Clean Water Rule Comment Compendium
Topic 10: Legal Analysis

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 the Agencies' legal analysis submitted by commenters. Comments have been copied into this document "as is" with no editing or summarizing. Footnotes in regular font are taken directly from the comments.

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

Topic 10. COMMENTS ON LEGAL ANALYSIS

Agency Summary Response

For the reasons articulated in the Preamble to the rule, the Technical Support Document, the Science Report, and the administrative record for the rule, the agencies conclude that the rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution.

Specific Comments

Offices of the Attorney Generals of Oklahoma, West Virginia, Nebraska (Doc. #7988)

10.1 The Agencies should reverse course immediately. As explained below, numerous features in the Proposed Rule are illegal. Under the Supreme Court's CWA cases, these aspects of the Proposed Rule exceed the statutory requirements of the CWA, the federalism policies embodied in the CWA, and the outer boundaries of Congress' constitutional authority. The Agencies should thus withdraw the Proposed Rule and replace it with a narrow, common-sense alternative that gives farmers, developers, and homeowners clear guidance as to the narrow and clearly-defined circumstances where their actions require them to obtain a federal permit under the CWA. In order to help develop that common-sense alternative, we urge the Agencies to meet with State officials, who can help the Agencies understand the careful measures the States are already taking to protect the lands and waters within their borders. (p. 2)

Agency Response: The rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and I.C. The rule provides increased clarity and certainty. Preamble, II and IV. The agencies met extensively with State officials to discuss the proposed rule. Preamble VI.E and federalism report in the docket.

Florida Department of Agriculture and Consumer Services (Doc. #10260)

10.2 The Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) have alleged that the proposed rule changes do not expand the jurisdiction of the Clean Water Act (CWA or Act). However, an initial analysis of the proposed regulations, performed by the Florida Department of Agriculture and Consumer Services (Department), indicates otherwise. The Department's analysis suggests that the Corps's jurisdictional wetland determinations will differ before and after the proposed rule is promulgated. The following comments on the legal jurisdiction of the CWA cannot reach the subject of how the EPA and the Corps (the agencies) currently interpret and enforce the CWA relative to what waters are included and, consequently, whether the current application will functionally change in response to the change in the rule. This commentary is therefore limited to (1) what the plain language states in the current rule,

(2) what the Supreme Court has held regarding the permissible interpretation of that language, taking into account Congress's authority and legislative intent, (3) how the proposed rule does not comply with the Supreme Court's holdings relative to the plain language and permissible interpretations of the statute, and (4) how the proposed rule fails to conform to general tenets of constitutional limits on Congressional power and the Supreme Court dicta in the CWA cases regarding such power. It is based upon an analysis of these subjects that the permissibility and functional consistency of the proposed rule is called into serious doubt. (p. 62)

Agency Response: **The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and I.C.**

10.3 Over the course of CWA history, the Supreme Court has ruled multiple times on the agencies' interpretations of the extent of CWA jurisdiction and the definition of "waters of the United States." See *U.S. v. Riverside Bayview Homes*, Inc., 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. U.S.*, 547 U.S. 715 (2006). It appears this rule change expands the definition of "waters of the U.S." beyond the position taken by the EPA and Corps before 2006, a stance that already led to a plurality decision by the U.S. Supreme Court in *Rapanos* regarding proper federal jurisdiction under the CWA. The regulations in effect at the time of *Rapanos*, which are currently in effect, define "waters of the United States" as:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ;
4. All impoundments of waters otherwise defined as waters of the United States under the definition;
5. Tributaries of waters indentified in paragraphs (a)(1) through (4) of this section;
6. The territorial seas;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) of this section. 33 C.F.R. § 328.3(a) (2013). (p. 63)

Agency Response: **The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and I.C.**

10.4 In *Rapanos*, a divided Court resulted in a plurality decision, with multiple concurring and dissenting opinions. The resulting ambiguity poses serious problems in anticipating how the Court will decide an issue in the future and parsing what the current status of the law is. A "plurality" occurs when a majority of the Court agrees upon an outcome (or judgment), but not upon a single rationale. Typically, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds…." *Marks v. United States*, 430 U.S. 188, 193 (1977). The applicability of this general rule is questionable in *Rapanos* because the opinions are not capable of being fit concentrically within one another. The *Rapanos* case garnered five written opinions, with four justices agreeing to the plurality rationale as written by Justice Scalia, four justices joining the dissenting opinion and rationale written by Justice Stevens, and Justice Kennedy writing a concurring opinion that uses a different rationale to reach the majority decision. 547 U.S. 715. As a consequence, some lower courts have followed Justice Stevens' approach by applying either the Scalia test or the Kennedy test. Id. Other courts have concluded that Justice Kennedy's concurring opinion is the "controlling" opinion as they view Justice Kennedy as having concurred on the narrowest grounds.

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

10.5 In the *Rapanos* opinion written by Justice Scalia, the plurality holds that the term "navigable waters" includes something more than traditional navigable waters, but the qualifier "navigable" is not devoid of significance. *Id*. at 731. "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. The limited effect of "navigable" includes, at a bare minimum, the ordinary presence of water. *Rapanos*, 547 U.S. at 734. In both *Riverside Bayview* and *SWANCC*, as well as in *Rapanos*, the Court repeatedly described navigable waters as "open waters," and no rational interpretation would allow typically dry channels to be described as "open waters." Id. at 735 (quoting *SWANCC*, 531 U.S. at 167-68, 172; *Riverside Bayview*, 474 U.S. at 132-34). The CWA itself includes these channels and conduits that typically carry intermittent flows of water in its definition of "point source." Additionally, the CWA only authorized jurisdiction over "waters" not "water," the former of which is defined narrowly as water as found in bodies forming geographical features such as streams, oceans, rivers, and lakes or the flowing or moving masses, as of waves or floods, making up such streams or bodies. *Id*. at 732. The only plausible interpretation of "waters" includes only those waters that are continuously present and fixed, "relatively permanent, standing or flowing bodies of water," rather than "transitory puddles or ephemeral flows of water," through which water only occasionally or intermittently flows, or channels that periodically provide drainage for rainfall. *Id*. at 732-33. (p. 64-65)

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

10.6 Another aspect of the proposed rule that causes concern involves the fact that jurisdictional determinations of the waters and wetlands on one individual's property may affect jurisdictional determinations on another's property. If the Corps, in performing the case-by-case analysis reserved for "other waters," finds that a property owner's waters have a significant nexus due to the rationale of being "similarly situated" with other

waters in the region that have already been determined jurisdictional, this predicates one individual's determination on another's. There is certainly a risk that such situations would be rife with inconsistency as well as potentially violative of due process by not providing adequate notice. And as the Supreme Court has held regarding notice, "clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012).

The agencies have announced in the Federal Register that the definition of "waters of the United States" under the CWA will be changed in the following locations: 33 C.F.R. Part 328 and 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. While the notice of proposed rule cites to multiple locations where the definition will be amended, the current language in several of those locations does not necessarily include all "parts" of the current, much less the proposed, definition of "waters of the U.S." If the full definition proposed by the agencies is substituted in all of the above-cited locations, the status quo will certainly not be preserved, if not functionally at least legally. It is very ambiguous what the end result of these changes would be. This uncertainty further deprives the public of adequate notice, infringing upon due process rights. (p. 74)

Agency Response: **The proposed rule provided notice of the provisions to be amended consistent with the requirements of the Office of Federal Register. As the agencies stated in the preamble to the proposed rule, the term "navigable waters" is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process. While there is only one CWA definition of "waters of the United States," there may be other statutory factors that define the reach of a particular CWA program or provision. The rule is consistent with the Constitution. Technical Support Document, I.C.**

10.7 Chief Justice Roberts' concurring opinion in *Rapanos* suggests that had the EPA and the Corps completed the rulemaking contemplated in 2003, the Court would have afforded the agencies deference when considering the limits of the agencies' power under the CWA. "Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer." *Rapanos*, 547 U.S. at 758 (discussing *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc*., 467 U.S. 837, 842-845 (1984)). The Court has also held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). For this reason and because they found the language in the Act to be clear, the Court in *SWANCC* determined that it would not extend *Chevron* deference to the "Migratory Bird Rule." *Id*.

Given the deferential standard of review, and the suggestion made by Chief Justice Roberts, it is not surprising that the agencies are attempting the current rulemaking. However, it still appears that, rulemaking or not, the agencies are not attempting to constrain "an outer bound to the reach of their authority." *Rapanos*, 547 U.S. at 758. The inclusion of a case-by-case jurisdictional analysis of "other waters, including wetlands,

provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas" expands the scope well beyond anything contemplated by Congress in passing the CWA, and does not clearly demarcate the boundary of CWA jurisdiction. (p. 75)

Agency Response: The rule demarcates the boundaries of CWA jurisdiction. Preamble, IV. The rule is consistent with the Clean Water Act and Supreme Court decisions. Technical Support Document, I.A. and IC.

10.8 It is abundantly clear, based on the foregoing, where the agencies have divined inspiration for the scope and terminology of the proposed rule. However, a scientific basis for the rule only goes so far in providing a justification for the scope of jurisdiction under the CWA. The science seems to indicate that all water will be inevitably connected and physically mixed through subsurface connection, groundwater connection, and even through the processes of evaporation, condensation, and precipitation. The agencies have extrapolated that, by virtue of that inevitable connection, the CWA authorizes regulation of all water so that every molecule of water is prevented from coming in contact with pollutants that may degrade its biological, chemical, and physical integrity, and that will then ultimately degrade other waters. However, there are legal and constitutional bounds to the federal government's reach under the CWA. (p. 77)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters, including covered tributaries and adjacent waters, and to provide that other certain waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

10.9 Congress cannot regulate outside of its constitutionally enumerated powers, which in this context is its power to regulate interstate commerce, and executive agencies like the Corps and the EPA cannot promulgate rules which extend beyond those powers or which establish jurisdiction beyond the reach of the enacted language of the CWA. The Supreme Court has held that "[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *U.S. v. Morrison*, 529 U.S. 598, 608 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 556-557 (1995)). The Court has warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* (p. 78)

Agency Response: The rule is consistent with the Constitution. Technical Support Document, I.C.

10.10 While the Supreme Court has thus far avoided addressing the subject of the extent of federal authority under the CWA, which it has generally attributed to the Commerce Clause, the Court has noted the general principle that "unless Congress conveys its

purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). In *SWANCC*, the Court explained its avoidance of the constitutional issue by noting its assumption that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," especially when the interpretation has the effect of altering the "federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172-173. The federalization of all waters by an expansion of federal power through an "increasingly generous…interpretation of the commerce power of Congress," creates "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 583-584 (1985) (O'Connor, J., dissenting). The proposed rule serves to essentially federalize all waters throughout the states, contradicting the CWA's stated purpose of preserving the states' rights to plan the development and use of land and water resources and directly infringing on the Constitution's clear limitations on federal powers. (p. 80)

Agency Response: The rule is consistent with the Constitution. Technical Support Document, I.C

State of New York, Office of Attorney General (Doc. #10940)

10.11 Third, by clarifying the scope of "waters of the United States," the proposed rule would promote predictability and consistency in the application of the law, and in turn help clear up a confusing body of case law that has emerged. Since the Supreme Court's plurality decision in *Rapanos v. United States,* 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain CWA jurisdiction, with some courts adopting Justice Kennedy's significant nexus test, some adopting the plurality's test, and some tending to defer to the agencies' fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for Agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act's application. The proposed rule's clear categories of waters subject to the Act would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would be of benefit to the states because it would ease some of the administrative burden of having to make many fact-based determinations employing uncertain tests. In this regard, in the rulemaking the agencies have requested comments as to how a final rule could ease that burden further. For these reasons we express our support for EPA's and the Corps' proposed rules defining the scope of waters protected under the CWA, and urge its promulgation by the agencies.(p. 2-3)

Agency Response: The agencies agree.

Texas Comptroller of Public Accounts (Doc. #10952)

10.12 While I appreciate the Agencies' attempts to provide more regulatory certainty and to reduce delays, this proposal does not appear to achieve these goals, and the methodology used to accomplish them is legally problematic. The Agencies are implementing a two-

pronged approach to determining Federal jurisdiction: 1) using Justice Kennedy's significant nexus standard set forth in *Rapanos,* the Agencies deem certain categories of waters, specifically tributaries to navigable waters, interstate waters, or the territorial seas, and their adjacent waters and wetlands, jurisdictional by rule because, according to the Agencies, these types of water bodies *always* have a significant nexus to those waters traditionally regulated by the Agencies; and 2) determining whether "other waters" are WOTUS using the same significant nexus analysis on a case-by-case basis. The proposal exceeds the scope of the law as presented in the Kennedy, dissenting, and plurality opinions in *Rapanos.*

The threshold question is whether it is reasonable to apply Justice Kennedy's significant nexus standard (which he applied only to "adjacent wetlands") to other specific categories of water bodies, such as all waters adjacent to tributaries of traditional navigable waters, interstate waters, or wetlands, and whether it is appropriate to use that test to automatically deem *all* adjacent waters (including wetlands) jurisdictional by rule? The answer requires a brief review of three of the pertinent opinions in *Rapanos* case.

First, Kennedy did not conclude in *Rapanos* that *all* adjacent waters should or could be automatically deemed jurisdictional. While Kennedy points out the importance of wetlands to WOTUS throughout his opinion (e.g., they "can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage"), he does not conclude that all adjacent wetlands, therefore, should be considered per se jurisdictional. Indeed, Kennedy mentions several fact-based scenarios where jurisdiction might not attach. For example, the "mere adjacency to a tributary is insufficient as a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it." He also states that the "quantity and regularity of flow in the adjacent tributaries may be important in assessing nexus." Finally, he notes that "mere hydrologic connection should not suffice in all cases." Kennedy simply remanded the case to the Court of Appeals for "consideration whether the specific wetlands at issue possess a significant nexus with navigable waters." The Kennedy opinion does not stand for and would not appear to support blanket jurisdiction as proposed in the Agencies' rule. (p. 3-4)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is based on the agencies' determination of significant nexus. Preamble, III, and Technical Support Document, I.C. and II.

