Control and Countermeasures (“SPCC”) requirements, 40 C.F.R. 112 (2014).

¹⁸³ National Pollutant Discharge Elimination System (“NPDES”) Program regulatory requirements, 40 C.F.R. § 122 et seq. (2014).

¹⁸⁴ Section 404, 40 C.F.R. §230 (2014).

finishing operations may be required to “mitigate” potential environmental impacts with expensive restoration or prevention projects. These significant regulatory costs and burdens would be imposed on surface finishing operations with little, or no, meaningful human health and environmental benefits regulatory requirements, numerous potential disputes over the applicability of these requirements, delays in making improvements and other changes at the facility, possible enforcement actions, and numerous legal challenges. EPA and the Corps appear to ignore the potentially debilitating regulatory burdens posed on industrial operations by the proposed regulation and continue to downplay their significance. (p. 10-11)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.4 (Other CWA Programs) and for information of ditch exclusions see Compendium #6.

National Association of Manufacturers (Doc. #15410)

11.1.260 The NAM’s members have begun to assess the increased number of permits they will now have to obtain, and the increase for many of these companies is significant. With an increase in permits comes a corresponding increase in compliance costs. (p. 30)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Association of Nebraska Ethanol Producers (Doc. #15512)

11.1.261 In these comments, ANEEP references separate comments submitted to the Docket Office of Advocacy of the US Small Business Administration (SBA). The SBA comments point out the very large and significant costs of the proposed WOTUS which will be borne by the regulated community, many of which are small businesses similar to many ANNEP members along with those in the agricultural community that provide grains as feedstock to our ethanol plants. Although USEPA's public pronouncements suggest that the proposed WOTUS rule does little to expand the scope of jurisdictional waters, the reported costs to the regulated community may still be in excess of \$100 million. Much of these costs are expected to be borne by small business. It seems remarkably inconsistent that the proposed WOTIJS rule will have no or little impact as advanced by USEPA's public pronouncements, yet would still result in Substantial added costs to those regulated under the Clean Water Act. USEPA needs to reconsider this inconsistency.

Also, USEPA'S economic review does not consider the added costs to be borne by the regulated community, even assuming that the scope of jurisdictional waters does not increase. The uncertainty regarding the scope of WOTUS under the new definition which is illustrated by comments made here and elsewhere in this Docket means that regulated sources, such as ANEEP members and our friends in the agricultural community, will need to verify the jurisdictional status of any and all waters leaving one's plant site or property under the new WOTUS definition. This in turn means that the regulated community across the United States, most of which are small businesses, will be spending time and resources verifying that waters previously determined by USEPA to be non-jurisdictional do in fact remain as non-jurisdictional under the new regulatory definition.

Such costs may be substantial, especially in cases where the jurisdictional status of individual waters may be in question or in cases where USEPA and/or the state local authority (or even a local environmental advocacy group) elect to challenge this determination. Our understanding is that USEPA has not considered such costs in its economic analysis and has only considered increased the added compliance costs in cases where the jurisdictional status of individual waters may change.

Furthermore, USEPA's economic analysis appears to be predicated on its assertions that the scope of jurisdictional waters will not increase significantly. These assertions have been challenged by these comments and others presented elsewhere in the Docket. If USEPA's assertions are incorrect and in fact, the scope of jurisdictional waters increases, the compliance costs estimated by USEPA in its analysis will have been underestimated by a substantial margin. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Westmoreland Country Club (Doc. #17008)

11.1.262 The rule as presently published, could have a devastating economic impact on the golf course industry, potentially threatening to economically weaken, if not eliminate, golf facilities which are 95% small businesses. It would include almost every river, stream, creek, wetland, pond, and ditch in the United States under the jurisdiction of the CWA. Golf courses that have these waters on or near them would now be required to obtain costly, federal permits for any land management activities or land use decisions made.

Further, we would face an uncertain business environment where many of our now routine activities (such as fertilizer and pesticide applications) would require a permit before we would be able to proceed. Most important, there is no legal right for a permit for either of these activities nor any deadline on EPA's process to issue a permit. Permitting could take months or even years, or permits may simply be unavailable. This could halt operations on golf courses or even cause them to shut down altogether.

Golf facilities could be required to get permits for all activities in or near WOTUS and that will mean a substantial increase in costs to our small businesses for permits, mitigation, monitoring and assessments as well as increased costs for permit review and issuance to be borne by state governments. It also increases our liability to manage the property due to the threat of citizen action lawsuits. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Pinnacle Construction & Development Corporation (Doc. #1807)

11.1.263 Finally, as a business owner, I take great issue with the EPA declaration that this new regulation will not have a significant economic impact on a substantial number of small business entities. This declaration, which allows the EPA to avoid the Regulatory Flexibility Act, could not be further from the truth in Charlottesville, Virginia. This will

significantly impact small business and I encourage the EPA to reconsider their declaration to the contrary. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Ernst Concrete Inc. (Doc. #12347)

11.1.264 Ernst Concrete Inc. believes it is important for the agencies to do a better, more thorough analysis of the economic impacts of changes to jurisdiction under the CWA. Without obtaining information on how the proposal will impact small businesses, Ernst Concrete Inc. believes that current proposal lacks complete, accurate, timely and relevant data and information to craft an eventually finalize the proposal. EPA needs to appropriately and further consider the rule's affects on all the small businesses it intends to regulate. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Pennsy Supply, Inc. (Doc. #15255)

11.1.265 (...) EPA has not sufficiently analyzed the impact, in particular the impact to smaller businesses. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

National Hispanic Landscape Alliance (Doc. #15171)

11.1.266 The lack of clear definition around the expanded jurisdiction under the proposed rule may also create significant new legal and regulatory costs for businesses providing landscape service. The majority of these are small businesses that do not have attorneys nor related experts on staff to assist with a complicated assessment of whether a given landscape would fall under the jurisdiction of a 'water of the United States' under the proposed rule.

Accordingly, the NHLA is concerned that costly and time-consuming permits may be required for regular landscape service tasks that do not presently require permits. The NHLA is not aware of an assessment conducted by the EPA and Corps that would quantify such effects on landscape service businesses. It is our position that such an assessment should have been completed and made public in conjunction with the publication of the proposed WOTUS rule. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Smith's Ready Mix, Inc. (Doc. #19313)

11.1.267 Additionally, the agencies state that this rule would not have a significant impact on small entities. This is simply not the case. Failure to take into account impacts to small entities is incredibly concerning and not calling a small business advocacy review panel, the agencies have missed valuable input from small entities, like ready mixed

concrete producers; 85% of which are small entities. Smith's Ready Mix, Inc. believes a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is needed to provide more complete, accurate, timely and relevant information on how small businesses will be affected by the proposal. The agencies must do this outreach before moving forward with this proposed rulemaking in order to better assess the impacts on and reduce the impacts to small entities. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

CEMEX (Doc. #19470)

11.1.268 EPA's economic analysis does not take into account the real costs of permitting and mitigation and must be redone. EPA and the Corps must also convene a Small Business Regulatory Flexibility Act panel as required by law to assess the impacts on small businesses that make up 70 % of NSSGA's membership. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

National Association of Home Builders (Doc. #19540)

11.1.269 Equally problematic is the Agencies' claim that the rule does not impose significant economic impacts on small businesses. Home builders have long recognized the substantial costs incurred whenever the Agencies assert jurisdiction over their properties. In fact, EPA's own economic analysis finds that over \$1.7 billion is spent each year by the private and public sectors to obtain federal wetlands permits. Over 90 percent of NAHB's land developer and builder members meet the federal definition of a "small entity" and many will be swept into the federal realm a result of this rule. Given these facts and the notable increase in the number of areas and entities subject to the permitting and other requirements of the CWA, it is not clear how the Agencies can justify their claim that the proposal will not have a substantial economic impact. This conclusion is even more troublesome considering the U.S. Small Business Administration Office of Advocacy has called for the rule's withdrawal because of its significant and direct economic impacts on small businesses. (p. 2-3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

11.1.270c. The Proposed Rule will Impose Significant and Unnecessary Costs on Already Heavily Regulated Home Builders.