10.13 In support of their methodology, the Agencies point to the dissenting opinion in *Rapanos,* saying "the four dissenting Justices in *Rapanos* would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluding that the term 'waters of the United States' encompasses....all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy." However, the dissent does not support blanket or per se jurisdiction of *all* adjacent waters under all circumstances; it merely concludes that either standard is an appropriate mechanism for determining jurisdiction under the facts provided. Because neither the plurality nor the Kennedy opinion support blanket jurisdiction, the Agencies should not rely on this dissenting opinion as rationale for such a significant rule change. (p. 4)

Agency Response: **EPA determined that covered adjacent waters are "waters of the United States" based on its review of the scientific literature and consistent with Supreme Court decisions and the caselaw. Preamble, III and VIII, Technical Support Document, I.C.**

10.14 Finally, this method is also unacceptable under the Plurality standard, which generally concluded that the CWA confers jurisdiction only over waters containing a relatively permanent flow and those adjacent wetlands possessing a continuous surface connection. (p. 4)

Agency Response: **The rule is consistent with Supreme Court decisions and the caselaw. Technical Support Document, I.C.**

Georgia Department of Agriculture (Doc. #12351)

10.15 The goal of this revision is to clarify confusion relating to the scope of the CWA. However, GDA has serious concerns about the consequences that accompany the rule as proposed. Under the new rule, EPA jurisdiction will be expanded to include all waters defined as "other waters" with a "significant nexus" to navigable waters, and to the tributaries of these waters. The term "significant nexus" is not defined in the ruling by Justice Kennedy in *Rapanos v. United States*. As such, the agencies have taken it upon themselves to decide how the term is applied. GDA believes it the responsibility of regulatory agencies to enforce the law through rules and regulations, not to create the law through rules and regulations. (p. 2)

Agency Response: **This rule is promulgated pursuant to Section 501 of the CWA and is consistent with the statute and .and Supreme Court decisions. Technical Support Document, I.A. and C.**

Department of Justice, State of Montana (Doc. #13625)

10.16 We are a headwaters state blessed with waters of exceptional quality, and the people of Montana have taken steps to fully protect that priceless resource for ourselves, our downstream neighbors, and all of our progeny. Those steps begin with our state constitution, which declares "[A]ll surface, underground, flood, and atmospheric waters within the boundaries of the state" to be the property of the state for the use of its people, (Mont. Const. art. IX, §3(3)), and requires the legislature to "provide adequate remedies for the protection of the environmental life support system from degradation" and to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Cont. art. §1(3). These constitutional safeguards are implemented by means of the Montana Water Quality Act, Mont. Code Ann.75-5-101, *et seq*., a comprehensive water quality protection law enacted in 1971. The Montana Board of Environmental Review has promulgated regulations to implement the legislation, and the statutes and the regulations are implemented by the Montana Department of Environmental Quality.

Your proposal states at least twice (Federal Register, Vol. 79, No. 76, at 22189,22192) that, pursuant to the U.S. Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the CWA in the proposed rule is narrower than that under the existing regulations. It appears this remarkable assertion is based on the observation, at page 22192, that the proposal would delete the "all other waters" subsection in the rule.

However, the rules which would replace the deleted subsection, including the provisions containing new definitions for "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus", as well as providing for inclusion of "other waters" on a case-by-case basis, appear clearly to extend jurisdiction of your agencies far more broadly, As I read the proposed rules, CWA jurisdiction would extend upgradient from traditional navigable waters into the lands of our State, no matter how remote from traditional navigable waters, which host occurrences of water that, due to gravity, could conceivably end up in a traditional navigable water. (p. 1-2)

Agency Response: **The rule is narrower in scope than the existing regulations. Technical Support Document, I.B.**

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

10.17 Pennsylvania is concerned that under the proposed rule, the agencies' authority to assert jurisdiction is limitless. The proposed rule confuses Federal control with environmental protection. Where in the past, jurisdiction was based on a sitespecific analysis, the proposed rule creates broad categories of waters that would now be considered jurisdictional by rule. For example, under the proposed rule, remote features on the landscape that carry only minor water volumes (e.g. ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, and man-made drainage ditches), would now automatically be subject to federal CWA jurisdiction.

In addition, under the proposed rule, waters and wetlands are regulated if they are "located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have "a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[1] The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval.[2] The proposal also fails to provide the limits of"shallow subsurface hydrological connections" that can render a feature jurisdictional but instead leaves that analysis to the best professional judgment of the agencies.[3]

Inconsistent with the limits established by Congress and recognized by the Supreme Court, the proposed rule creates sweeping jurisdiction based on connections under newly devised theories such as "any hydrological connection," "significant nexus," "aggregation," and new definitions and key regulatory terms such as "tributary," "adjacent waters," and "other waters." Through use of the broad definition of"tributary" the agencies will extend jurisdiction to any channelized feature, (e.g., ditches, ephemeral drainages, stormwater conveyances), wetland, lake or pond that directly or indirectly contributes flow to navigable waters, without any consideration of the duration or frequency of flow or proximity to navigable waters.[4]

The rule also proposes to expand "adjacent waters," to include any wetland, water, or feature located in an undefined floodplain or riparian area, or that has a sub-surface

[1] 79 Fed. Reg. at 22,262·63.
[2] *Id*. at 22,208.
[3] *Id*.
[4] 79 Fed. Reg. at 22, 201.

hydrologic connection to navigable waters.[5] A new catch-all "other waters" category would include isolated waters and wetlands that, when aggregated with all other wetlands and waters in the entire watershed, have a "more than speculative or insubstantial" effect on traditional navigable waters.[6] Under the proposed rule, ditches, groundwater and erosional features (i.e., gullies, rills, and swales) can serve as a subsurface hydrological connection that would render a feature a jurisdictional "adjacent water" or demonstrate that a feature has a "significant nexus" and is therefore a jurisdictional "other water."[7] Such far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow was not what Congress intended and goes far beyond even the broadest interpretation of recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (200 1) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006). (p. 5-6)

Agency Response: **The rule demarcates the boundaries of CWA jurisdiction. Preamble, IV. The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

U.S. House of Representative Committee on Small Business (Doc. #14751)

10.18 Judicial interpretations of the RFA do not support the conclusion that the Rule only indirectly affects small entities. The agencies also appear to have concluded that small entities are affected only indirectly by the Proposed Rule because they cite a series of cases where the United States Court of Appeals for the District of Columbia ("D.C. Circuit") has concluded, for the purposes of RFA compliance, that an agency need not assess the effects of a regulation on small entities or on a particular group of small entities if they are not subject to the regulation.[8] However, the agencies are incorrect and the regulations that were challenged in those cases can be distinguished from the Proposed Rule.

In *Mid-Tex Elec. Coop., Inc. v. FERC*, the D.C. Circuit determined that the Federal Energy Regulatory Commission (FERC), which had promulgated a rule that regulated the wholesale rates of electric utilities, was not required to assess the rule's effects on retail customers of the utilities since FERC was only regulating wholesale sales.[9] Similarly, in *Cement Kiln Recycling Coalition v. EPA*, the D.C. Circuit concluded that the EPA was not required to assess the effects of a rule that regulated the emissions of hazardous waste combustors on hazardous waste generators because only hazardous waste combustion was being regulated.[10] This precept, that the RFA applies only to situations in which an agency directly imposes regulatory burdens on entities, was followed in a number of cases concluding that the development of national ambient air quality standards (NAAQS) under the Clean Air Act did not impose any regulatory burdens on small entities since activities of those entities were not circumscribed by EPA's development of

[5] *Id*. at 22,206.
[6] *Id*. at 22,211.
[7] *Id*. at 22,219.
[8] 79 Fed. Reg. at 22,220.
[9] 773 F.2d 327, 340-43 (D.C. Cir. 1985).
[10] 255 F.3d 855, 868-69 (D.C. Cir. 2001).

NAAQs but rather in rules imposed by states to achieve the NAAQS.[11] The situation of the Proposed Rule is quite distinguishable from the inapplicability of the RFA to retail electric customers, hazardous waste generators or the adoption of NAAQS by EPA.

The Proposed Rule will change the scope of waters subject to the jurisdiction of the CWA. That means small entities will have to obtain permits under§§ 402 and 404 of the CWA in situations in which they previously would not have needed to seek permits for their activities. Thus, the scope of a small entity's activities is circumscribed by the rule which is quite distinct from the indirect effects cases cited by the agencies in which the rules imposed no potential limitations on the actions of small entities.

Nor is the agencies' argument that the Proposed Rule only indirectly regulates small entities any more availing because small entities would have to subsequently obtain a permit in a later proceeding. In *Nalional Ass 'n of Home Builders v. Army Corps of Eng 'rs*[12] ("*Home Builders*"), the Corps' issuance of certain nationwide permits (NWPs) under§ 404 of the CWA were challenged.[13] The Corps reduced the number of acres for which it would issue a NWP without providing public notice and an opportunity to comment. [14] The Corps argued that modification in scope of the NWP did not require compliance with the RF A because the modification was not a rule since the only time an entity would be affected was when it had to apply for an individual permit.[15] The D.C. Circuit roundly rejected that argument. The court first held that the modification of the standards for obtaining the NWP was a rule since entities would have to modify their behavior (which permit to seek) based on the change.[16] The court then determined that small entities were directly affected because they would need to modify their projects to meet the new NWP or obtain an individual permit.[17]

The logic of the court in *Home Builders* could not be more clear in the Proposed Rule. By changing the fulcrum on which the CWA rests, the agencies are either permitting or delimiting activity that prior to the change would not have fallen within the scope of the CWA. As a result, small entities may be required to obtain permits, that prior to the change, they would not have. And the *Home Builders* court forecloses the argument that obtaining permits saves the agencies from the rule-like nature of imposing obligations

[11] *Michigan v. EPA*, 213 F.Jd 663, 688-89 (D.C. Cir. 2000); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1043-45
(D.C. Cir. 1999), afl'd in part and rev 'din part on other grounds sub nom., *Whitman v. American Trucking Ass 'ns*, 531 U.S. 457 (2001).
[12] 417 F.3d 1272 (D.C. Cir. 2005).
[13] *Id*. at 1277-78. The Corps may issue general (state, regional or nationwide) permits for similar activities that when performed separately will cause only minimal environmental effects. 33 U.S.C. § 1344(e). General permits may not be issued for a period of more than five years. Id. The Corps may also issue "individual permits" on a case-by-case basis. *Id*. at § 1344(a).
[14] 417 F.3d at 1276-77, 1284-86. This meant that entities would have to seek and comply with more detailed rules on individual permits rather than relying on their actions falling under the general categorical nature of a NWP.
[15] *Id*. at 1282, 1285.
[16] *Id*. at 1284. "[Entities} must either modify their projects to conform to the NWP thresholds and conditions (as the Corps contemplates they will do) or refrain from building until they can secure individual permits. The NWPs therefore affect the [entities'] activities in a 'direct and immediate' way." *Id*.
[17] *Id*. at 1284-85.

directly on small entities.[18] As a result, the definitions changing the scope of the CWA by regulation requires compliance with the RFA-either preparation of an IRFA or the provision of an adequately based certification. The agencies have done neither. (p. 13-14)

Agency Response: The agencies have complied with the requirements of the RFA. Preamble, VI.C. and Response to Comments, Compendium 11.1.

State of Oklahoma (Doc. #14773)

10.19 [T]he proposed WOTUS rule basis continues to be Justice Kennedy's concurring opinion in Rapanos, using the "significant nexus" test to determine if a stream meets the WOTUS definition. This presents a unique standard that will continue to require an individual determination of whether or not a stream is a WOTUS. By implementing this option, the Agencies will continue to allow discrepancies from one part of the country to the other. Jn order to promote better use of resources and bring more consistency to the permitting process, I recommend you base the final rule off the plurality opinion in the Rapanos case. Quoting Justice Scalia, WOTUS should " ... include only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' ... ". This definition based on "relative permanence" would afford much more delineation of jurisdictional waters, which would help reduce the scope of federal jurisdiction in favor of traditionally delegated state regulation. It would also better allow the Agencies to develop clear maps identifying the separation between the WOTUS and Waters of the State. (p. 2-3)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C. The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty by, for example, including new definitions, providing explicit exclusions, and only authorizing the agencies to make case-specific determinations in certain circumstances. Preamble, II and IV, and Technical Support Document, I.B. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters almost exclusively in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination. Determination and mapping of all "waters of the United States" would be prohibitively expensive and intrusive.

Arctic Slope Regional Corporation (Doc. #15038)

10.20 Congress intended the land grant in ANCSA to provide for economic development for the benefit of all Alaska Natives. The House Report made this intention clear: When determining the amount of land to be granted to the Natives, the Committee took into consideration . . . the land needed by the Natives as a form of capital for economic development.[19] Moreover, Congress' "economic development" intent expressly included mineral development. The Committee Report stated that the Regional Corporations will: each share equally in the mineral developments. The mineral deposits . . . [are] included

[18] The analysis of the agencies is particularly galling since the *Home Builders* involved one of the agencies that issued the Proposed Rule.
[19] H.R. Rep. 92-523 at 5 (September 28, 1971); 1971 U.S.C.C.A.N. 2192, 2195 (emphasis added).

as part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.[20] In *City of Angoon v. Marsh,*[21] the Ninth Circuit addressed the conflict between resource development on ANCSA and ANILCA[22] lands and land use restrictions that would prohibit such resource development (in that case, federal designation of a national monument including the lands at issue and a federal statutory prohibition on the sale or harvest of timber "within the monument"). Noting that the land conveyance to the Alaska Native Village Corporation of Shee Atiká, Incorporated was for the "economic and social needs of the Natives,"[23] the court stated that "it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands so conveyed."[24] The Ninth Circuit Court of Appeals further concluded that the District Court's contrary interpretation of legislation "would defeat the very purpose of the conveyance to Shee Atiká . . . ."[25] In Koniag, Inc. v. Koncor Forest Resource Management Co.,[26]the Ninth Circuit reaffirmed congressional intent for to resource development by Native Corporations. Quoting the House Report cited above, the Ninth Circuit stated: ANCSA's legislative history makes clear that Congress contemplated that land granted under ANCSA would be put primarily to three uses – village expansion, subsistence, and capital for economic development. See H.R. Rep. 92-523 at 5, 1971 U.S.C.C.A.N. at 2195. Of these potential uses, Congress clearly expected economic development would be the most significant: The 40,000,000 acres is a generous grant by almost any standard. . . . The acreage occupied by the Villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, most of it will be selected for its economic potential. *Id*. (emphasis added). See also *Chugach Natives, Inc. v. Doyon, Ltd*., 588 F.2d 723, 731 (9th Cir. 1978). While the Act itself does not speak directly to this congressional expectation, it is reflected in ANCSA's requirement that Natives form corporations to receive and administer the land they receive. There would be little purpose in this requirement if Congress did not expect Natives to benefit from the economic development of their land.[27] In short, Congress's stated purpose of granting lands to Alaska Natives (to develop their own economic well-being on their own lands) will be substantially and

[20] Id.
[21] 749 F.2d 1413 (9th Cir. 1984), later proceedings at Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), cert. denied, Angoon v. Hodel, 484 U.S. 870 (1987).
[22] The Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 410hh - 410hh-5, 460mm - 460mm-4, 539-539e and 3101-3233, also 43 U.S.C. §§ 1631-1642; December 2, 1980, as amended.
[23] The Congressional findings included in ANCSA, 43 USC § 1601(b) state:
[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property .
[24] Id. Page 8
[25] Id. at 1418. These issues appeared again in City of Angoon v. Hodel. The Ninth Circuit affirmed its decision in City of Angoon v. Marsh that Congress would not intend to take away the economic use of property conveyed under ANCSA and ANILCA.
[26] 39 F.3d 991 (9th Cir. 1994).
[27] Id. at 996-97 (emphasis added).

unfairly eroded if the Proposed Rule is allowed to go into effect in its present form. (p. 8-9)

Agency Response: The scope of ANCSA and ANILCA is not affected by this rulemaking.