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must

adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home buying public to absorb the multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold – costs that increase home prices. With increased housing prices in response to additional regulations (see Section VIII. d.), it may take longer for the home to sell. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face every day. Today’s proposal only adds to the headwinds that our industry faces. (p. 138)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

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

11.1.271 The proposed rule will make it even more difficult and expensive for companies to meet the needs of their customers who depend on a supply of aggregate for essential public works projects such as new road construction, flood control, water and wastewater treatment, and the repair of existing bridges and highways. Ultimately the increased infrastructure costs are borne by taxpayers. (p. 6)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit) and 11.3.1 (Costs).

11.1.272 Because of the underlying geology and the abundance of perched groundwater throughout the Snake River Plain, many aggregate operations are located in isolated wetted areas. The construction industry relies on these aggregate reserves to supply the building and maintenance of critical infrastructure. Should wetted aggregate reserves be closed in Idaho, local businesses will be seriously impacted. Calculating the financial impact is more than just the loss of reserves. It would include lost profits from these lines of business, the additional cost to replace the aggregates, the increased cost of doing business with unproven sources, and the impact to competitiveness in the market if the new reserves are further away than current reserves. One Idaho aggregate company estimates that loss of current reserves due to a jurisdictional determination under the proposed guidance would have a financial impact of over \$30 million per year. (p. 30-31)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.3.1 (Costs), and 14.1 (Site-specific).

Midway Gold U.S. and MDW Plan (Doc. #15056)

11.1.273 Midway strongly mandate and limits set forth by Congress under the Clean Water Act ("CWA"); however, Midway is concerned that the proposed rule unduly and unlawfully expands federal jurisdiction under the CWA in a manner that would result in a significant reduction In the Nation's mineral resource production alone is sure to cause rippling effects on local and state economies, not to mention private users and, far reaching adverse economic effects on many businesses and small businesses (the necessary analysis for which has not been completed as required under federal law for the proposed rulemaking).¹⁸⁵ (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

11.1.274 **The Proposed Rule Will Significantly Negatively Impact Many Small Businesses**

The expanded definition proposed in the 2014 proposed rule will lead to a significant expansion of federal jurisdiction that will exert more government control over landowners. Small businesses will also be impacted by the proposed reform. If property owned by a landowner or small business is determined to have a jurisdictional wetland upon it, the owner would no longer be able to make use of that property. If the owner proceeds in using the property in a way that violates the Clean Water Act, he or she will face crippling fines of up to \$37,500 per day.¹⁸⁶

The prospect of staggering fines leaves small businesses two options: (1) leaving their land undeveloped; or (2) applying for a Clean Water Act permit. The former creates the potential for an owner to be unable to develop their property at all, denying them of the opportunity of creating any economic benefit from their land. The latter creates significant expense and work. As of 2002, the average CWA permit cost over \$270,000.¹⁸⁷

If the Corps expands the definition of “waters of the United States”, there should be a small business exemption built into the rule. While Hawkes objections to the expansion of the definition, if the rule becomes effective and a Corps Section 404 permit is required, exemptions must be created that will lower permitting costs, allowing small companies to receive permits without investing an unreasonable sum of money.¹⁸⁸ (p. 2-3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

¹⁸⁵ In light of the substantial economic impact the proposed rule will have on numerous small entities, the rulemaking process here suffers from a fatal flaw for the Agencies’ failure to comply with applicable requirements under the Regulatory Flexibility Act (5 U.S.C. 601-612) and, instead, relying on an invalid certification that the scope of the regulatory jurisdiction is narrower than under existing regulations and will not affect small entities.

¹⁸⁶ National Federation of Independent Business, Letter Asking the OMB to Return a Clean Water Act Rule to the EPA (Sept. 24, 2013), <http://www.nfib.com/article/letter-asking-the-omb-to-return-a-clean-water-act-rule-to-the-epa-63895/>.

¹⁸⁷ Id.

¹⁸⁸ Id.

11.1.275 The Agencies Need to Conduct and Publish Another Economic Analysis

Both agencies have consistently maintained that their joint economic analysis shows the economic benefit of the proposed rule would range from \$300.7 million to \$397.7 million annually, while the costs would be between \$133.7 million and \$200 million. Even if these studies are accurate, the greatest costs would still be incurred by developers, mining companies, landowners and other permit applicants. Those parties would be forced to mitigate the loss of land by obtaining permits under Section 404. Forcing the bulk of the costs onto a relatively small group of stakeholders is not an equitable solution. The agencies should attempt to “balance the hardships” preventing small groups from bearing the brunt of the costs associated with the new rule.¹⁸⁹

Additionally, the results of the economic studies may not be an accurate reflection of the costs and benefits of the proposed rule. David Sunding, a professor at the University of California at Berkeley College of Natural Resources, noted that the agencies “relied on incomplete data, flawed methodology, and outdated studies” to make their determinations. While experts often disagree on the validity of economic benchmarking techniques, if there is any potential that the information the agencies possess is false, new studies should be performed and published to ensure the benefits associated with the rule are realistic. It is not reasonable to place such strong demands on smaller groups when it is unclear if the data is accurate.¹⁹⁰ (p. 4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.3.2 (Benefits) and 11.4 (Other CWA Programs).

Hawkes Company (Doc. #15057)

11.1.276 Additionally, the proposed rule will negatively impact small businesses and landowners who, as a result of the proposed rule, will have their property rights further encroached upon by the federal government.¹⁹¹ (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Lafarge North America (Doc. #16555)

11.1.277(...)

- EPA's economic analysis does not take into account the real costs of permitting and mitigation and should be redone.
- The proposed rule is so expansive that it will trigger numerous additional environmental reviews to address such issues as endangered species and historic preservation, which will make it even more difficult and costly for Lafarge to ensure timely supply of

¹⁸⁹ Amana H. Saiyid, Proposed EPA, Corps Rule Clarifies Federal Jurisdiction Over Waters, Wetlands, Bloomberg Law (Mar. 28, 2014).

¹⁹⁰ Id.

¹⁹¹ Definition of “Waters of the United States,” 79 Fed. Reg. 22263 (Proposed April 21, 2014) (to be codified at 33 U.S.C. pt. 110).

construction materials for public works projects essential to continuing economic recovery.

- Lafarge's has performed its own economic analysis, detailed in the next section below, which provides an illustration of the significant economic impacts the rule would have on our business. These projected economic impacts for just one company illustrate that EPA's nation-wide cost estimate is clearly much lower than will actually occur on a nation-wide basis. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs) and 14.1 (Site-specific).