San Carlos Apache Tribe (Doc. #15067)

10.21 The U.S. Supreme Court has rejected the expansion of administrative authority into areas which are traditionally matters of state, tribal or local concern, despite a possible connection to interstate commerce. In *SWANNC*, Chief Justice Rehnquist "reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWAANC*, 531 U.S. at 172-173 (2001). Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. *Id*. (Citations omitted.) Congress declared its intent in the CWA to "recognize, preserve, and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. §1251(b). The proposed rule violates the clear intent of Congress as set forth in 33 U.S.C. §1251. (p. 5)

Agency Response: The rule is consistent with the Clean Water Act and the decisions of the Supreme Court. Technical Support Document, I.A and .C.

Samuel T. Biscoe, County Judge (Doc. #4876)

10.22 The definition of "waters of the United States" appropriately conforms to recent Supreme Court decisions. The rule neither narrows nor expands the scope of federal Clean Water Act programs. (p. 1)

Agency Response: The final rule is consistent with the decisions of the Supreme Court and is narrower in scope than existing regulations. Technical Support Document, I.B. and C.

Bonner County Board of Commissioners (Doc. #4879)

10.23 The U.S. federal court system has made it clear that the EPA and USACOE had acted beyond fair or reasonable boundaries of jurisdiction while defining "Waters of the U.S". It is extremely unreasonable for local communities, state land managers, or federal agencies to expand these jurisdictions the courts determined were excessive or unclear. (p. 2)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

Monroe County, New York (Doc. #5555.1)

10.24 These additional regulations, beyond significant costs and delays to taxpayers of Monroe County, have little, if any, substantive environmental benefit while diverting limited resources from other programs that do provide environmental protection. For this reason,

Monroe County believes that any alterations to the CW A should originate in Congress and not in the overreach of the Administration. (p.1)

Agency Response: The agencies have concluded the benefits of the rule exceed the costs. Preamble, V and Economic Assessment in the docket. This rule is promulgated pursuant to Section 501 of the CWA.

Karnes County Soil and Water Conservation District (Doc. #6793)

10.25 First, the definition as proposed is illegal based on the Commerce Clause of the U.S. Constitution, the framework and goals of the CWA, Congressional intent and Supreme Court rulings. Each places a limit on federal jurisdiction over the nation's waters. Currently, your proposed rule has practically no limit whatsoever. (p. 1)

Agency Response: The rule demarcates the boundaries of CWA jurisdiction. Preamble, IV. The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

County of Butler, Board of Commissioners (Doc. #6918.1)

10.26 Federal jurisdiction should not regulate state and local government jurisdiction land use for farmers and individuals. Federal jurisdictional oversight has no place restricting activities around small creeks and streams, including pathways and ditches carrying water during rainfall. This is a massive joint regulatory agency undertaking without support from a comprehensive direct impact investigation and input from state and local governments in violation of Constitutional federalism mandates. Upon reading the proposed rule and Supreme Court cases relied on by the EPA and the Corps, the proposed rule is based on a misreading, misinterpretation and misapplication of tile Supreme Court's decision in *Rapanos v. United States,* consolidated with *Carabell v. United States Army Corps of Engineers* (547 U.S. 715, 2006). The proposed rule severely broadens and extends agency regulatory jurisdiction where the Supreme Court determined both Agencies exceeded regulatory authority. The *Rapanos* Court interpreted "waters of the U.S." under the Clean Water Act (CWA) and set forth clarifications regarding the erroneous applications and misunderstandings in both the concurring and dissenting opinions cited by the EPA and Corps in their proposed rule. (p. 2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.27 Regulation, regulation and more regulation-- will it ever stop? Not only is permitting regulation extremely costly, the proposed rule and its regulatory expansion violates Constitutional law, exceeds statutory authority, negates Congressional intent and ignores Supreme Court directives. The *Rapanos* case involved §404 of the CWA and §301 (a) requiring persons wishing to discharge dredged or fill material into "navigable waters" to obtain a permit from the Corps regarding two (2) "adjacent wetlands." *Rapanos* involved whether the CWA's jurisdictional reach extended to non-navigable wetlands that do not abut navigable water. *Carabell* involved whether §404 permitting extended to "wetlands hydrologically isolated from any of the "waters of the U.S." And if so, would such jurisdiction exceed Congress' power under the Commerce Clause? The *Rapanos* Court's remand directives to the Sixth Circuit were clear:

> "because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered 'waters of the U.S.,' and because of the paucity of the record in both of these cases, the lower courts should determine . . . whether the ditches or drains near each wetland are 'water' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that created tile boundary drawing problem we addressed *in United States v. Riverside Bayview*." (474 U.S 121, 1985).

Despite the *Rapanos* Court wanting the lower Court to decide the issues, the Sixth Circuit Court remanded the case to the "District Court with instructions to remand to the Corps for further proceedings consistent with the Supreme Court's decision in *Rapanos*." Even the Sixth's Circuit's remand order is in direct opposition to tile Supreme Court's directive. Wily was tile remand given to a party-opponent to decide tile issues instead of the District Court? Now, the EPA and Corps' proposed rule modifies existing regulations by expanding the scope of CWA's regulatory implementation in place for the last twenty-five (25) years through a misdirected and dissected incorporation of Supreme Court decisions. In *Rapanos,* the Supreme Court set forth the historical interpretation of the definition of "waters of the U.S." and indicated the Corps had expansively over broadened its interpretation and exceeded regulatory authority. (p. 2-3)

Agency Response: The remand order of the Sixth Circuit is outside the scope of this rulemaking. The rule is narrower in scope than existing regulations. Technical Support Document, I.B. The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

10.28 Given the *Rapanos* Court's clear opinion interpreting "waters of the U.S.," the expansive scope of the EPA and Corps' self-regulatory authority under the proposed rule is quite disconcerting especially when you review the rule's "discussion of major conclusions" which sets the tone for its expansive implementation rationale. Throughout the proposed rule, the EPA and Corps rely on issues raised by the dissenting opinion in *Rapanos* which the Court showed to be "short on analysis of the statutory text and structure." The Supreme Court clarified "it was not willing to broaden tile definition of "waters of tile U.S." The dissenting opinion and self-regulating proposed rule would hold that "the waters of the U.S. include any wetlands "adjacent" (no matter how broadly defined" to "tributaries" (again, no matter how broadly defined) of traditional navigable waters." The dissent relied on the *Riverside Bayview* opinion and Congress' deliberate acquiescence in the Corps 1977 regulations. However, the *Rapanos* Court stated "each of these is demonstrably inadequate to support the apparently limitless scope that the dissent would permit tile Corps to give the Act." The Supreme Court determined Agency jurisdiction was broader in scope and expanded jurisdictional federal control beyond tile CWA §404 permitting process. By this proposed rule, the EPA and the Corps exceed jurisdictional authority by attempting regulatory implementation expansion beyond the Supreme Court's limitations in *Rapanos* which will significantly increase the number of public infrastructure ditches under federal jurisdiction applicable to all CW A programs, not just permitting. If a project is determined to be jurisdictional, the rule will impact other regulatory programs, including §402--storm water management program and §401--water quality certification. For example, federal laws and environmental impact statements

would be triggered such as the National Environmental Policy Act and impacts under the Endangered Species Act. Other impacts pertaining to CWA programs under §303 Water Quality Standards, the National Pollutant Discharge Elimination System, total maximum daily load and other water quality standards programs will be realized. (*State water quality certification or Spill Prevention, Control and Countermeasure programs have not been analyzed.*) Such expansive regulatory implementation was not Congress' intent under statutory language or established Supreme Court precedent. Citing *Riverside Bayview*, the *Rapanos* Court clearly noted the dissent's acceptance of the Corps' inclusion of dry beds as tributaries was implausible as was acceptance of the Corps' definition of "adjacent" which extended beyond reason to include the 100 year flood plain of covered waters. The *Rapanos* Court further noted the dissenting opinion with its "exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters' of the U.S." Ultimately, the *Rapanos* Court was clear tile Corps exceeded their authority and from its opinion was not going to broaden the definition of "waters of tile U.S. Specifically, the Court quoting *SWANCC*, stated "we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." The *Rapanos* Court admonished the dissenting opinion and limited the Corps' authority (the same authority the Corps is attempting to broaden by this proposed rule) by clearly stating:

> "'[W]aters of the U.S.' is in some respects ambiguous. The scope of that ambiguity, however, does not conceivably extend to whether storm drains and dry ditches are 'waters,' and hence does not support the Corps' interpretation. And as or advancing 'the purpose of the Act': we have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textural limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations."

The dissent noted "whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges." In the only point of agreement with the dissent, the *Rapanos* Court went on to state "neither…should it be answered by appointed officers of the Corps of Engineers in contradiction of congressional direction." The Court's opinion is quite clear about regulatory agencies exceeding statutory authority. The EPA and Corps missed the entire point of the *Rapanos* Court's interpretation given the proposed rule's extensive reliance on the dissenting and concurring opinions. Specifically, the Court found the dissenting opinion "failed to provide overwhelming evidence that Congress considered and failed to act upon the 'precise issue' -- what constitutes an 'adjacent' wetland covered by the Act."

The proposed rule also attempts to expand regulatory implementation by citing Justice Kennedy's concurring opinion which the *Rapanos* Court considered a misreading of *SWANCC*'s "significant nexus" and in "utter isolation of the Act." The EPA and the Corps' case by case determination of "significant nexus" was clarified by the *Rapanos* Court, quoting the *Riverside Bayview* Court, who "explicitly rejected such case by case determinations of ecological significance for the jurisdictional question whether a wetland is covered, holding instead that all physically connected wetlands are covered…Likewise, that test cannot be derived from *SWANCC's* characterization of *Riverside Bayview*, which emphasized the wetlands which possessed a 'significant nexus'

in the earlier case 'actually abutted on a navigable waterway and specifically rejected the argument that physically unconnected ponds could be included based on their ecological connection to covered waters .... "Wetlands are waters of the U.S if they bear the 'significant nexus' of physical connection, which makes them as a practical matter indistinguishable from waters of the U.S."

Our government consists of three (3) separate and distinct branches-Executive, Legislative and Judicial. The purpose of this governmental process creates a checks and balance system of oversight protection. In this particular case, regulatory agencies are performing both legislative and judicial interpretation functions. Unilaterally extending an agency's regulatory powers to legislative and judicial authority is quite disturbing. This is especially troubling given the fact the Supreme Court in two (2) cases raised questions about which waters fall under federal jurisdiction. In *SWANCC*, the Corps used the "Migratory Bird Rule" (wherever a migratory bird could land) to claim federal jurisdiction over an isolated wetland. The Court ruled the Corps exceeded their authority and infringed on states' water and land rights. In *Rapanos* the Corps was challenged over their intent to regulate isolated wetlands under the CWA §404 permit program. The Court ruled tile Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion stated that only waters with a relatively permanent flow should be federally regulated. Until the Legislature or the Supreme Court clearly defines waters under federal jurisdiction, the matter is not within regulatory agency expansion. In both cases, the Court determined the regulatory agency exceeded its authority. (p. 7-8)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

10.29 Based on the Supreme Court's interpretation and reasons set forth in its analysis, the EPA and Corps should withdraw their draft guidance and proposed definitional expansion of regulatory implementation. Furthermore, given the recent passing of proposed legislation HR 5078-Waters of the United States Regulatory Overreach Protection Act of 2014 by the House of Representatives on September 9, 2014, which mandates the withdrawal of the proposed rule, the EPA and Corps, should voluntarily withdraw their joint proposed rule and proceed with the directives of the legislation. (p. 9)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C. The agencies comply with enacted laws.

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

10.30 Highlighted portions of National Association of Counties Policy Brief should be included. (p. 3)

Agency Response: The commenter did not include a highlighted version of the National Association of Counties Policy Brief and therefore did not provide specific issues for the agency to consider in the rulemaking. Comments submitted by the National Association of Counties are responded to in the Response to Comments Document.

Murray County Board of Commissioners (Doc. #7528.1)

10.31 The newly proposed rule offers new language and terms that depart from the nomenclature used in the Clean Water Act, historical regulations, and existing case-law precedence. The proposed rule therefore is challenging to synthesize with existing case law. (p. 2)

Agency Response: The rule does include new terms and definitions; they are consistent with the statute and the caselaw. Technical Support Document, I.A and C.

10.32 We oppose the replacement of "adjacent wetlands" with "adjacent waters" and believe that this proposal is not legally supported by the Clean Water Act and its case law. As proposed, this section of the rule represents the largest expansion of jurisdiction by the agencies over regulated waters.

In *Riverside Bayview* Homes, the Supreme Court explained that Congress's concerns over restoring the integrity of navigable waters could reasonably conclude that "regulation of at least some discharges into wetlands" adjacent to navigable waters is permitted by the Clean Water Act. See *US v. Riverside Bayview Homes, Inc*., 474 U.S. 121 , 137 (1985). In *SWANCC*, the Court rejected extension of jurisdiction to wetlands not adjacent to navigable waters, stating, "It was the significant nexus between wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview* Homes." *Solid Waste Agency of N. Cook Cnty. v. US Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001). In *Rapanos*, Justice Kennedy recognized that the limit of the agencies' powers over adjacent wetlands is set by a determination of the wetlands significant nexus to navigable water. *Rapanos v. U.S*, 547 U.S. 715, 759 (2006). (p. 6)

Agency Response: The rule is narrower in scope than the existing regulation, and the rule is consistent with the statute and Supreme Court decisions. Technical Support Document, I.A., B., and C

Southeast Texas Groundwater Conservation District (Doc. #8142)

10.33 It is the belief of the Board that the United States Congress, not individual federal agencies, should make substantive changes in the laws of our nation. Any such changes in jurisdiction of the federal government should only result from Congressional action. (p. 1)

Agency Response: This rule is promulgated pursuant to Section 501 of the CWA. .