11.1.278 Lafarge's Analysis of Economic Impacts

To assess the business impacts to Lafarge if the proposed rule were to be finalized in its current form we retained a specialized consulting firm with expertise on "jurisdictional waters" determinations to evaluate and quantify the expected impacts. The consulting firm performed a detailed study which included site visits to four (4) representative Lafarge facilities to perform a field study and literature review for each site. Based on the site-specific evaluations at these four sites, the findings were scaled and applied more generally to quantify the overall impact to Lafarge's 41 largest sites. This analysis provides a science-based and documented assessment of the overall business impact the proposed rule would have to our overall Lafarge's U.S. business operations.

Of the Lafarge sites studied, each included an aggregate / limestone quarry operation. The evaluation considered the "jurisdictional waters" that will be impacted by the "current rule" and for comparison by the expanded "proposed rule" as we proceed with our known business plan. These business plans essentially are based on projections of how the quarry will expand across our property into areas of known / available mineral reserves. These business plans typically reflect a ten (10) plus year planning cycle. The calculated economic impacts for each of the four sites are shown below in Table 1.

Table 1
Incremental Added Cost of Proposed Rule Compared to Current Rule

<u>Site Location</u>	<u>Low Range estimate</u>	<u>High Range estimate</u>
Kentucky	\$1,100,000	\$1,700,000
Louisiana	\$200,000	\$600,000
Louisiana	\$50,000	\$120,000
New York	\$1,200,000	\$1,800,000

The typical cost items included for an individual site are endangered species studies, archeological surveys, jurisdictional waters determination, stream mitigation, wetland mitigation, and long-term mitigation monitoring. To illustrate this in more detail we

provide below a summary of the cost breakdown for the New York site in Table 2, immediately below.

Table 2
Example Cost Analysis Detail from New York Site

<u>Item</u>	<u>Low Range estimate</u>	<u>High Range estimate</u>
Endangered Species (Bats)	\$5,000	\$10,000
Archeological Survey	\$50,000	\$100,000
Stream Mitigation (1,811 linear feet)	\$1,075,000	\$1,585,000
Wetland Mitigation (0.40 acres)	\$15,000	\$29,000
Mitigation Monitoring (10 years)	<u>\$50,000</u>	<u>\$100,000</u>
Totals	\$1,195,000	\$1,824,000

The site specific cost estimates from the Kentucky, Louisiana, and New York sites were scaled and applied across Lafarge's 41 largest U.S. sites. Based on this further evaluation, from an overall company perspective the projected cost impact considering these 41 sites is in the range of \$18,500,000 (low range) to \$32,800,000 (high range) for the described planning cycle. This study illustrates the need for Lafarge to make significantly greater expenditures if it wishes to continue with its current business plans for its existing sites. In addition, any yet-to-be-determined new / Greenfield production sites would be similarly impacted. (p. 4-5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 14.1 (Site-specific).

Bayou Concrete LLC (Doc. #16629)

11.1.279 Bayou Concrete LLC has concerns that this rule will greatly increase the cost of doing business, as well as raise the cost of all construction projects across the country to unacceptable and unnecessary levels. Bayou Concrete LLC suggests EPA take great consideration of the economic effects on both materials. Please see comments submitted by the National Ready Mixed Concrete Association for more information, in part, on the economic impacts on the industry as a whole.

Additionally, the agencies state that this rule would not have a significant economic impact on small entities. This is simply not the case. Failure to take into account impacts to small entities is incredibly concerning and not calling a small business advocacy review panel, the agencies have missed valuable input from small entities, like ready mixed concrete producers; 85% of which are small entities. Bayou Concrete LLC believes a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is

needed to provide more complete, accurate, timely and relevant information on how small businesses will be affected by the proposal. The agencies must do this outreach before moving forward with this proposed rulemaking in order to better assess the impacts on and reduce the impacts to small entities.

Bayou Concrete LLC believes it is important for the agencies to do a better, more thorough analysis of the economic impacts of changes to jurisdiction under the CWA. Without obtaining information on how the proposal will impact small businesses, Bayou Concrete LLC believes the current proposal lacks complete, accurate, timely and relevant data and information to craft and eventually finalize the proposal. EPA needs to appropriately and further consider the rule's effects on all the small businesses it intends to regulate. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Snyder Associated Companies, Inc. (Doc. #18825)

11.1.280(...) EPA has not sufficiently analyzed the impact, in particular the impact to smaller businesses. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Georgetown Sand & Gravel (Doc. #19566)

11.1.281 EPA has not sufficiently analyzed the impact, in particular the impact to smaller businesses. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

North Dakota Soybean Growers Association (Doc. #14121)

11.1.282 Despite clear indications that the proposed, revised definitions will impose widespread unknown or fully evaluated impacts on small entities (e.g., small businesses, small not-for-profit organizations, and small government jurisdictions), the agencies have certified that, under the Regulatory Flexibility Act, the rule would not result in significant economic impact for this substantial number of entities. (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Western Growers Association (Doc. #14130)

11.1.283 Adding urgency to our requests, is the Small Business Administration's (SBA) call for the EPA and Corps to withdraw the rule pending a new process that would recalculate the economic impact these changes will have on small businesses. These small businesses include many family farms within our membership and throughout the United States.¹ We thus echo the SBA's request that the proposed rule be withdrawn in full. At an absolute minimum, we contend significant elements of the proposed rule must be clarified and those elements reopened for further public comment. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Arizona Farm Bureau Federation (Doc. #15064)

11.1.2843. The economic analysis is severely flawed.

The proposed rule would have far reaching negative economic impacts related to food costs, the vitality of rural communities, and dissolution of family farms. Family farms would not be able to withstand the hefty permitting fees and/or fines which would be enforced as a result of this rule. The tens of thousands of dollars of additional costs for federal permitting of ordinary farming activities is beyond the means of most farmers and ranchers- the vast majority of whom are family-owned small businesses. However many more of our farm and ranch families could potentially face thousands of dollars in civil penalties or even higher criminal penalties, given that it is nearly unavoidable to manage a farm or ranch without the ability to make critical decisions on the hour based upon changing conditions. Farmers and ranchers operate in an environment that often requires quick actions to keep their crops and livestock healthy and safe.

We refer to and support the comments filed by the Small Business Administration's Office of Advocacy, that state the EPA and the Corps have failed to take into account small business impacts, including impacts on small business farmers.¹⁹² As a result of this failure, SBA recommends EPA and Corps withdraw the rule. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Huntington Farms (Doc. #16331)

11.1.285 Additionally, there are existing requirements already in place for Central Coast farming and ranching operations for water quality, both surface and groundwater, administered by our State's regional water quality control board. These are a set of compliance requirements relating to irrigation tailwater discharges, percolation to groundwater basins, sediment constituents in water, and the use of nitrogen in agricultural operations. This layer of regulatory burden is resulting in additional costs for farmers and ranchers as they adopt revised on-farm methods of production and irrigation management controls; the costs of this water quality regulatory process impacts the bottom line of farming economics, particularly in a marketplace where these costs cannot be passed along to consumers. The end result is that small farm operations are struggling with water quality regulations and will ultimately be forced out of production if the economics are not sustainable for compliance. Additional burdens of the proposed rule change will certainly contribute to the downfall of the small farmer and rancher because they just cannot comply at any price. (p. 2)

¹⁹² 3October 1, 2014 letter to Administrator McCarthy and Major General Peabody from Winslow Sargeant, Chief Counsel for Advocacy, Small Business Administration's Office of Advocacy

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

American Horticulture Industry Association (Doc. #16359)

11.1.286 The Proposed Rule Fails to Assess Its Impact on Small Businesses.

The majority of horticultural industry professionals are small businesses that do not have in-house attorneys or hydrology professionals on staff to help them make the very complicated assessment about whether their land or a customers' property includes a "Water of the US." There are also significant costs associated with expanded permit requirements including the assessments that need to be conducted and the staff time associated with planning, monitoring and reporting. In addition, some customers could choose to forgo professional landscape services due to the potential litigation associated with Clean Water Act permits.

The Small Business Administration's Office of Advocacy recognized these significant costs in a letter submitted to the agencies on October 1. The Office of Advocacy found that the rule would have a significant economic impact on a substantial number of small businesses. Feedback from our own memberships supports this conclusion. We agree with the Office of Advocacy's finding that the EPA and the Corps should have conducted a Small Business Advocacy Review Panel prior to releasing the rule for comment. (p. 3-4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

West Side Canal Company, Inc. (Doc. #17044)

11.1.287 WSC's small family-run farms and ranches cannot withstand the expense and delay associated with CWA permits or fines for non-compliance while performing traditional farming practices such as the application of fertilizer, pesticides, herbicides, or even performing such common tasks as ditch cleaning and maintenance, earth moving, plowing and fencing. Nor can WSC's farmers economically engage in water conservation and irrigation improvement projects on their farms if they must endure the cost and delay of finding their way through the labyrinth of the EPA's or the Corps' various permit requirements. The CWA was never intended to regulate such typical and traditional farming and ranching activities where water from such work does not flow directly into navigable streams or which does not otherwise have a significant nexus to waters already under the CWA's jurisdiction. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.3.1 (Costs), 11.4 (Other CWA Programs).

Windsong Farm Golf Club (Doc. #14746)

11.1.288 The proposed rule would have a profound and significant impact on small businesses providing pest, turf and lawn control solutions around the United States. The cost of

pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also have to be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

BMG Marine, Inc. (Doc. #18855)

11.1.289(...) EPA has not sufficiently analyzed the impact, in particular the impact to smaller businesses. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

N.W. Electric Power Cooperative, Inc. (Doc. #13623)

11.1.290 N.W. Electric Power Cooperative, Inc. is particularly concerned that EPA and the Corps failed to even consider and evaluate the potential impact of these proposals on small businesses. We agree with the Small Business Administration Office of Advocacy and encourage the agencies to withdraw the proposal, convene a small business advocacy review (SBAR) panel and complete a thorough Regulatory Flexibility Act analysis prior to any reproposal. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Southern Illinois Power Cooperative (Doc. #15486)

11.1.291 As UWAG explains in their comments, an individual permit can be expected to cost ten times as much as a general permit, and take twice as long to obtain.¹ As noted above, coops are small businesses and their operating costs must be largely born by their member-owners. The economic challenges faced by so many cooperatives and their member-owners underscore the importance of a cost-effective regulatory program. A ten-fold increase in cost of permitting to construct and maintain critical infrastructure with no appreciative environmental benefit is not cost-effective. (p. 4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.3.2 (Benefits) and 11.4 (Other CWA Programs).

11.1.292 From the description of coop concerns described above, SIPC believes the proposed rule would impose significant costs and have a significant economic impact on SIPC and other rural electric cooperatives; the vast majority of which are small businesses. SIPC concurs with the findings of the Small Business Administration Office of Advocacy (SBA Advocacy) that EPA and the Army Corps of Engineers improperly certified the rule as not posing a significant economic impact on a substantial number of small entities.

SIPC agrees with SBA Advocacy that the agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. Furthermore, EPA erred in not conducting a small business advocacy review (SBAR) panel in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA). (p. 9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.293 The agencies have flouted federalism policies and have not consulted with their State partners. Nor have they consulted with small businesses as required by the Regulatory Flexibility Act. (p. 10)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

U.S. Chamber of Commerce (Doc. #14115)

11.1.294 The States would be responsible for implementing all of these expanded duties within their existing budgets and staffing levels. Because businesses depend on being able to get State-issued permits within a reasonable timeframe, the additional workload the revised definition would place on the States would become a serious obstacle to commercial activity. (p. 23)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction).

Southern Illinois Power Cooperative (Doc. #14402)

11.1.295 As UWAG explains in their comments, an individual permit can be expected to cost ten times as much as a general permit, and take twice as long to obtain.¹ As noted above, coops are small businesses and their operating costs must be largely born by their member-owners. The economic challenges faced by so many cooperatives and their member-owners underscore the importance of a cost-effective regulatory program. A ten-fold increase in cost of permitting to construct and maintain critical infrastructure with no appreciative environmental benefit is not cost-effective. (p. 5)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

Arizona's Generation and Transmission Cooperatives (Doc. #14901)

11.1.296 **The economic analysis completed for the Proposed Rule is critically flawed.**

In support of the Proposed Rule, the Agencies rely on the Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014; Analysis), which is critically flawed. The Analysis was also completed prior to the Report being reviewed by the SRB, and to our knowledge was never released for public comment. Like

the Report, the Analysis is used to support the Proposed Rule, so it should withstand basic scrutiny.

For purposes of the Analysis, the Agencies evaluated requests for JDs from 2009 and 2010, which corresponds with one of the worst economic periods in U.S. history, marked by very little construction activity. As such, the Analysis substantially underestimates the incremental cost of the Proposed Rule.

The most significant (and erroneous) conclusion of the Analysis is that the total jurisdiction of the Agencies would only be expanded by 2.7 percent with the promulgation of the Proposed Rule. This is a gross underestimate based on a flawed analysis of JDs. There are two significant problems with how the Agencies determined the 2.7 percent increase. First, in the 2009-2010 time-frame most of the regulated community was operating based on a reasonable interpretation of language resulting from Rapanos and may not have engaged the Agencies for a formal JD at all. Indeed, the current (December 2008) guidance provides that “small washes characterized by low volume, infrequent, or short duration flow” are not waters of the U.S. This definition would seem to encompass a great number of the ephemeral washes that are typically under consideration for jurisdiction in the arid West. It would not be unreasonable, therefore, for a landowner to assume that the minor ephemeral washes on their property are not jurisdictional and not seek concurrence from the Corps. The Agencies attempt to quantify this phenomenon by simply making an assumption that these “other waters” are likely the most isolated: “Landowners and developers may assume that some waters are non-jurisdictional and not request a determination or engage in the permitting process. These waters would not be represented in the ORM2 FY2009-2010 data base. However, these waters are also likely to be the most isolated and the least connected to other waters and therefore the least likely to have their status changed under this proposed rule.” Without some ability to quantify how many projects were never submitted for review and what the surface water features on those projects consisted of, there is no realistic way to know what the Agencies would have concluded regarding their jurisdictional status.

Second, the Agencies relied on a review of 262 project case files to determine what additional waters of the U.S. would be identified while applying the Proposed Rule. However, the case files were from only 30 states and the Analysis does not identify which states were subject to this review. Additionally, there is no mention of which districts the “Corps experts” represented. The aforementioned problems associated with the Report’s inadequacy in dealing with small ephemeral washes combined with the fact these conditions may not have been present in the case files reviewed, seriously calls the Analysis into question.