La Plata Water Conservancy District (Doc. #8318)

10.34 Accordingly, the LPWCD respectfully requests that the Agencies withdraw the proposed Rule and draft a new rule that (1) lawfully adheres to the plurality opinion of the Supreme Court in *Rapanos* and asserts jurisdiction on much narrower, more predictable grounds. (p. 2)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C. The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV.

Southeast Texas Groundwater Conservation District (Doc. #8419.1)

10.35 Additionally, it is the belief of the Board that the United States Congress, not individual federal agencies, should make substantive changes in the laws of our nation. Any such changes in jurisdiction of the federal government should only result from Congressional action. (p. 1)

Agency Response: Agency Response: This rule is promulgated pursuant to Section 501 of the CWA.

Beaver County Commission (Doc. #9667)

10.36 …the CWA directs the Environmental Protection Agency, the Army Corps of Engineers and other federal agencies to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, other federal laws require federal agencies to disclose information related to the effects of their actions on the American public. We feel that the Agencies do not meet this requirement with the proposed rule and further, that the Agencies have engaged themselves in an effort to sway the public into supporting a new definition of the WOUS that the Agencies have determined is necessary but is independent of what is intended or presented in the CWA. This effort to gain support for an unnecessary new definition of the WOUS is carried out despite a recent Supreme Court decision that clearly defines the WOUS. (p. 2)

Agency Response: The agencies promulgated the rule consistent with all requirements. Preamble, VI. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

10.37 The title of the proposed rule clearly states that the subject matter is the definition of a term, "Waters of the United States". The purpose of such a definition is declared to be to define the scope of waters that are protected under the CWA. However, the most significant and the most looming gorilla in the room associated with the Agencies' proposed regulatory definition is that there is no valid or justifiable need or purpose in redefining "waters of the United States", and that the actual purpose of the proposed rule is not to create a definition but to mask a tremendous expansion of the scope of CWA protected waters.

The task of establishing the parameters of the scope of responsibility for the Agencies that will enable them to carry out their missions[28] cannot be accomplished by proposing to redefine a term that already has a well-understood meaning in the English language. The Agencies, in couching the proposed rule as a request for unnecessary and inappropriate redefinitions of that and multiple additional terms, beg the question of actual intent for doing so.

[28] The EPA mission is to protect human health and the environment. http://www2.epa.gov/aboutepa. The mission of ACE is to "Deliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters." http://www.usace.army.mil/About/MissionandVision.aspx Summary of the Clean Water Act 33 U.S.C. §1251 et seq. (1972)
The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. http://www2.epa.gov/laws-regulations/summary-clean-water-act.

The Agencies have stated in the Federal Registry that there is a need for adopting a formal statement of the meaning or significance of the phrase "waters of the United States". The Agencies stated that the need for this proposed rule was because the scope of CWA protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006.

A regulatory definition, ideally, would be consistently and systematically used by the Agencies when interpreting and implementing the Clean Water Act (CWA). The Agencies' proposal that the definition of "waters of the United States" be defined masks the fact that no such new definition is needed or even wanted by the Agencies. In fact, the Agencies would be delighted for the public to accept "waters of the United States" at face value.

This approach is a "bait and switch" process based on confusion caused by self-referential internal definitions within the proposed rule, making any real definition of any term nearly impossible. The proposed rule is presented with an ultimate objective of substantially increasing the scope of waters protected by the CWA (the switch) as a consequence of getting the public to agree to using the term "waters of the United States" at face value meaning.

The bait is the pretense that a real rule change is being proposed to meet legal requirements for public notice and mandated public hearings (the bait), while bypassing not only the objective of public notice and public discussion on the actual rules, but avoiding the scrutiny of the legislative and judicial eyes (enabling the switch).

Any ordinary speaker of the English language understands "waters of the United States" to mean, in plain writing and common use, "all waters located within the territorial boundaries of the United States". None of the words are hard to comprehend, and the use of this type of phraseology is common to native speakers of the English language (e.g., "riders of the purple sage", "ranchers of the western states", "farmers of the Midwest", "speakers of the English language"). It is a non-specific term that does not exclude any specific kinds of water to be found within the United States (or, e.g., riders to be found riding the purple sage, etc).

No matter what definition could come about from the proposed rule, "waters of the United States" means all waters, including waters over which the Agencies have not previously had jurisdictional authority, e.g. waters of the States and private lands. This is not the intent of the CWA, although it apparently is the intent of the Agencies.

In the English language when a word or term must be qualified with a modifier it is an indicator that the word or term is too general for the intended meaning. Thus the reason for the many modifiers for "waters of the United States" in the CWA, is because the CWA was not intended to apply to every drop of water located within the territorial boundaries of the United States. Modifying words have been used to provide parameters for implementation of protection of water quality since the Water Pollution Control Act of 1948. (p. 4-5)

Agency Response: **The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative**

Procedure Act. The rule is also consistent with the statute and caselaw. Technical Support Document, I. A and C.

10.38 There is no doubt that with the plurality decision in the *SWANCC* and *Rapanos* cases the Supreme Court has already provided a clear definition of "waters of the United States". (See summary of the Supreme Court's decision in the attached "Syllabus of *Rapanos et ux et al. v. United States*"[29])

Interpreting the law and providing a clear meaning to the intent of laws when there is doubt or a dispute is the primary role of the Supreme Court. The Supreme Court has done its job concerning the definition of "waters of the United States" and "jurisdictional waters" under the CWA. We find that the Agencies have been and are continuing to struggle with "mission creep", i.e. self-determined expansion of their mission beyond their statutory authority, as demonstrated by their unwillingness to accept the (*Rapanos*) Supreme Court decision and instead formulating this proposed rule. Unwilling to accept the Supreme Court definitions, the Agencies are attempting to implement their own definition of the "waters of the United States", which has led to much confusion and uncertainty for the American public. (p. 6)

Agency Response: The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule is also consistent with the statute and caselaw. Technical Support Document, I. A and C.

10.39 We finds it is very disheartening to have to deal with a proposed rule that is counter to the latest Supreme Court decision (*Rapanos et ux et al. v. United States*), which has clearly addressed this matter. By issuing the current proposed rule the Agencies appear to be attempting to override the *Rapanos* Supreme Court decision, which for the most part dismissed the notion that intertwined "water connectivity" and the presence of some kind of nebulous "significant nexus" to navigable waters give the Agencies jurisdiction for permitting a much expanded jurisdictional authority, including authority over a broader suite of land use activities.

In the *Rapanos et ux et al. v. United States* decision, Justice Scalia's plurality opinion, section VII, clearly addresses and shows the errors with the Agencies notion that "water connectivity" and the presence of a "significant nexus" somehow come from and are part of the CWA. In this opinion, it is stated in the first paragraph of page 37:

> "One would think, after reading Justice Kennedy 's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from *SWANCC's* cryptic characterization of the holding of *Riverside Bayview*."

This statement alone should have been a red flag to the Agencies that the occurrence of "water connectivity" and the presence of a "significant nexus" was somehow a mandate

[29] http://www.law.cornell.edu/supct/htm1/04-1034.ZS.html. Accessed 06/24/14.

for them to take it upon themselves to redefine what constitutes "waters of the United States" for CWA purposes.

We find it alarming that the Agencies feel free to ignore the intent of Congress through bypassing the CWA and ignoring the findings of the Supreme Court. It is even more troubling that the Agencies would attempt to convince the public that they are somehow empowered to greatly expand their jurisdictional authorities, which would open the door for them to substantially increase their influence in land use activities across the entire nation.

Withdraw the current proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law, specifically incorporating the "waters of the United States" definition presented by the plurality Supreme Court opinion in the *Rapanos et ux et al. v. United States decision*. Furthermore, the Agencies must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority. (p. 8)

Agency Response: The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule is also consistent with the statute and caselaw. Technical Support Document, I. A and C.

10.40 The extraordinary expansion of the Agencies' jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the Agencies would result in citizens being required to obtain permits and pay the government for ordinary activities on private property. This amounts to a seizure of that property without compensation, i.e. a regulatory taking. Although the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interests, this is not true when the regulations prevent a property owner from making "economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property.

This type of violation of the Fifth Amendment would not come about except that the Agencies propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the Agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use. (p. 12)

Agency Response: This rule does not constitute a taking of private property in violation of the Fifth Amendment. Technical Support Document, I.C.

Imperial County Board of Supervisors (Doc. #10259)

10.41 Ultimately, county governments are liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal Agencies in a timely manner. For

example, in *Arreola v. Monterey* (99 Cal. App. 4th 722), the court held that Monterey County (CA) was liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county argued that the Army Corps' permit process did not allow for timely approvals. (p. 2)

Agency Response: This state court case is outside the scope of this rulemaking.

Richland County, Montana Office of County Commissioners (Doc. #10551)

10.42 Constitution of the United States of America: Amendment X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution of the State of Montana: Article IX Section 3. Water rights.

1. All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
2. All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses provided by law.

We are asking the Administration to remand the rules until answers to the questions; as to under what authority are these rule being administered and what economic impact these rules will have on Richland County and the state of Montana. We are respectfully requesting the agencies (EPA) and (Corps) reopen the comment period after the questions have been answered. (p. 1-2)

Agency Response: This rule is promulgated pursuant to Section 501 of the CWA. The agencies have provided an economic assessment of the rule. Preamble, V, and economic assessment in the docket.

Sanpete County Commissioners (Doc. #11978)

10.43 Interpreting the law as providing a clear meaning to the intent of laws when there is doubt or a dispute is the primary role of the Supreme Court. The Supreme Court has done its job concerning the definition of "waters of the United States" and 'jurisdictional waters" under the CWA. An unwillingness to accept the (*Rapanos*) Supreme Court decision and formulating this proposed rule is demonstrated "mission creep." There can only be one reason for the EPA and Corp concerns with having to evaluate jurisdiction of waters on a case-specific basis which is to expand their scope of jurisdiction over the Nation's waters. Unfortunately for the EPA and the Corp, the Constitution does not grant power to any federal agency to establish their own authority or jurisdictional boundaries independent of Congress and the Supreme Court. (p. 1-2)

Agency Response: The rule is consistent with the statute and caselaw and is narrower in scope than the existing regulations. Technical Support Document, I.A, B, and C.

10.44 We believe that statements in the proposed rule are just additional examples of "mission creep." FR page 22189, column 1 state: *The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the*

nexus, alone or waters in the region, is significant based on data, science, the CWA, and case law. In addition, the proposed rule suggests that *"other waters" (those not fitting in any of the above categories) could be determined to be "waters of the United States" through a case-specific showing that, either alone or in combination with similarly situated " other waters" in the region, they have a " significant nexus" to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated "other waters" in the region should be identified.* By virtue of the Acts of 1866, 1870, and 1877 the federal government divested itself of its authority over all non-navigable water in the West, ceding that authority to the states. This action of Congress has only been changed in the past by the exemption of water from appropriation under state law. The Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the US Constitution. Thus, non-navigable waters of the West are still outside of the jurisdictional authority of the EPA and the Corp. The proposed expansion of authority and jurisdiction over lands that may be or are covered with water for short periods of time cannot be justified. These are non-navigable waters. The idea that because intertwined "water connectivity" and nebulous "significant nexus" to navigable waters might exist should not give the EPA and the Corp jurisdictional authority. The issuance of the proposed rule appears to override the *Rapanos* Supreme Court decision, which for the most part dismissed a notion of intertwined "water connectivity" and the presence of some kind of nebulous "significant nexus" to navigable waters gives the EPA and Corp jurisdiction for permitting a much expanded jurisdictional authority, including authority over a broader suite of land use activities. (p. 2)

Agency Response: The rule is consistent with the statute and caselaw and is narrower in scope than the existing regulations. Technical Support Document, I.A, B, and C.

10.45 Of greater concern is the possible violation of the Fifth Amendment "regulatory taking." The extraordinary expansion of the Agencies' jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the Agencies would result in citizens being required to obtain permits and pay the government for ordinary activities on private property. This amounts to a seizure of that property without compensation, i.e. a regulatory taking. Although the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interests, this is not true when the regulations prevent a property owner from making economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property. This type of violation of the Fifth Amendment would not come about except that the Agencies propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the Agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use. (p. 3)

Agency Response: This rule does not constitute a taking of private property in violation of the Fifth Amendment. Technical Support Document, I.C.

Washington County Board of County Commissioners (Doc. #12340)

10.46 Consequences of the proposed rules would allow the EPA and the Corps to utilize definitions with the CWA to regulate activities on dry land farm ground and county easements when those activities are not connected to interstate commerce. We believe this is an over reach of the intent of the 1972 law. (p. 1)

Agency Response: The definition of "waters of the United States" in the rule only includes waters. The rule is consistent with the statute. Technical Support Document, I.A.

Weld County, Colorado (Doc. #12343)

10.47 The *Rapanos* and *Solid Waste* decisions both dealt with the federal governments increasing assertion of jurisdiction under the Clean Water Act. In both cases, the majority of the Supreme Court held that the government was extending the scope of the Clean Water Act beyond the original intent. The *Rapanos* decision, written by Justice Scalia, and the *Solid Waste* decision written by Chief Justice Rehnquist, both sought to limit the reach of the Clean Water Act. With the proposed rule change, the agencies are attempting to clarify the supposed confusion created by these cases. However, it appears that the rulings from these two cases make clear that jurisdiction under the Clean Water Act is limited. (p. 4)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

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

10.48 The proposed rule fails to provide the necessary clarity that gave impetus to this rule. We support a rulemaking process that interprets court decisions and ensures future progress in meeting the requirements of the Act. Unfortunately, the aggressive reach of this rule and its ambiguous provisions and terminology introduces uncertainty, requires more agency analysis and intervention, and creates increased potential for litigation. (p. 4)

Agency Response: The rule provides increased certainty and is consistent with caselaw. Preamble, IV, and Technical Support Document, I.C.

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

10.49 We find that any determination without first seeking Congressional language for guidance would be an agency fiat. But Congressional intervention in fact that is the last thing this process seeks to do. (p. 3)

Agency Response: Agency Response: This rule is promulgated pursuant to Section 501 of the CWA.