In the Analysis, the Agencies assert that 58 percent of JDs submitted for review in 2009 and 2010 were “preliminary JDs” (PJD), but it is unclear if the Agencies included any PJDs in the analysis that produced the estimate of a 2.7 percent increase in federal jurisdiction. PJDs, by definition, assume that all surface water features within a given analysis area are w jurisdiction of surface water features is conceded by the applicant in exchange for what is hoped will be a timely review and permitting process. In such instances, the surface water features in question may or may not be considered jurisdictional as part of an Approved JD review. Therefore, if PJDs were considered in the Analysis of the 262 project case files, the estimated 2.7 percent increase in federal

jurisdiction would undoubtedly be low. The Proposed Rule states that, “[m]ost prairie streams and southwest intermittent and ephemeral streams are likely to be considered tributaries to (a)(1) through (a)(3) waters”. Because this is such a significantly large departure from how the Agencies are currently evaluating ephemeral washes, it is highly unlikely that the stated 2.7 percent total increase in jurisdiction is even close to accurate.

To further demonstrate how much the Agencies have underestimated the degree to which the Proposed Rule will expand federal jurisdiction, AzGT reviewed the most recent 24 AJDs approved in Arizona (2013 and 2014) posted on the U.S. Army Corps of Engineers Los Angeles District’s webpage (<http://www.spl.usace.army.mil/Missions/Regulatory/FinalRegulatoryActions.aspx>).

Of the 24 Arizona JDs that were completed in 2013 and 2014 (and that have been posted to the Corps website), the Corps asserted jurisdiction over surface water features in only 7 of them (or 29%). Therefore, 17 of the 24 JDs had negative determinations for waters of the U.S., i.e. no surface water features were identified. Of the 7 JDs that had positive determinations, 6 had jurisdiction asserted only over relatively permanent waters (RPWs, which refer only to intermittent or perennial waters). As such, in only 1 of 24 (or 4%) of AJDs for Arizona, completed in 2013 and 2014, did the Corps assert jurisdiction over ephemeral washes.

This is in contrast with the proposed rule, wherein the EPA states that most ephemeral streams will likely be considered tributaries, i.e. waters of the U.S. It is reasonable to conclude therefore that most or all of the 17 negative determinations described above would have some degree of federal jurisdiction under the new rule.

Delving further into the data, for the 7 JDs in which federal jurisdiction was asserted, the Corps asserted jurisdiction over approximately 334 acres of non-wetlands and 2.5 acres of wetlands. Of the 17 JDs in which the Corps did not assert jurisdiction, detailed information on the evaluated ephemeral surface water features was provided in only 5 (or, coincidentally, 29%). The total area of ephemeral washes identified on these 5 determinations was approximately 242 acres, all of which would likely be considered jurisdictional under the Proposed Rule. These 5 determinations alone would increase the extent of federal jurisdiction by over 72% (i.e. raising the total area of jurisdictional waters from 336.5 acres to 578.5 acres). Adding data from the other 12 AJDs with negative determinations would undoubtedly increase this number much higher.

These analyses are based on readily available public information and clearly illustrate that, at least regionally, the increase in the extent of waters of the U.S. under the Proposed Rule would be much larger than that assumed by the Agencies in the Analysis. (p. 5-7)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

Golf Course Superintendent’s Association of America, et al. (Doc. #14902)

11.1.297 Necessary permits and approvals are sought once a plan is in place. Regulatory permitting may be necessary during course design, development, renovation and construction and can involve federal, state and occasionally local level regulatory

agencies. This work typically includes jurisdictional determinations from the Corps before proceeding as well as obtaining individual or general permits. As proposed, WOTUS regulations could dramatically increase development and operational costs beginning at the earliest stages of the design or master planning process when a site assessment is being done to determine if a new golf course will be physically, environmentally and economically possible and sustainable, or an existing course can improved to a higher standard. (p. 8)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

American Wind Energy Association (Doc. #15208)

11.1.298 Within the EPA’s economic model, the agency fails to accurately quantify increases in its jurisdiction due to its use of the Army Corps’ ORM2 Database. The ORM2 data fails to capture the entire universe of areas that are jurisdictional under the current CWA framework because it only accounts for situations in which regulated entities engage in the section 404 jurisdictional determinations or permitting process. Even for those instances where regulated entities engage in that process, the ORM2 database does not capture all aquatic resources on the subject parcel because the Agencies focus only on impacted areas and mitigation sites. One of the issues with the ORM2 database is that “aquatic resource type” is not a required field for Army Corps staff to fill out in the database. As a result, of the 196,208 ORM2 FY2009-10 records used by EPA in its calculations, 36,063 (18.4%) did not have an associated aquatic resource type listed. This “water type null” category was not accounted for in EPA’s calculation of the 2.7 percent increase in jurisdictional waters under the new rule or any other calculations in the economic analysis.

Since EPA did not use upper-bound estimates of costs for many of the cost categories, its analysis is also flawed. This leads to a significant underestimation of total added impacts. AWEA also takes issue with the EPA’s incremental acreage calculations because they are based upon atypical statistics. The EPA’s report bases its finding on a period of extremely low construction activity, using data from the peak of the recession to make its predictions; as such, these predictions result in artificially low numbers of applications and affected acreage. Even if the percent increase in added permits is correct, using the number of permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector.¹⁹³ In short, EPA’s analysis for calculating the average acreage per permit, as presented, does not allow one to study the underlying heterogeneity at the state level and may result in a significant underestimation of the impacts. If the new rules disproportionately affect larger projects, the proposed approach using averages underestimates the affected acres.¹⁹⁴ Further, AWEA believes that the EPA’s incremental cost calculations are rife with errors because the EPA analysis ignores any potential changes to the distribution of individual and general permits. The addition of jurisdictional waters could force a restructuring in the permitting system where projects

¹⁹³ Army Corps staff concluded that an expanded definition of “waters of the United States” would result in 2.7% more jurisdictional waters than under the current definition. *Id.* at 10.

¹⁹⁴ *Id.* at 14.

that were previously eligible for general permits must apply for individual permits. These changes would have notable implications to the overall cost of the definitional change, and yet they are omitted from the analysis.

The data on permitting costs from the Sunding and Zilberman study are, in addition, nearly twenty-years old and are not adjusted for inflation or any other changes in the permit system. Thus, they likely underestimate the present cost of the permitting process. The EPA analysis also ignores the costs of avoidance and delay, which are likely to dominate the out-of-pocket expenses for permit application and mitigation. The delay estimates are likely to be larger than suggested if the influx of new permits is not offset by additional staff and infrastructure for processing. (p. 8-9)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

North Dakota Wildlife Federation (Doc. #13569)

11.1.299 Cost/benefit

Wetlands provide economic and outdoor recreation benefits to the residents of North Dakota and downstream states in the Mississippi and Central flyways. On average, 22,000 hunters collectively spend 209,000 hours annually hunting ducks in North Dakota. These hunters have a significant impact on our state's economy, creating the equivalent of 166,000 North Dakota jobs and nearly \$3.8 million in income. Expenditures by duck hunters also create almost \$500,000 in state tax revenue. ND contributes up to 50% of the duck production in the United States prairie pothole region. Our ducks create almost 500 million dollars of economic benefit to other states within the flyway. There are substantial ecological wetland values in addition to waterfowl hunting such as water storage, contaminant removal and storage, carbon sequestration, sediment removal and habitat. An analysis of wetland values show a median value of \$200 per ha per year, resulting in an ecological value of ND prairie potholes of \$290,525,600 per year. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.2 (Benefits).

Clean Water Action (Doc. #14884)

11.1.300 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 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 section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.2 (Benefits).

Clean Water Action et al. (Doc. #15072)

11.1.301 Millions of small streams and wetlands provide most of the flow to our most treasured rivers that feed the Chesapeake Bay. If we do not protect these streams and wetlands, we cannot protect the livelihood on which communities and local economies depend. Leaving critical water resources vulnerable jeopardizes drinking water sources, public health and quality of life, as well as jobs and revenue for businesses that depend on clean water, including commercial fishing, outdoor activities and water-based recreation. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

11.1.302 Protecting small streams and wetlands is also vital for to the state’s vibrant recreation and tourism industries. In Maryland outdoor recreation is an essential driver of economic activity bringing in dollars from residents and out-of-state visitors alike. Outdoor recreation attracts and sustains families and businesses, creates healthy communities and fosters a high quality of life. At least 43% of Marylanders participate in outdoor recreation each year. Overall outdoor recreation generated \$9.5 billion in consumer spending in Maryland and supports 85,000 jobs. Additionally, the economic impact of tourism in Maryland is significant. More than 35.4 million people visited Maryland in 2012 and spent \$14.9 billion on travel and other related activities. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Black Warrior Riverkeeper, Inc. (Doc. #15090)

11.1.303 The streams and wetlands of the Black Warrior watershed provide many benefits to surrounding communities. They help control floodwaters, recharge groundwater supplies, remove pollution, transport nutrients, and provide habitat for fish and wildlife.¹⁹⁵ They furnish clean water for drinking and recreation, such as swimming, paddling, boating and fishing. In Alabama, outdoor recreation is an economic driver, generating \$7.5 billion in consumer spending, 86,000 direct Alabama jobs, \$2.0 billion in wages and salaries, and \$494 million in state and local tax revenue. See Outdoor Industry Association’s 2012 Report. (p. 4)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Audubon Florida and Audubon of the Western Everglades (Doc. #15251)

11.1.304 Economic Impact of Not Approving and Implementing the Proposed Rule

AF and AWE will note one final substantive comment on the proposed rule and that is our concern that lack of approval and implementation of the rule is likely to allow continued accelerating wetland losses in Florida and nationwide, and that has very negative consequences for the sustainability of the wood stork rookery at Audubon’s Corkscrew Swamp Sanctuary and wading birds across the greater Everglades. Corkscrew

¹⁹⁵ EPA puts the potential economic benefits of the proposed rule at \$390 to \$510 million, about double the potential costs (\$160 to \$278 million).

Swamp Sanctuary is privately owned and managed by Audubon Florida as a national eco-tourism destination, and draws up to 100,000 paying visitors each year and most are very interested in the nesting storks. Scarcity of wood storks has a financial impact for this sanctuary, which depends on paid admissions to help cover the management cost of the sanctuary. There are even bigger consequences of declining wading birds and the unique spectrum of wetlands they depend on Everglades-wide and nation-wide. (p. 6)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Red River Valley Association (Doc. #16432)

11.1.305 **4. Economic Analysis Underestimates the Cost:** Over \$1.7 billion is spent each year by the private and public sectors on administrative costs to obtain wetlands permits, without taking into account the cost of required mitigation, and we are concerned that this Proposed Rule will increase both dollar amount and the time required to obtain these permits. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

American Legislative Exchange Council (Doc. #19468)

11.1.306 Lastly, and perhaps most significantly, a redefinition of the “waters of the United States” would impose a substantial financial burden on the business community and the general public. According to the Waters Advocacy Coalition, the public and private sectors already spend \$1.7 billion each year to obtain Section 404 wetlands permits. Securing only one such permit through the Corps takes an estimated 788 days and comes at an average cost of \$271,596. Notably, these figures do not take into account the costs for mitigation or design changes. By redefining the “waters of the United States,” the federal government would likely impose even greater burdens on farmers, businesses, local governments, and landowners than those that already exist. (p. 3)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

Committee on Small Business, U.S. House of Representatives (Doc. #14751)

11.1.307 **VI. The Significant and Direct Effects of the Proposed Rule on Small Entities**

Having already demonstrated that the Proposed Rule should not have been certified for the reason proffered by the agencies, it is now appropriate to show the significant impacts on small entities of the proposed rule. Any change of the scope of waters subject to the

CWA jurisdiction will affect small businesses and other small entities, despite the agencies' certification to the contrary.¹⁹⁶

The Proposed Rule will impose requirements on small businesses, as it will change the scope of the permits needed to carry out actions in or adjacent to waters of the United States, and concomitantly costs, on any business that is working in or near a body of water that is deemed to be a water of the United States pursuant to the Proposed Rule. In addition, the Proposed Rule will impose requirements on small governmental jurisdictions.¹⁹⁷ According to the EPA, over 90 percent of United States governmental jurisdictions, or about 40,000, are small governmental jurisdiction,¹⁹⁸ The agencies should have assessed the proposed rule's impact on small governmental jurisdictions, such as counties, because they too work in or near bodies of water, such as ditches, that will be deemed "waters of the United States" under the Proposed Rule.

Small businesses such as construction firms, land developers, natural resource extraction operations, agricultural producers, and small governmental jurisdictions, such as counties, that conduct dredge and fill activities (even clearing vegetation and debris from ditches) will require Section 404 permits. Stormwater discharges from small municipal separate storm sewer systems, construction activities, and industrial activities (e.g., manufacturing, mining, oil and gas exploration and processing) will require Section 402 permits. In addition, farmers and ranchers may need Section 402 permits for discharges from animal feeding operations or pesticide applications.¹⁹⁹

The permitting process can be lengthy and expensive. For example, at the WOTUS Hearing, Tom Woods, President of Woods Custom Homes, testified that one of his company's building projects was entangled in the permitting process for over two years and the permitting process cost \$250,000.²⁰⁰ According to a 2002 assessment, "[t]he average applicant for an individual [Section 4041 permit spends 788 days and \$27 1,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915.²⁰¹ This does not include the time and expense of any design changes or mitigation.²⁰² At the WOTUS Hearing, Alan Parks, Vice President of Memphis Stone and Gravel Company, testified that under the Proposed Rule, one member of his industry calculated that mitigation of a stream would cost more than \$100,000,²⁰³ Section 402 permits, which include effluent limitations, monitoring and reporting requirements, and conditions, impose costs as well. For example, EPA estimated the per construction site

¹⁹⁶ 79 Fed. Reg. at 22,220.

¹⁹⁷ 5 U.S.C. 5 601(5). The RFA defines small governmental jurisdictions as those with a population of less than 50,000.

¹⁹⁸ EPA RFA Guidance, *supra* note 64, at 46-47.

¹⁹⁹ Small businesses also may be affected by other provisions of the CWA such as 5 3 1 I (oil and hazardous substance liability) and 6 505 (citizen suits). 33 U.S.C. 5 1321, 1365.