Mille Lacs County Board of Commissioners (Doc. #13198)

10.50 By using the phrase "Waters of the United States," Congress carefully balanced the interests of the federal government with state and private interests to protect and improve water quality. This phrase imposes a limit on federal jurisdiction that was established in

venerable federalism cases of the nineteenth century. Congress did not intend or empower the Environmental Protection Agency, or any other federal agency, to challenge the public trust responsibilities of the States as defined in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) through administrative rules altering the definition of "waters of the United States." The public trust doctrine was developed to protect the rights of all people to the navigable in fact waterways. Congress was, as a matter of federalism, made responsible for maintaining the navigability of waterways under its Commerce Clause authority while the States were given the water management responsibilities. See *Pollard's Lessee v. Hagan*, 44 U.S. 212; 3 How. 212 (1845). In passing the Clean Water Act, Congress expanded the federalism balance to add the federal interest of ensuring clean water in interstate waterways while protecting the local and state authority over water management.

The proposed rule is an expansion to the Congressional definition of "waters of the United States." It sets the term as to how the federal agencies will determine what other water bodies will be subject to the regulations of traditional "waters of the United States."

The rule makes no mention as to the effect the expanded definition of"traditionally navigable waters" will have on the interpretation of Indian tribal authority over water under the Clean Water Act. Congress amended the Clean Water Act to allow qualified Indian tribes to be treated as states under specific circumstances. Indian reservations are considered territory of the United States not subject to state jurisdiction. See *Village of Hobart v. Oneida Tribe of Wisconsin*, 732 F.3d 837 (7th Cir. 2013).

The rule is disturbingly similar to a recommendation made by Albert Bacon Fall in a report in 1922 that precipitated major federal litigation over the Colorado River. The States reacted to the Fall-Davis Report (S. Doc. 142, 67th Congo 2nd Sess.) by entering into the Colorado River Compact and agreeing to the legislation that became the Boulder Canyon Projects Act. However, the States contractual water rights were challenged twenty years later by the United States, on behalf of the Indian tribes, claiming huge preexisting reserved tribal rights and Mexican treaty rights. See *Arizona v. California*, 373 U.S. 546 (1963). (p. 1-2)

Agency Response: **The rule is consistent with the statute and Supreme Court CWA caselaw. Technical Support Document, I.A and C. This rule has no effect on the ability of tribes to seek TAS eligibility under the CWA. Currently, no tribes have been approved to administer the CWA Section 404 permitting program. Further, this is a definitional rule that clarifies the scope of the "waters of the United States", consistent with the statue and Supreme Court case law.**

Lafourche- Terrebonne Soil and Water Conservation District (Doc. #13582)

10.51 Legal scholars will argue that Congress is the only body that has and can set the scope of the Clean Water Act. Only Congress can expand the scope and intended purpose of the Clean Water Act, and it has chosen not to do so in both the 110th and 111th Congresses. The attempts of the EPA and COE through this proposed rule can only be interpreted as an attempt to circumvent the people of the United States and exert their agencies authority and control over their 'subjects'. (p. 2)

Agency Response: This rule is promulgated pursuant to Section 501 of the CWA and is consistent with the statute. Technical Support Document, I.A.

Parish of Jefferson (Doc. #14574.1)

10.52 The limits of federal regulation that burden states must first take place in the political process. *Garcia v. San Antonio Metropolitan Transit Auth*., 468 U.S. 521 (1985). That is the purpose of these comments, to persuade EPA and the Corps to place reasonable limits and constraints, including clarity and obtaining more input from state and local governments, in its proposed rules. Regulation of "waters of the U.S." too broadly and unfairly impedes local police powers. (p. 3)

Agency Response: The rule establishes reasonable limits and is consistent with the statute. Preamble, IV and Technical Support Document, I.A. The agencies sought input from States. Preamble, VI.E. and Federalism report in the administrative record.

Waters of the United States Coalition (Doc. #14589)

10.53 The Ninth Circuit Court of Appeals' decision in Pronsolino v. Nastri, 291 F.3d 1123 (2002) illustrates the issue. In that case, the EPA imposed TMDLs on a river that was polluted only by non-NPDES sources of pollution. Some property owners who owned land in the river's watershed applied for an agricultural permit which was granted along with certain restrictions to comply with the EPA's TMDL. The property owners sued the EPA, contending that EPA did not have the authority to impose TMDLs on rivers that were polluted only by non-NPDES sources of pollution. The both the trial court and the Ninth Circuit Court of Appeals sided with the EPA, holding that the CWA's 303(d) listing and TMDLs requirements apply to all waters of the United States regardless of the source of impairment.

Thus the idea that it doesn't matter whether a water is designated waters of the United States if an activity does not require a Clean Water Act permit is incorrect. Other requirements apply and impose restrictions that are outside the scope of the Clean Water Act's permitting process. For some water bodies that is entirely appropriate. For man-made ditches, aqueducts, treatment wetlands, Low Impact Development BMPs, terminal reservoirs, and flood control systems, the designation can be extremely problematic and will have a negative impact on public agency operations across the United States. (p. 18-19)

Agency Response: The agencies considered impacts on implementing programs. Preamble, V and economic analysis in the administrative record.

10.54 The various iterations of NRDC v. County of LA are instructive. In that case, the Natural Resources Defense Council ("NRDC") sued the County of Los Angeles Flood Control District alleging that the County's NPDES permit required strict compliance with Water Quality Standards. The Los Angeles Regional Water Quality Control Board, the agency issued the permit, had previously issued the County a letter stating that a violation of Water Quality Standards would not be considered a violation of the County's NPDES permit. The District Court and the Ninth Circuit Court of Appeals disregarded the Regional Board's assurance to the County and held that the permit's language should be

read as if it were a contract. As a result, the County was held liable for the fact that the Los Angeles River routinely violates the designated Water Quality Standards.

The case demonstrates that although EPA may have the best intentions in the application of its Proposed Rule, unless the language is appropriately tailored to EPA's stated goals it can be misconstrued. The current language is simply too broad and as described in greater detail below, must be revised (p. 19-20)

Agency Response: **The rule makes no changes to the municipal separate storm sewer system program and regulations at issue in NRDC. See Preamble VI for discussion of exclusions and municipal separate storm sewer systems.**

10.55 [I]n South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), the Supreme Court held that movements of water within "the waters of the United States" were not discharges from a point source. The Court declined, however, on the basis of the record to determine whether the waters at issue were a single water body or separate waters of the United States, although there was some evidence indicating that the drainage canal and wetland at issue were in essence the same body of water. The Court remanded the case for further review of whether the two waters were distinct water bodies.

The Supreme Court subsequently reached the same conclusion in Los Angeles County Flood Control District v. NRDC, __U.S. __, 133 S.Ct. 710 (2013). There, the Court considered whether water movement within the channelized portions of the Los Angeles River could be considered a discharge from a point source. Citing Miccosukee, the Court unanimously held that water movement within the Los Angeles River would not constitute a discharge from a point source under the Clean Water Act. Specifically, the Court held that the channelized portions of the river were not point sources discharging into the non-channelized portions of the river.

The Court's decisions in both Miccosukee and Los Angeles County Flood Control District recognized the fundamental difference between waters of the United States and a point source that discharges into waters of the United States. A feature cannot be both. If a manmade conveyance meets the definition of point source under the Act, the EPA and the Army Corps lack the discretion to classify it as waters of the United States based on an expansive definition of the term not found in the text of the Act itself. (p. 28-29)

Agency Response: **Water transfers were at issue in those cases; the scope of water transfers is beyond the scope of this rule. The agencies disagree that the Supreme Court has held that a "water of the United States" cannot also be a "point source." Technical Support Document at I.C.**

10.56 Congress adopted this limitation because the states have traditionally regulated all waters within their jurisdiction, subject only to the federal government's power to regulate navigable waters under its commerce powers. (United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 (1940) (describing federal power to regulate navigable waters); The Daniel Ball, 77 U.S. 557, 563 (1870) (same); California v. United States, 438 U.S. 645, 662 (1978) (describing states' traditional authority to regulate water); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158, 163-164 (1935)

(same).) Many states, particularly in the arid west, are dependent on aquaducts, irrigation canals and other conduits to provide water to a thirsty populace:

- The federal Central Valley Project (CVP) in California, the nation's largest federal reclamation project, consists of dams, canals and other facilities that transfer water from the rivers of northern California to the central and southern parts of the State, in order to serve agricultural, municipal, industrial and other uses. Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 280-283 (1958); United States v. Gerlach Live Stock Co., 339 U.S. 725, 728-736 (1950).
- California's State Water Project (SWP), the analogue of the federal CVP, similarly transfers water from northern California rivers for agricultural, municipal and other uses in other parts of the State. United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 98-100 (1982).
- The Metropolitan Water District of southern California, which provides water supplies for the people of southern California, operates a dam on the Colorado River that transfers water through the district's aqueduct to the district's service area, where it is distributed to cities, towns and water districts for urban and other uses. Metropolitan Water District v. Marquardt, 59 Cal.2d 159, 171-173 (1963).
- The Newlands Reclamation Project in Nevada—the first federal reclamation project built pursuant to authority of the Reclamation Act of 1902—transfers water from the Truckee River for irrigation uses in the project area located in central Nevada. Nevada v. United States, 463 U.S. 110, 115-116 (1983).
- The Central Arizona Project, which was built by the State of Arizona in order to provide Colorado River water for the benefit of the people of Arizona, transfers water from the Colorado River to the cities of Phoenix and Tucson, among others, to meet their domestic and other needs. Maricopa-Stanfield Irrig. & Drainage Dist. v. United States, 158 F.3d 428, 430-431 (9th Cir. 1998); United States v. 0.59 Acres of Land, 109 F.3d 1493, 1495 (9th Cir. 1997).
- The Colorado-Big Thompson Project, a federal reclamation project in Colorado, transfers water from the western slope of the Continental Divide through a tunnel to the eastern slope of the Rocky Mountains, in order to provide water supplies for people in Denver and other areas on the eastern slope. City of Colorado Springs v. Climax Molybdenum Co., 587 F.3d 1071, 1074 (10th Cir. 2009).

These federal and state water projects have obtained their right to appropriate water pursuant to the water laws of the states where they are located. If the manmade conduits that they rely on to transport water are reclassified as waters of the United States, the projects may be forced to reduce or in some cases cease operations. This is because they may be required to meet Water Quality Standards and TMDLs internally, and because normal maintenance operations could require permits under section 404 of the Clean Water Act which would in turn trigger a review under the Endangered Species Act.

There is no question that certain portions of the above listed projects are already waters of the United States. However, extending that designation to all conduits and canals in the system would substantially increase the regulatory burden on these projects and upset the careful balance struck by Congress on this issue. (p. 31-33)

Agency Response: **The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C. Questions about the jurisdictional status of specific waters, and any related permitting requirements, should be addressed to permitting authorities.**

10.57 The Clean Water Act limits its intrusion into the states' traditional authority to regulate water by providing that the NPDES program applies only to discharges from a "point source." (Id. at §§ 1362(12) [defining "discharge of a pollutant"].) The states are responsible for regulating discharges from nonpoint sources, such as return flows from agricultural runoff. (Id. at §1362(14); Pronsolino v. Nastri, 291 F.3d 1123, 1126-1127 (9th Cir. 2002); Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1096-1097 (9th Cir. 1998).) (p. 33)

Agency Response: **The statute speaks for itself. The definition of "point source" is outside the scope of the rule.**

10.58 The states' traditional authority to regulate water is rooted in both constitutional and statutory principles. Under the equal footing doctrine—which is based on principles of federalism written into the Constitution, each state upon its admission to statehood, acquires sovereign rights and interests in navigable waters and underlying lands within its borders, subject to the federal government's paramount authority to regulate and control navigation. (PPL Montana, LCC v. Montana, 132 S.Ct. 1215, 1226-1228 (2012); Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372-374 (1977); Shively v. Bowlby, 152 U.S. 1, 49-50 (1894); Pollard's Lessee v. Hagan, 44 U.S. 212, 224-229 (1845); Martin v. Waddell, 41 U.S. 367, 410 (1842).) (p. 35)

Agency Response: **The rule is consistent with the statute and the Constitution. Technical Support Document, I.A. and C.**

10.59 [B]oth the Constitution and the Clean Water Act make clear that the states have primary authority to regulate water in our federal system. This basic principle of federalism informs the meaning of sections 101(g) and 510, and indicates that the Act cannot be construed to limit or hinder water rights and the movement of water for purposes of supply within the states. This basic premise is supported by both the Clean Water Act and the doctrine of constitutional avoidance. This doctrine holds that congressional statutes should be construed to avoid constitutional difficulties, unless such construction is plainly contrary to the congressional intent. (Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); Machinists v. Street, 367 U.S. 740, 749-750 (1961); Crowell v. Benson, 285 U.S. 22, 62 (1932).)

In Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159, 172 (2001), the Supreme Court applied the constitutional avoidance doctrine in holding that the Corps does not have authority under the Act to regulate "isolated" waters, i.e., waters not connected to navigable waters, because such waters are traditionally regulated by the states. SWANCC, 531 U.S. at 172-173. The Court stated:

> Where an administrative interpretation of a statue invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.[30]

The Court stated that the Corps' interpretation of its authority "would result in a significant impingement of the States' traditional and primary power over land and water use." (SWANCC at 174.)

The Proposed Rule presents the same problem. Many water supply conduits are susceptible to being reclassified as waters of the United States under the Proposed Rule. Application of the Proposed Rule to these structures will infringe on the states' ability to manage water supplies within their jurisdictions, and will thereby violate the Clean Water Act. (p. 35-37)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

Republican River Water Conservation District (Doc. #15621)

10.60 When read together, *Riverside, SWANCC* and *Rapanos* require a much narrower interpretation of federal jurisdiction under the CWA than the one EPA and Corps now advance. This is especially true given that the agencies appear to give nearly unlimited breadth to "waters of the U.S." in the proposed rule. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. 159, 172. The only clear indication that exists is that Congress did *not* intend such a result. (p. 6)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

10.61 In its current form, the all-encompassing definition of "waters of the U.S." would establish a framework under which the EPA and Corps could wrest "primary responsibility" to regulate water pollution away from the States. This would disregard both the intent of Congress in enacting the CWA and the well-settled right of Colorado to spearhead efforts to protect and preserve waters within its borders. *SWANCC*, 531 U.S. 159, 174 (allowing the Corps to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use.") (p. 6-7)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A. and C.

[30] 12 Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159, 172-73 (2001) [internal citations omitted].

Meeteetse Conservation District (Doc. #16383)

10.62 In two separate cases the Supreme Court has ruled that there are in fact limits to the Clean Water Act (*SWANCC v. U.S. Army Corps of Engineers*, 2001 and *Rapanos v. United States*, 2006). With this proposed rule, the EPA and Army Corps are clearly trying to expand their jurisdictional boundaries in order to further regulate American citizens. We believe the EPA is overstepping the legal authority granted to them under the Clean Water Act and that they are blatantly ignoring these two U.S. Supreme Court decisions. (p.3)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A. and C.

Hot Springs County Commission (Doc. #16676)

10.63 The Hot Springs County Commission requests that any final rule refrain from a blanket presumption of federal jurisdiction and instead move toward a broad presumption of state jurisdiction. A "waters of the state" presumption will serve the dual purpose of avoiding the unintended consequences of perverse incentives for state and locally led water quality efforts, and shift the burden of proof back onto the EPA in cases when jurisdiction may not be clear, such as Hot Springs County's dual use diversions. Given that the EPA has twice failed to prove that expanded jurisdiction is warranted under the CWA, it is clear that the burden of proof should rest at the EPA whenever it seeks to expand its authority beyond that explicitly granted in the CWA, and constrained by the Supreme Court.[31] This is particularly important to Wyoming's counties that with limited budgets must comply with all state and federal permitting requirements and cannot afford to seek judicial redress for every disputed case of state vs. federal jurisdiction. (p. 4)

Agency Response: The federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule, promulgated under authority of Section 501 of the CWA, is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

Colusa County Board of Supervisors (Doc. #17002)

10.64 Ultimately, a county is liable for maintaining the integrity of their ephemeral flow ditches, even if federal permits and the attendant state water quality certifications are not approved by the federal and state agencies in a timely manner. For example, in 2002, in *Arreola v. Monterey* (99 Cal. App. 4th 722), the court held Monterey County (CA), among other local entities, liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county argued that the regulatory permit process did not allow for timely approvals. In addition, based on recent federal court rulings regarding Corps' actions and decisions, the expansion of the WOUS definition and the attendant potential for delays related to permit processing could increase the Corps' liability exposure as well. (p. 4)

[31] See *SWANCC v. the U.S. Army Corps ofEngineers*, 531 U.S. 159, regarding the limitations on EPA's jurisdiction over isolated waters, and *Rapanos v. the United States*, 547 U.S. 715, regarding the limitations on EPA's jurisdiction over intermittent and ephemeral streams.

Agency Response: **This state court decision is outside the scope of this rulemaking.**

Sienna Plantation Levee Improvement District (Doc. #17455)

10.65 The proposed rule ignores Congressional intent and Supreme Court rulings, and impermissibly expands Federal jurisdiction. Congress enacted the CWA as a means to exercise its traditional commerce power over navigation, and it is clear Congress intended to create a partnership between the Federal agencies and states to jointly protect the nation's water resources. The proposed rule reaches well beyond what Congress intended and expands the scope of the CWA to isolated, nonnavigable waters. Additionally, it is contrary to the Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*. The *SWANCC* Court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could apply to wetlands and other waters that were not themselves navigable. But the Court went on to make clear that "limited effect" is not the same as "no effect whatever." The proposed rule seeks to strip the term navigable of having any meaningful effect. In *Rapanos v. United States* the Supreme Court identified limits to Federal authority under the CWA. Although the meaning and intent of *Rapanos* have been the subject of extensive debate, one aspect of the case is certain: it limits Federal jurisdiction. The Agencies are now ignoring those limits as well as Supreme Court precedent. The multiple opinions in the *Rapanos* case and the tests put forth by the Justices provide a rather complex framework for determining the scope of CWA jurisdiction. Even so, the decision-making process arising from that framework is defensible. Over time and through continued application the determinations made thereunder are becoming increasingly consistent and repeatable. Having already strayed far from the initial intent of Congress, the Agencies are now disregarding the clear outcome of *Rapanos* by having put forth a proposed rule that would essentially remove the remaining limits to establishing Federal jurisdiction under the authority of the CWA. The claim by the Agencies that the proposed rule will only slightly (approximately 3%) expand jurisdiction is not based on an actual field application, but rather an internal review of existing records and the information contained therein. It is to be expected that data in existing records would be what was relevant under the exiting rule, rather than that required for a determination under the proposed rule. Efforts to analyze application of the proposed rule have found that it will significantly expand jurisdiction, and in some areas the amount of jurisdictional waters (river miles and number of ponds) may more than double. This Federal overreach by the Agencies will usurp any meaningful authoritative role for the states and put in place an approach that can be used to exercise Federal control over any and all waters, including those that have been traditionally identified and regulated as "Waters of the State." (p. 3-4)

Agency Response: **The rule is consistent with the statute, the caselaw, and the Constitution and is narrower in scope than the existing regulations. Technical Support Document, I.A., B., and C. The scope and conclusions of the Economic Analysis are discussed at Section V of the Preamble, in the Economic Analysis, and the Economic Compendium response to comments.**

Fountain Green City Council (Doc. #18899)

10.66 Of greater concern is the possible violation of the Fifth Amendment "regulatory taking." The extraordinary expansion of the Agencies' jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the Agencies would result in citizens being required to obtain permits and pay the government of ordinary activities on private property. This amounts to a seizure of that property without compensation, i.e. a regulatory taking. Although the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interests, this is not true when the regulations prevent a property owner from making "economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property. This type of violation of the Fifth Amendment would not come about except that the Agencies propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the Agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use. (p. 2)

Agency Response: This rule does not constitute a taking of private property in violation of the Fifth Amendment. Technical Support Document, I.C.

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

10.67 Concerns from Congress: The fact that several Federal Legislative Bills (including S. 2496: "Protecting Water and Property Rights Act of 2014," S. 2613: "Secret Science Reform Act of 2014," H.R. 5071: "Agricultural Conservation Flexibility Act of 2014," and H.R. 5078: "Waters of the U.S. Regulatory Overreach Protection Act of 2014") have been filed that requests the withdrawal or revision of the proposed rule indicates there are major problems with this proposed rulemaking as presented. (p. 2)

Agency Response: The agencies disagree that there are major problems with the proposed rule. The final rule reflects the agencies' consideration of public comment. The agencies have complied with enacted laws.

California State Association of Counties (Doc. #9692)

10.68 Ultimately, a county is liable for maintaining the integrity of their ephemeral flow ditches, even if federal permits and the attendant state water quality certifications are not approved by the federal and state agencies in a timely manner. For example, in 2002, in *Arreola v Monterey*, the court held Monterey County (CA), among other local entities, liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county argued that the regulatory permit process did not allow for timely approvals. In addition, based on recent federal court rulings regarding Corps' actions and decisions, the expansion of the WOUS definition and the attendant potential for delays related to permit processing could increase the Corps' liability exposure as well. (p. 2)

Agency Response: This state court decision is outside the scope of this rulemaking. The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

10.69 It is unclear if the current rule accurately reflects the narrower of the two holdings in *Rapanos v United States*, 547 U.S 715 (2006). A four-vote plurality of the court held that "Navigable waters" regulated under the CWA are limited to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features,'" such as streams, oceans, river, and lakes. Wetlands with a "continuous surface connection" to such bodies of water, so that "there is no clear demarcation between," are "adjacent to" such water bodies and also are covered. Justice Kennedy concurred in the judgment of the plurality, but on different grounds, relying on the "significant nexus" test and the significant ecological functions wetlands adjacent to tributaries can serve.

The origins of this legal term of art suggests a common sense plain meaning of "significant" that may not be consistent with the science-driven nexus approach adopted by the agencies. Further, the agencies' proposed rule's definition of what is significant is anything that is not speculative or insubstantial. CSAC believes this is too low a bar and does not accurately reflect the meaning of significant.

The agencies seem to draw significant support from the Kennedy concurrence as opposed to the four vote plurality. Despite adopting the significant nexus test from the concurrence, the proposed rule does not accurately mirror the language. Justice Kennedy cited the significant nexus as "significantly affects the chemical, physical, and biological integrity…" whereas the proposed rule uses "or" in place of "and." The rule should accurately reflect the language of *Rapanos*. (p. 4)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

Florida Association of Counties (Doc. #10193)

10.70 The objective of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the Nations' waters. It is clear that ·water quality was the focus upon its passage in 1972, but exactly what the drafters intended by the term "Nations' waters" has been subject to judicial interpretation ever since. What is also clear is that the scope of the Nations' waters must be informed by the stated policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources.' Although this important policy has been recognized and referenced by the Supreme Court. there is another congressional policy that should not be overlooked, that "'to the maximum extent possible, the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government. We believe that with myopic focus on the Act's goals, the Agencies have disregarded these equally important policies.

The Agencies have interpreted the law and their jurisdiction broadly over the years, and courts have often been called upon to resolve resulting disputes. Three specific disputes decided by the Supreme Court have been referenced by the Agencies in support of the proposed rule: *United States v. Riverside Bayview Homes. Inc.* (Riverside Bayview); *Solid Waste Agency of Northern Cook County v. United Stale Army Corps of Engineers* (SWANCC); and *Rapanos v. United States* (Rapanos). A careful reading of these cases,

however, reveals that the proposed rule and its interpretations do not comport with their findings or with the CWA. (p. 5-6)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

10.71 Notwithstanding this overwhelming condemnation, the Agencies find support for their broad interpretation in one concurring opinion, written by one justice. Justice Kennedy, in his concurrence, would allow federal regulators to "establish" a significant nexus if waters affect the chemical, physical or biological integrity of other covered waters. But as the plurality points out, a significant nexus (the term itself, a "cryptic characterization of the holding of *Riverside Bayview*") was simply one reason for holding physically connected wetlands jurisdictional. A case-by-case determination of ecological effect was not the test. To use this "gimmick" to substitute the purpose of the CW A for its text simply rewrites the statute. This "whatever affects waters ... is waters" result is not what Congress intended. (p. 8)

Agency Response: The rule is consistent with the statute and caselaw. Technical Support Document, I. A and C.

Nebraska Association of Resource Districts (Doc. #11855)

10.72 By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding in *Rapanos*:

> [C]lean water is not the only purpose of the [CWA]. So is the preservation of primary state responsibility for ordinary land-use decisions. … It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of 'waters of the United States.' It did not do that[.]"

Rapanos v. United States, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006). The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

> If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. …The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.' 870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. (p. 7)

Agency Response: The rule explicitly excludes groundwater from the definition of "waters of the United States" and the agencies disagree that the rule indirectly regulates groundwater. The rule does not include a provision defining neighboring based on shallow subsurface flow. Preamble IV. While the agencies acknowledge

that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." Preamble IV. The rule is consistent with the statute and caselaw. Technical Support Document, I. A and C.

Florida Rural Water Association (Doc. #14897)

10.73 The Supreme Court of the United States (SCOTUS) has recently and clearly interpreted the limits of federal authority in regulating water resources under the U.S. Constitution and the CWA. In the 2001 Supreme Court case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the court ruled that the agencies have no jurisdiction over non-navigable, isolated, and intrastate waters. (p. 3)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

10.74 The EPA proposed rule on WOTUS must be withdrawn immediately as evidenced by the passing of U.S. House Bill H.R. 5078. The intent of this bill is to prohibit the EPA and ACOE from moving forward with its proposed WOTUS rule. Congress is responsible for making laws and EPA cannot side-step these laws. (p. 3)

Agency Response: This rule is promulgated pursuant to Section 501 of the CWA and is consistent with the statute. Technical Support Document, I.A.

Fort Bend Flood Management Association (Doc. #15248)

10.75 The proposed rule ignores Congressional intent and Supreme Court rulings, and impermissibly expands federal jurisdiction. Congress enacted the CWA as a means to exercise its traditional commerce power over navigation, and it is clear congress intended to create a partnership between the federal agencies and states to jointly protect the nation's water resources. the proposed rule reaches well beyond what congress intended and expands the scope of the CWA to isolated, non-navigable waters. Additionally, it is contrary to the Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC).* The *SWANNC* court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could apply to wetlands and other waters that were not themselves navigable but the court went on to make clear that "limited effect" is not the same as "no effect whatever." The proposed rule seeks to strip the term navigable of having any meaningful effect. in *Rapanos v. United States* the supreme court identified limits to federal authority under the CWA. Although the meaning and intent of *Rapanos* have been the subject of extensive debate, one aspect of the case is certain: it limits federal jurisdiction. The agencies are now ignoring those limits as well as Supreme Court precedent. The multiple opinions in the *Rapanos* case and the tests put forth by the justices provide a rather complex framework for determining the scope of CWA jurisdiction. Even so, the decision-making process arising from that framework is defensible. Over time and through continued application the determinations. Over time and through continued application the determinations made thereunder are becoming increasingly consistent and repeatable. Having already strayed far from the initial intent of Congress, the Agencies are now disregarding the clear outcome of *Rapanos* by having put forth a proposed rule that would essentially remove the remaining limits to establishing Federal jurisdiction under the authority of the CWA. The claim by the

Agencies that the proposed rule will only slightly (approximately 3%) expand jurisdiction is not based on an actual field application, but rather an internal review of existing records and the information contained therein. It is to be expected that data in existing records would be what was relevant under the existing rule, rather than that required for a determination under the proposed rule. Efforts to analyze application of the proposed rule have found that it will significantly expand jurisdiction, and in some areas the amount of jurisdictional waters (river miles and number of ponds) may more than double. This Federal overreach by the Agencies will usurp any meaningful authoritative role for the states and put in place an approach that can be used to exercise Federal control over any and all waters, including those that have been traditionally identified and regulated as "Waters of the State."(p. 5)

Agency Response: The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and I.C.

Oklahoma Municipal League (Doc. #16526)

10.76 This rule invites a legal challenge. In the *Rapanos* case, 5 of 9 Justices disapproved the Corps' assertion that authority under the Clean Water Act was "essentially limitless" [characterized in J. Roberts' concurring opinion]. Despite that clear ruling, the proposed rule is written in such broad terms that it can be interpreted to subject nearly all waters to CWA jurisdiction. It retains the same "boundless view" of the scope of the Agencies' power that was explicitly rejected by a majority of the justices. Although there was not a majority opinion settling where the Agencies' jurisdiction begins, a rule that extends federal jurisdiction potentially to any water feature runs afoul of the majority view. The U.S. Supreme Court has twice curtailed the Agencies' attempts to expand their control under the Clean Water Act. (p. 2-3)

Agency Response: The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C.