²⁰⁰ WOTUS Hearing, *supra* note 5, at 30.

²⁰¹ Rapanos, 547 U.S. at 721 (citation omitted).

²⁰² *Id.*

²⁰³ WOTUS Hearing, *supra* note 5, at 7 (statement of Alan Parks).

compliance costs for its Phase 11 Section 402 storm water permitting program was between \$2,143 and \$9,646 for sites disturbing between one to five acres.²⁰⁴

While the agencies did not provide any discussion in the RFA certification of the small entities that would be affected nor the potential impacts on small entities, the agencies did discuss entities that would be affected and potential costs in the RIA.²⁰⁵ Even though the RIA inaccurately refers to the costs as indirect and is flawed,²⁰⁶ it does show that the agencies are capable of providing an assessment of the effects of the Proposed Rule.²⁰⁷ The agencies estimate that the Proposed Rule will annually cost between \$133 and \$231 million.²⁰⁸ Furthermore, the agencies identify entities landowners, energy companies, agricultural operations, transportation firms, land developers, industrial operations and local governments, that will be affected. If the agencies are able to estimate costs and identify entities affected, even under flawed conditions, then the agencies certainly could parse the data to prepare an IRFA. Given the testimony at congressional hearings, the flawed incomplete RIA data, and the costs of compliance with NPDES permits, expansion of the pivotal definition in the CWA clearly will have significant and direct effects on a substantial number of small entities. (p. 15-17)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.4 (Other CWA Programs) 14.1 (Site-specific), 7.4.4 (MS4s), and Compendium #6 for information on ditch exclusions.

11.1.308 VII. Conclusion

The Proposed Rule is fatally flawed arbitrary and capricious decisionmaking. The agencies failed to comply with the requirements of the RFA and their rationales appear to be nothing more than pretexts to avoid consideration of impacts on small businesses,

²⁰⁴ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ECONOMIC ANALYSIS OF THE FINAL PHASE 11 STORM WATER RULE ES-4 (1999). The compliance cost figures are the sum of the average best management practice costs and administrative costs. Id.

²⁰⁵ Regulatory Impact Analysis, supra note 77, at 5-7,32-33.

²⁰⁶ Id. at 5-7,32. Moreover, in the 2003 advanced notice of proposed rulemaking (ANPRM) for the definition of "waters of the United States," the agencies identified entities that "are likely to be regulated by a rulemaking based on this ANPRM." 2003 Guidance, supra note 26, at 1992. The entities identified included: local governments or instrumentalities; industrial, commercial, or agricultural entities; land developers; and landowners. Id. If the agencies were able to identify entities that were likely to be regulated by a definitional change in 2003, they could surely do so now.

²⁰⁷ Although the proposed rule will affect all CWA programs, the Regulatory Impact Analysis only used 6404 permitting data to project the increase in CWA jurisdiction. Id. at 11-12. The restriction to Section 404 makes no sense since obtaining a NPDES permit is quite expensive. Fees must be paid for such permits and such fees are not de minimis. See A. ROGER GREENWAY, HOW TO OBTAIN WATER QUALITY PERMITS 13-318 (2004) (setting out state fee structures). And the fees do not include the capital needed to modify production activities to meet the terms of the NPDES and the effluent limitation imposed by EPA to ensure that the waters of the United States are not polluted. In addition, the agencies used data from Fiscal Year 2009-2010, a time period of low construction activity following the Great Recession, which is not likely to reflect future economic activity and the need for CWA permits. Moreover, the agencies' analysis does not account for waters that have previously been assumed to be nonjurisdictional by landowners and businesses. Letter to EPA and Corps from Waters Advocacy Coalition 2 (May 13, 2014), available at <http://www.regulations.gov/j#!documentDetail;D=EPA-HQ-OW-2011-0830>

²⁰⁸ Regulatory impact Analysis, supra note 77, at 32-33.

small governmental jurisdictions and small not-for-profits as directed by Congress. Moreover, even if the agencies had complied with the RFA in its entirety and still adopted the current proposed rule, they would not achieve their objective of clarifying the scope of the CWA because the language remains vague, self-referential, and in some instances tautological. Had the agencies conducted a SBAR panel and developed an IRFA, they would have learned of the fatal flaws in the Proposed Rule. As it now stands, the Proposed Rule will clarify little, lead to significant litigation (including challenges that might prohibit enforcement against small entities²⁰⁹), and ultimately undermine the agencies' mission of protecting the waters of the United States from degradation. The only logical course for the agencies is to rescind the proposal and reissue it after fully complying with the RFA so the end result will be a logical, non-arbitrary rule that actually clarifies definitions and protects the waters of the United States. (p. 17)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

Congress of the United States (Doc. #4905)

11.1.309 The provisions to include isolated wetlands under Clean Water Act jurisdiction may yield unintended yet damaging consequences to job growth in the real estate, construction, agriculture, transportation, and energy sectors. New challenges would emerge in the form of major project permitting delays, costly resource outlays for new permit applications, and regulatory uncertainty in the administration of Corps permitting programs. We worry the impact will be felt by the entire regulated community and by average Americans, including small landowners and small businesses least able to absorb additional costs. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs).

House of Representatives (Doc. #12751)

11.1.310 Economic Impact on Farmers

The proposed CWA rule will negatively impact any individual, entity, or business that is involved in the practices taking place on land that the EPA and the Army Corps of Engineers (Corps) deem to be in a "Water of the U.S.". Specific industries subject to the rule would include farming, agri-business, home and commercial builders, manufacturers and others. Homeowners may also be subject to the regulation, depending on location and land features in, or adjacent to, their communities and their practices, such as fertilizing their yard. (p. 1)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

²⁰⁹ 5 U.S.C. 5 61 1.

United States Senator, Mark R. Warner (Doc. #18022)

11.1.311 Most cattle operations like mine are relatively small and have little or no margin to handle increased costs. The federal permitting cost and burden would be too great for many of us, therefore this regulation would have the effect of forcing many cattle ranches to sellout, losing much of the open landscape that protects water quality and provides for wildlife. While the agencies claim to have preserved the exemptions for agriculture, these are not good enough. Many of my ditches, low-lying areas and anything it seems that will hold water after a rain shower will now be a water of the U.S. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. Also see Compendium #6 for ditch exclusions.

United States Senate (Doc. #19301)

11.1.312 Under the proposed rule, more waters would become WOTUS, and as a result, fewer projects will qualify for nationwide permits. Instead, applicants will need to obtain an individual permit from the Corps. The increased utilization of individual permits will trigger more companion federal permitting processes; during these costly review procedures, consulting federal agencies are not bound by a specific time limit. Over \$1.7 billion is spent each year by the private and public sectors on administrative costs to obtain wetlands permits, without taking into account the cost of required mitigation. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), and 11.3.1 (Costs).

11.1.313 Additionally, with more WOTUS dotting the landscape, more section 404 permit will be needed. Section 404 permits are federal "actions" that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topic 11.3.1 (Costs).