Minnesota Chamber of Commerce (Doc. #16473)

10.77 In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Scalia emphasized t hat ditches are expressly included in the CWA definition of "point source," which is a separate and distinct category from "navigable waters" (i.e. "waters of the United States"). The CWA prohibits unpermitted "discharges"-defined as the addition of pollutants from a "point source" into "navigable waters." Justice Scalia concluded that "[t]he definition of 'discharge' would make little sense if the two categories were significantly overlapping . The text of the CWA thus demonstrates t hat ditches "are, by and large, not waters of the United States." *Id*. at 735-36. (p. 4)

Agency Response: The agencies disagree that the Supreme Court has held that a "water of the United States" cannot also be a "point source." Technical Support Document at I.C. The rule is consistent with Supreme Court decisions and other case law. Technical Support Document, I.C.

Louisiana Landowners Association (Doc. #16490)

10.78 The United States Constitution makes no express grant of power to regulate the nation's waters. While the Constitution vests Congress with the power to regulate interstate commerce, no such grant of authority has been given to the EPA or Corps. *See U.S. Constitution, Article I, Section 8.* The regulatory authority of the EPA and Corps to enforce the Act is derived entirely from the scope and intended purpose of that law as originally enacted by Congress. Only Congress has the constitutional authority to expand the application of the Act and it has chosen not to do so. *See e.g., Hearing on Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule Before Committee on Transportation and Infrastructure (Jun. 11, 2014) (statement by Chairman, Rep. Bill Shuster) (citing 110th and 111th Congresses' consideration, and rejection, similarly proposed jurisdictional expansions to the application of the Clean Water Act).*

The idea that the changes the EPA and Corps have proposed merely "clarify" the United States Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. US. Army Corps. of Engineers,* 531 U.S. 159 (2001) ("*SWANCC*") and *Rapanos v. United States*, 547 U.S. 715 (2006) is meritless. In *SWANCC*, the Court rejected the EPA's use of the "migratory bird rule" to assert jurisdiction over isolated bodies of water. 531 U.S. 159 (2001). In *Rapanos*, the Court rejected federal regulatory efforts to prohibit a private landowner from filling sand in "isolated wetlands." 547 U.S. 715 (2006). Both decisions patently reject federal regulatory efforts to expand the reach of the Act and emphasize the requirement that regulatory federal agencies show that the body of water at issue meets the Act's definition of "navigable waterway." Thus, in its current form, the proposed Definition is directly contrary to United States Supreme Court precedent. (p. 2)

Agency Response: The rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and I.C.

Mountain States Legal Foundation (Doc. #15113)

10.79 The Proposed Rule drastically expands the scope of the Kennedy wetland test. The test is limited to wetlands with a significant nexus to waters "navigable in fact or that could reasonably be so made," *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). Yet, the Proposed Rule extends the Kennedy wetland test to cover all waters (not just wetlands) and all waters adjacent to non-navigable interstate waters. 79 Fed. Reg. at 22,254. This expansion of the Kennedy wetland test is significant. It means that any tributary, intrastate lake, river, stream (including intermittent streams), mudflat, sandflat, wetland, slough, prairie pothole, wet meadow, playa lake, or natural pond that is connected to any water that is either navigable or interstate, is subject to federal regulation.[32] See *id* at 22,193. For example, a wet meadow or prairie pothole that crosses state lines, but in no way impacts interstate commerce, would be considered a jurisdictional "water" and any water feature with a significant nexus to that interstate wet meadow or prairie pothole would be subject to federal regulation. *Id*. This expansion of the Kennedy wetland test is

[32] The agencies state that this list of waters will be deleted from the existing regulatory provision, 79 Fed. Reg. at 22,192; 33 C.F.R. § 328.3(a)(3), but these waters will still be subject to federal regulation under the "other waters" definition of "waters of the United States."

unwarranted by the facts of *Rapanos* and, as discussed in more detail below, stretches the constitutional limits of CWA jurisdiction past the breaking point.

The Proposed Rule modifies Justice Kennedy's opinion to arrive at a definition of "similarly situated waters" that could lead to grossly over-exaggerated "significance" determinations. As stated above, according to Justice Kennedy, the "requisite nexus" for CW A jurisdiction over wetlands not adjacent to navigable waters exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780.

The Proposed Rule makes a subtle but significant change to this formulation by substituting "wetlands" for "lands." 79 Fed. Reg. at 22,192 ("'if the wetlands, either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" (substitution in Proposed Rule) (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring))). This alteration allows the agencies to look at categories of waters in isolation, e.g., analyzing the combined impact of all the wetlands in a watershed, but not considering how the tributaries, land features, other waters, etc. contribute to the integrity of the covered waters.

The impact of this shift is illustrated by the 2011 Draft Guidance, which made the same alteration to Justice Kennedy's formulation: "For affirmative determinations especially, consideration of a subset of adjacent wetlands may be sufficient, since including additional adjacent wetlands in the analysis would only establish a more significant nexus to the traditional navigable water or interstate water." 2011 Draft Guidance at 18. Thus, in any given jurisdictional determination, the Corps can take a myopic view of the significance of the type of waters under review, ignoring other "lands in the region" that may mitigate the significance of the waters under review. Instead, jurisdictional determinations should view the entire watershed as an interrelated system as Justice Kennedy commands by his reference to other "lands in the region."

The Proposed Rule assumes that if CWA jurisdiction exists for one intermittent tributary in a watershed, it will exist for all tributaries, because of "a tributary's ability to transport pollutants to downstream" categorically jurisdictional waters. 79 Fed. Reg. at 22,201-02. That this standard ignores the significance of the transported pollutants, flood waters, and other materials is bad enough, but to then bootstrap from one intermittent tributary a blanket jurisdictional determination for every other tributary in the watershed is a bridge too far. This is in stark contrast to Justice Kennedy's warning that, "[absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring).

As demonstrated above, the Proposed Rule pushes the Kennedy wetland test beyond the facts and holding of *Rapanos*. The expansion of federal authority over land use rights could be significant. The agencies should abandon their unlawful effort to drastically increase CWA jurisdiction. (p. 9-10)

Agency Response: **The commenter's statement that the agencies take a myopic view of the type of waters to assess in combination and should consider "lands" in**

the region is unclear. The agencies explain their "similarly situated" conclusions in the Preamble at Section III and IV, and the Technical Support Document at II and VI. The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

10.80 The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause is the wellspring of Congressional authority that gives life to the CW A. SWANCC, 531 U.S. at 162. This is reflected in the fact that the predecessor statutes to the CW A were firmly grounded in the language of interstate, water-borne commerce. *Rapanos*, 547 U.S. at 723-24. The CWA did not abandon this statutory heritage, nor could it, because without a connection to interstate or foreign commerce, the CW A would be unconstitutional. See *SWANCC*, 531 U.S. at 173; see also *Marbury v. Madison*, 5 U.S. (1Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

In *United States v. Lopez*, the Supreme Court established "three broad categories of activity that Congress may regulate under its Commerce power." 514 U.S. 549, 558 (1995); see *United States v. Morrison*, 529 U.S. 598, 609 (2000) (applying Lopez). Congress may regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558. Accordingly, in addition to the statutory limitations contained in the CW A, the agencies may not assert CWA jurisdiction over any waters that do not also meet at least one of the factors identified in *Lopez*.

The Proposed Rule takes the view that the agencies have jurisdiction over non-navigable interstate waters, their tributaries, and any other waters with a significant nexus to non-navigable interstate waters. 79 Fed. Reg. at 22, 188-89, 22,200. In particular, the Proposed Rule asserts jurisdiction over non-navigable interstate waters directly, not by way of any *Rapanos*-style connection to navigable waters. *Id*. at 22,198 (defining "waters of the United States" to include "all interstate waters," regardless of navigability). Accordingly, the agencies' jurisdiction over these waters must be premised on one of the Lopez categories.

"The first two categories of authority may be quickly disposed of." *Lopez*, 514 U.S. at 559. Non-navigable waters are, by definition, non-commercial. 33 C.F.R. § 329.4 ("Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."). Accordingly, non-navigable interstate waters are neither channels nor instrumentalities of interstate commerce. Thus, if the agencies can assert direct jurisdiction over non-navigable interstate waters, "it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Lopez*, 514 U.S. at 559.

The Proposed Rule fails utterly to justify its assertion of CWA jurisdiction over nonnavigable waters pursuant to the *Lopez* framework. Rather, the agencies deduce that "the language of the CWA indicates that Congress intended the term 'navigable waters' to

include interstate waters without imposing a requirement that they be traditional navigable waters themselves or be connected to traditional navigable waters."[33] 79 Fed. Reg. at 22,200; see *id*. At 22,254 ("Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of Federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of Federal regulation under the Commerce Clause."). However, the agencies fail to recognize "that limitations on the commerce power are inherent in the very language of the Commerce Clause." *Lopez,* 514 U.S. at 553. Congress may enact legislation under the provinces of the Commerce Clause, but that does not ipso facto mean Congress did not exceed its power. See *Lopez,* 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc*., 452 U.S. 264, 311 (1981)) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so[.]") (Rehnquist, J., concurring in judgment). It may be that a non-navigable interstate water has a surface hydrological connection or a significant chemical, physical, or biological nexus with "other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780. Absent such a demonstrated connection, the agencies may not constitutionally assert jurisdiction over non-navigable interstate waters.[34]

In violation of the Kennedy wetland test, the Proposed Rule asserts jurisdiction on a case-specific basis over "other waters," including "wetlands, provided that those waters alone, or in combination with similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas."[35] 79 Fed. Reg. at 22, 198. The agencies further rely on the concept of aggregation to expand jurisdiction to other waters. *Id*. at 22, 2 11. For instance, the

[33] The agencies indicate in Appendix B that "[i]nterstate waters are waters of the several States and, thus, the United States." 79 Fed. Reg. at 22,254. However, this does not affect analysis under the Commerce Clause, as to whether Congress has the power to regulate such interstate waters. The agencies also rely *on Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91 (1972) and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) in their position that "nothing in the Court's language or logic limits the reach of this conclusion to only navigable interstate waters." 79 Fed. Reg. at 22,256; see *id*. at 22,259 ("Authority over interstate waters is squarely within the bounds of Congress['s] Commerce Clause powers."). But the Supreme Court did not discuss the Commerce Clause in Illinois and merely mentions the Commerce Clause in dicta in City of Milwaukee. See *City of Milwaukee*, 451 U.S. at 315 n.8 ("Whether interstate in nature or not, if a dispute implicates "Commerce . . . among the several States" Congress is authorized to enact the substantive federal law governing the dispute."). Rather, the main concern was whether the Federal Water Pollution Act pre-empted the field of federal common law of nuisance. See *Illinois*, 406 U.S. at 107 (stating that new federal law may in time pre-empt federal common law, but that time has not yet come); *City of Milwaukee*, 451 U.S. at 317 (finding that the Federal Water Pollution Act, after being amended in 1972, now occupies the field of federal common law of nuisance). There was absolutely no analysis or decision rendered on whether Congress could regulate non-navigable interstate waters under the Commerce Clause.

[34] The fact that non-navigable interstate waters cross state lines is not enough. As demonstrated herein, the exercise of Commerce Clause authority requires some connection between commerce and the exercise of federal authority. See *United States v. Clark*, 435 F.3d 1100, 1115 (9th Cir. 2006) ("Like the statute regulating illicit drugs at issue in [*Gonzales v. Raich*, 125 S. Ct. 2195 (2005)], the activity regulated by the commercial sex prong of§ 2423(c) is 'quintessentially economic,' 125 S.Ct. at 2211 , and thus falls within foreign trade and commerce.").

[35] The agencies propose to define "significant nexus" to mean "a water, including wetlands, either alone or in combination with other similarly situated waters in the region ... , significantly affects the chemical, physical, or biological integrity of a water[.] For an effect to be significant, it must be more than speculative or insubstantial." 79 Fed. Reg. at 22,269.

agencies propose to use aggregation to reach other waters "where they are similarly situated in the region" of an interstate water and "significantly [affect] the chemical, physical, or biological integrity of' an interstate water. *Id*. This approach attempts to mirror the Supreme Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942).

In *Wickard*, the Supreme Court aggregated Filburn's production of wheat for home consumption with the production by others to determine that Congress had the power to regulate the wheat market under the Commerce Clause. *Id*. at 127-28 ("That [Filburn's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial". Yet, the Supreme Court in *Lopez* indicated there must be some economic activity: "Even *Wickard* . .. involved economic activity in a way that the possession of a gun in a school zone does not." Lopez, 514 U.S. at 560. Even more importantly, the economic activity, even when aggregated with other activities, must have a substantial effect. *Wickard*, 317 U.S. at 125. However, the agencies proposition is attenuated at best, especially since the agencies case-specific "other waters" jurisdictional test fails to factor in the economic nature of an "other water" that might, in combination with similarly situated waters (lands), substantially affect non-navigable interstate waters, which by definition are not commercial.[36] As demonstrated above, non-navigable interstate waters cannot form the basis for CWA jurisdiction as part of a category. Thus, the agencies cannot constitutionally rely on proximity to non-navigable interstate waters to establish jurisdiction over "other waters."

This bootstrap approach also runs afoul of Justice Kennedy's concurring opinion. Justice Kennedy concluded that a significant nexus could give rise to CWA jurisdiction, "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. First, the Kennedy wetland test is limited to wetlands, as demonstrated above; it does not contemplate "other waters." Second, the Kennedy wetland test requires a nexus between wetlands and "waters more readily understood as 'navigable.'" *Id*. at 780. Justice Kennedy explicitly excluded non-navigable waters from those "covered waters" that could give rise to significant nexus jurisdiction. Accordingly, there is no basis for the agencies to assert jurisdiction over "other waters" based on the connection between "other waters" and non-navigable interstate waters. (p. 10-13)

Agency Response: **The Supreme Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. The rule is consistent with the Supreme Court decisions, and the Constitution. Technical Support Document, I.C and IV.**

Western Urban Water Coalition (Doc. #15178)

10.81 The Proposed Rule fails to adopt a narrow interpretation of *Rapanos* as is warranted where no opinion garners a majority of the Supreme Court, see *Marks v. United States*,

[36] At the very least, the agencies should replace "significantly affects" with "substantially affects," in the definition of "significant nexus" especially since "significant effect" means "more than...insubstantial." *Id.*

430 U.S 188 (1977), and instead heads in the opposite direction, expanding the scope of federal oversight. Under *Marks*, when no opinion of the Court garners a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193. The Proposed Rule allows the agencies to assert jurisdiction over more water bodies than are covered by the *Rapanos* plurality, more than are covered by the Kennedy concurrence in *Rapanos*, and more than are covered by the existing regulations defining waters of the United States. This can hardly be said to be a "narrow" interpretation. (p.7)

Agency Response: The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with Supreme Court decisions. Technical Support Document, I.C.