United States Senate (Doc. #19305)

11.1.314 In addition, as you are aware, the Small Business Administration's (SBA) Office of Advocacy has recently, indicated that the agency's "waters of the United States" proposed rule will have severe impact for small businesses. SBA stated that the proposal will result in a "direct and potentially costly impact on small businesses" and the "limited economic analysis which [EPA and the Corps] submitted with the rule

provides ample evidence of a potentially significant economic impact."²¹⁰ We share the SBA's concern and echo their call for this rule to be withdrawn. We reiterate our call for the current proposal to be abandoned and meaningful proposal be developed that limits federal jurisdiction and provides for regulatory clarity and consistency. At a minimum, in light of the SBA's recent letter, we ask for clarification on how the current proposed rule's impacts on small businesses will be addressed. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

11.1.2.1 404

Agency Summary Response

Please see summary response to Topic 11.1.

Specific Comments

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

11.1.315 The economic analysis clearly indicates that this rule is likely to have a significant economic effect on small businesses. In the analysis, the agencies examine the anticipated changes to permitting under CWA Section 404 (development projects that discharge dredge or fill material into waters of the U.S.). They find that in current practice 98 percent of streams and 98.5 percent of wetlands meet the definition of waters of the U.S.²¹¹ under the revised definition these figures rise to 100 percent.²¹² They find zero percent of "other waters" (the seventh category in the revised definition) to be covered in current practice, but the revised definition would cover 17 percent of this category.²¹³ The agencies evidence an understanding that this increase in jurisdiction will lead to greater costs stating, "A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program; a greater share of development projects would intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits."²¹⁴ (p. 8)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General

²¹⁰ Letter from SBA to the Hon. Gina McCarthy and Maj. Gen. John Peabody re: Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014), available at http://www.sba.gov/sites/default/files/Final_WOTUS%20Comment%20Letter.pdf.

²¹¹ Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 11 (March 2014).

²¹² Id.

²¹³ Id.

²¹⁴ Id. at 13. Advocacy disagrees with the agencies' assertion that this cost is indirect (see above).

Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), and 11.4 (Other CWA Programs).

U.S. Chamber of Commerce (Doc. #14115)

11.1.316 Homebuilders and Parties in Real Estate Transactions - The uncertainty created by the WOTUS rule would also impact homebuilders and persons involved in real estate transactions.

Homebuilders would face the problem of not knowing whether the property they intend to build on is actually WOTUS. The risk of building in a WOTUS without a section 404 permit is severe,²¹⁵ and developers would have much more difficulty finding non-WOTUS areas to build in. Many properties that are not now WOTUS would become effectively off-limits to homebuilders and other developers. Moreover, as costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the home building industry will face intense competition. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or conducting compensatory mitigation. All of these adaptations must be financed by the builder and ultimately results in a combination of higher prices for the consumers and lower output for the industry. A 2002 study found that it takes an average of 788 days and \$271,596 to obtain an individual permit and 313 days and \$28,915 for a “streamlined” nationwide permit. Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.²¹⁶ Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant, ranging from an estimated \$24,989 to \$49,207 per acre nationwide.²¹⁷

Because builders and developers are generally ill-equipped to make jurisdictional determinations under the CWA, they will have to hire outside consultants and seek jurisdictional determinations from the Agencies to ensure they are not disturbing land near a WOTUS. The resulting increase in the number of jurisdictional determination requests, across all industries, will create longer permitting delays as the Agencies are flooded with paperwork. In addition, because many federal statutes tie their approval/consultation requirements to those of the CWA, the builder will have to obtain approvals from other agencies – under laws including the Endangered Species Act and National Historic Preservation Act.

Moreover, in the affordable housing sector even relatively small price increases can have a major impact on low to moderate income home buyers. As the price of a home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by the National Association of Home Builders

²¹⁵ See, e.g., *Sackett v. EPA*, 566 U.S. ___, 132 S.Ct. 994 (2012) (property owner who planned to build home and cleared land received Compliance Order from EPA asserting that the property was jurisdictional wetlands in which the owner had placed illegal fill material. The property owner was ordered to restore the site to its original condition and pay up to \$75,000 per day for the illegal discharge of pollution.).

²¹⁶ Sunding, David L. and Zilberman, David, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*. *Natural Resources Journal*, Vol. 42, No. 1, Winter 2002. At 81. Available online:

<http://are.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf>

²¹⁷ EPA, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, at 12 (March 2014), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003>.

illustrates the number of households priced out of the market for a median priced new home due to a \$1,000 price increase. Nationally, this price difference means that when a median new home price increases from \$225,000 to \$226,000, 232,447 households can no longer afford that home.²¹⁸

Similarly, current real estate owners who wish to develop or sell their land would face new restrictions on the use or sale of their land if newly jurisdictional areas are created by virtue of the WOTUS rule. Even now, a new determination that a property contains jurisdictional waters will reduce the value of real estate. A recent example is instructive of a property seller in the West who had executed a sales contract with a buyer when a Jurisdictional Determination letter from the Corps arrived. The buyer backed out of the sale and the owner was unable to sell his property. Such situations—created because of a change in the WOTUS definition—could be repeated all across the country, destroying the value of thousands of properties by virtue of administrative fiat. (p. 20-21)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFEA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.4 (Other CWA Programs), and 14.1 (Site-specific).

11.1.2.2 303 and 305

The Agencies did not identify any substantive comments under this topic area.

11.1.2.3 311

The Agencies did not identify any substantive comments under this topic area.

11.1.2.4 401

The Agencies did not identify any substantive comments under this topic area.

11.1.2.5 402

Agency Summary Response

Please see summary response to Topic 11.1.

Specific Comments

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

11.1.317 The economic analysis also singles out a particular class of businesses potentially affected by the revised definition, yet fails to evaluate any of these potential effects.

²¹⁸ NAHB, “State and Metro Area House Prices: the “Priced Out” Effect” (August 2014).

EPA acknowledges that “a large portion of traditional 402 permit holders are located nearby large water sources to support their operations.”²¹⁹ The agencies do not identify how many of these businesses may be small nor do they discuss the expected impact of this rule on them. Yet this proposed rule would directly affect those small businesses that may be located next to large water sources and which fall within the 3 percent of waters that will be newly included in the definition “waters of the U.S.” (p. 8)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA.

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

11.1.318 The impact of the inclusion of ditches in “jurisdictional waters” will dramatically increase our NPDES MS4 expenses. (p. 2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11.4 (Other CWA Programs), 7.4.4 (MS4s), and Compendium #6 for ditch exclusions.

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

11.1.319 Based upon our review of the above-referenced documents and our assessment of the impact the Proposed Rule may have on our community if implemented in its current form, Northglenn respectfully requests that the EPA and United States Army Corps of Engineers (USACE) (collectively “Agencies”):

- (1) Stay the current rulemaking process until the scientific assessment is final, the credibility of the Connectivity Report is established and the Agencies have the necessary scientific and technical foundation for the Proposed Rule;
- (2) Stay the rulemaking process until the EPA's Economic Analysis is revised and the EPA is able to conduct an accurate cost-benefit study relevant to MS4s; then
- (3) Revise the Proposed Rule based upon the findings and recommendations of the Connectivity Report and Economic Analysis and the comments submitted by stakeholders, and finally;
- (4) Conduct a negotiated rulemaking process. (p. 1-2)

Agency Response: See section 11.1 summary response for information regarding RFA/SBREFA. In addition, see summary response Topics 11 (General Cost/Benefit), 11.2 (Scope of Change of Jurisdiction), 11.3.1 (Costs), 11.4 (Other CWA Programs), and 7.4.4 (MS4s).

²¹⁹ Id.