Western Urban Water Coalition (Doc. #15178.1)

10.82 The proposed rule states that "[A]s a result of the Supreme Court decisions in *SWANCC* and *Rapanos,* the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under existing regulations." However, the proposed rule does not appear to preserve the findings of *SWANCC* that addressed the nonjurisdictional status of isolated waters and narrowed the scope of CWA jurisdiction. The proposed rule does not define isolation and does not provide criteria and guidance for a nonjurisdictional determination based on isolation. The proposed rule relies instead on the significant nexus analysis, and only in the case of "other waters," not tributaries. Therefore, under the proposed rule, there would no longer be an opportunity for a project proponent to provide information to the Corps to consider when determining the jurisdictional status of an ephemeral or intermittent drainage. *Rapanos* did not overturn or replace *SWANCC*. *Rapanos* and *SWANCC* address different jurisdictional issues and facts relative to the jurisdictional status of waters and wetlands. Guidance from the opinions works in tandem, as demonstrated by the Corps' process for approved JDs (discussed above). Based on the opinions, a water can be determined nonjurisdictional because it is isolated, lacks a significant nexus, or both. The proposed rule needs to recognize the *SWANCC* and *Rapanos* opinions and preserve the ability to determine that a water or wetland is nonjurisdictional because it is isolated. (p. 9)

Agency Response: Consistent with Supreme Court decisions, the rule is based on the agencies' determination of significant nexus. Preamble, III, and Technical Support Document, I.C. and II.

Automotive Recyclers Association (Doc. #15343)

10.83 Under the proposed rule much more permitting, monitoring and reporting of stormwater discharge data would be required. ARA is concerned that the agencies' previous attempts (under a separate rule) to require electronic reporting of permit information will be finalized and provide a pandora's box of easily accessible data to be mined for CWA citizen lawsuits - data that often is misinterpreted to justify the lawsuit filing. Although ARA supports public awareness of the NPDES program and of the information collected and reported, Association members do not believe that specific data should be shared unless it is subject to some type of review on how the information will be used. The increased volume of data resulting from this rule could clog the courts even more. (p. 7-8)

Agency Response: The impacts of NPDES E-Reporting rule are beyond the scope of this rulemaking.

U.S. Chamber of Commerce, et al. (Doc. #14115)

10.84 The Agencies' rationale for their proposal rests upon a selective and biased reading of the principal Supreme Court precedents addressing jurisdiction under the CWA. It also ignores the clearly articulated Congressional design of the CWA and more than 40 years of its successful federal/State implementation. The proposal abandons key jurisdictional elements established in the *Riverside Bayview Homes* decision; ignores the clear restrictions imposed by the Court in *SWANCC*, including those articulated by Justice Kennedy; and distorts *Rapanos* by giving no weight to the plurality opinion while attributing to Justice Kennedy certain broad principles that are neither supported by his concurring opinion nor allowed within the jurisdictional bounds he helped clarify in *SWANCC*. (p. 41)

Agency Response: The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C.

10.85 From enactment of the landmark 1972 Clean Water Act, through its major amendments in 1977 and 1987, Congress clearly designed the Act to regulate the discharge of pollutants into waterways, not to regulate land uses. The CWA contains clear limitations on federal authority—and a corresponding preservation of traditional State and local authority—in the national effort to control water pollution while allowing beneficial land and water uses. CWA Section 101(b) provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use . . . of land and water resources…"[37] As a direct means of enforcing that policy, Congress also provided, in CWA Section 510, a rule for interpreting the Act when there is an issue as to the extent of federal authority within this sphere of State "rights and responsibilities": "Except as expressly provided in this chapter, nothing in this chapter shall… (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters…of such States."[38]

Because the Agencies' proposal to define the extent of federal authority under the CWA presents a question of federal regulatory jurisdiction versus traditional State authority, CWA Section 510 requires an inquiry as to whether the statute "expressly provide[s]" the authority that the Agencies claim. The U.S. Supreme Court has held repeatedly that this analytical approach is central to the task of interpreting the CWA when the limits of federal jurisdiction are at issue. (p. 41)

Agency Response: The rule is consistent with the Clean Water Act. Technical Support Document, I.A.

10.86 In *U.S. v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), the Court held that the CWA could be interpreted to cover some waters beyond traditionally navigable waters –

[37] 33 U.S.C. §1251(b).
[38] 33 U.S.C. §1370.

specifically, wetlands that actually abut on navigable waterways.[39] While some of the Court's language may suggest that it was considering a broader question of CWA jurisdiction over wetlands adjacent to "streams" and "other hydrographic features," the Court was limited to the facts in the case, which pertained only to a wetland that "extended beyond the boundary of respondent's property to Black Creek, a navigable waterway."[40]

Writing for a unanimous Court, Justice White explained that, "[i]n determining the limits of its power to regulate … under the Act" where the wetlands in question physically abut on a navigable waterway, "the Corps must necessarily choose some point at which water ends and land begins."[41] Recognizing the difficulty of that task, the Court found the Corps' determination that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality …" sufficient to support its decision to include such wetlands within the Act's jurisdiction.[42] The Court concluded that "[w]e cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with 'waters' of the United States … is unreasonable."[43] (p. 42)

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

10.87 Fifteen years later, the Court decided *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). At issue in *SWANCC* were several ponds in a former gravel pit that had developed a "natural character" and were used as habitat by migratory birds. The ponds were physically isolated in the sense that they were not adjacent to open water, but they shared a biological connection with other waters given their well-established use by migratory water birds such as heron, geese, ducks and kingfishers. The Corps had concluded that the water areas were WOTUS because the migratory birds cross state lines, bird hunting is a significant economic activity, and the wetland, although isolated, functioned in interstate commerce and made it a water of the U.S., not a water of Illinois.

After the case reached the U.S. Supreme Court, the *SWANCC* majority held that the CWA embodied Congress' explicit purpose of recognizing and preserving the "primary responsibilities and rights" of States to deal with water pollution and land uses.[44] The Court noted that Congress does not "casually authorize" agencies to interpret their statutory jurisdiction in a manner that would "push the limit of congressional authority," especially where doing so "alters the federal-state framework by permitting federal encroachment upon a traditional state power."[45] In such circumstances, the Court "expect[s] a clear indication that Congress intended that result."[46]

[39] *Id*. at 135
[40] *Id*. at 131
[41] *Id*. at 132
[42] *Id*. at 133.
[43] *Id*. at 134.
[44] 531 U.S. 159, 166-67 (quoting 33 U.S.C. § 1251(b)).
[45] *Id*. at 172-73.
[46] *Id*. at 172.

The Court then reiterated its holding in *Riverside* that federal jurisdiction extends to wetlands that are actually abutting navigable waters because protection of these adjacent (actually abutting) wetlands was consistent with Congressional intent to regulate wetlands "inseparably bound up with 'waters of the United States.'"[47] The Court found that this "inseparability" is what produces a "significant nexus" between the wetlands and navigable waters.[48] Thus, nothing in *Riverside* or *SWANCC* suggests that the concept of a "significant nexus" justifies CWA jurisdiction over anything beyond wetlands that actually abut waters that qualify as traditional navigable waters in their own right. Justice Kennedy was a part of the majority making this key conclusion.

SWANCC held that the Corps' assertion of federal jurisdiction over "ponds that are not adjacent to open water" is not permitted under the plain language of the CWA.[49] Nothing in the legislative history of the Act persuaded the Court that Congress intended to cover more than navigable waters and their adjacent wetlands.[50] And the Court declined to give *Chevron*[51] deference to the Corps' interpretation of its own jurisdiction over isolated waters used by migratory birds because it found that the statute was unambiguous. In addition, deference was not justified because the Court found that the Corps' interpretation would infringe on States' authority to regulate land and water use without any clear indication that Congress intended that result.[52] (p. 42-44)

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

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

- The CWA cannot be read to confer jurisdiction over physically isolated, wholly intrastate waters. In *SWANCC* the Court said: "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this."[53] The Court did not merely disagree with the Corps' argument that use by migratory birds could justify extending CWA jurisdiction to isolated waters. It concluded that the statutory text cannot justify regulation of intrastate ponds that are not adjacent to open water under any rationale;
- A water such as a pond is isolated (and therefore not jurisdictional) if it is not adjacent to open water. The Court understood adjacency as a limited concept, encompassing only those waters that actually abut on a navigable waterway.[54] The

[47] *Id*. (quoting Riverside Bayview Homes, 474 U.S. at 134).
[48] *Id*.
[49] *Id*.
[50] *Id*. at 170-71. While the Court noted it is possible to argue that the 1977 amendments adding Section 404(g) to the statute demonstrate a Congressional intent to cover "non-navigable tributaries and streams," the Court did not address that question. Id. at 171.
[51] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 531 U.S. at 172.
[52] *Id*. at 172-74.
[53] SWANCC at 168.
[54] *SWANCC* at 167. Note that in neither Riverside nor SWANCC was the Court called upon to decide whether Corps' regulatory definition of "adjacent" (i.e., "bordering, contiguous or neighboring") was a reasonable interpretation of the Act.

concept of adjacency must be so limited in order to give some import to Congress' use of the term "navigable" while at the same time recognizing that Congress intended to regulate "at least some waters" that are not navigable;[55] and,

- The *Riverside* decision must be understood to mean that wetlands adjacent to (i.e., actually abutting) navigable waters, which are thus "inseparably bound up with" navigable waters, provide the "significant nexus" on which the decision in *Riverside* rested.[56]

These were the jurisdictional boundaries drawn by the Court, including Justice Kennedy, prior to *Rapanos*. Neither the plurality opinion nor Justice Kennedy's opinion in *Rapanos* repudiates any aspect of the SWANCC decision, including the SWANCC majority's characterization of the rationale on which the outcome in Riverside rested. [57](p. 44)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

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

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

The Agencies' proposed WOTUS rule relies extensively on language from the Rapanos opinions, particularly Justice Kennedy's. Unfortunately, the Agencies ignore limitations on principles expressed by the Justices. In particular, the Agencies' reliance on Justice Kennedy's concept of "significant nexus" in Rapanos seems to completely ignore the limits on the concept that he himself articulated. Rather than staying within the contours of Justice Kennedy's "significant nexus" concept that they rely so heavily upon, the Agencies' proposal expands the concept to a virtually infinite, zen-like construct where every drop of water is intimately connected to every other drop. (p. 44-45)

[55] *Id*.
[56] *Id*.
[57] *Id*. Thus, conceptually there is little daylight between adjacency (meaning actually abutting) and the "significant nexus" that justifies extending CWA jurisdiction beyond navigable waters.

Agency Response: **Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.**

10.90 Justice Kennedy noted that both the plurality and the dissent would expand CWA jurisdiction beyond permissible limits. He wrote that the plurality's coverage of "remote" wetlands with a surface connection to small streams would "permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach" (i.e., wetlands near to, but lacking a continuous surface connection with, navigable-in-fact waters).[58] This, he said, was "inconsistent with the Act's text, structure, and purpose."[59] As for the dissent, Justice Kennedy said the Act "does not extend so far" as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial,that eventually may flow into traditional navigable waters."[60] Justice Kennedy's outright rejection of these jurisdictional theories–mere hydrologic connections to, and mere proximity to, navigable waters or features that drain into them—were not accounted for by the Agencies in their proposal. (p. 45-46)

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

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

10.91 Neither the federal Circuit Courts of Appeal nor the District Courts can agree on the appropriate test for deciding the scope of the Agencies' CWA jurisdiction under *Rapanos*. Several tests have been articulated. The seminal case directing the means of interpreting the controlling precedents from a fractured Supreme Court in which no single opinion garners the support of a majority of justices is *Marks v. United States,* 330 U.S. 188 (1977) which holds:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id*. at 193.

However, given that the respective rationales in *Rapanos* are not linear or logical subsets leading to a readily apparent "narrowest grounds," application of *Marks* by lower courts trying to interpret *Rapanos* has been of little or no assistance, some courts expressly refusing to apply it.

[58] Rapanos at 776-77
[59] Rapanos at 776.
[60] Rapanos at 778-79

The Agencies have made their position plain, however. "The government position since *Rapanos* has been that a water is jurisdictional under the CWA when it meets either the plurality or Kennedy standard."[61]

Although *Rapanos* has spawned multiple and diverse theories of establishing and limiting the Agenices' jurisdiction under the CWA, one thing is unmistakable: that jurisdiction is not boundless. Five Justices of the *Rapanos* court insisted that exertion of jurisdiction beyond navigable waters as traditionally understood must be premised upon significant and demonstrable effects on navigable waters. Speculative or insubstantial effects are well outside the outer bound of jurisdiction. And any mere hydrologic connection is not enough to uphold a claim of jurisdiction. (p. 11)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

New Mexico Association of Commerce and Industry (Doc. #14638)

10.92 Not surprisingly, this flawed proposal exceeds EPA and the Corps' authority under the United States. This statutory term has been interpreted by the Supreme Court to Clean Water Act, which only authorizes EPA and the Corps to regulate the "waters of mean either "traditional navigable waters" or other bodies of water that have a "significant nexus" to such waters. To have a significant nexus, the-water body at issue must 'significantly affect" the chemical, physical and biological integrity of -navigable waters in a manner that is more than speculative and insubstantial. (p. 1)

Agency Response: The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C.

Federal Stormwater Association (Doc. #15161)

10.93 First, while the statute and the regulations have not changed, the agencies in the past have attempted to expand their jurisdiction through guidance and permit decisions. Twice, the Supreme Court has ruled that these attempts to expand jurisdiction exceed the agencies' authority under the CWA. Broad assertions of jurisdiction based on factors such as use of water by migratory birds were never lawful and do not establish a baseline from which to compare the proposed rule. A fair reading of Supreme Court precedent does not support the proposed rule. FSWA believes the proposed rule as another attempt to circumvent Supreme Court decisions to expand federal authority. (p. 2)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

10.94 There is no question whether the Constitution or the CWA authorizes federal jurisdiction over "navigable waters and territorial seas."[62] However, the proposed rule has created uncertainty regarding what is considered "navigable." The preamble suggests that

[61] Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction), (April 27, 2011) . U.S. Envtl. Prot. Agency http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf

[62] Territorial seas are navigable. 33 CFR § 328.4(a) ("The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.").

commercial navigation can be demonstrated by an experimental canoe trip taken solely to demonstrate navigability. 79 Fed. Reg. at 22,253. While the agencies cite *FPL Energy Marine Hydro L.L.C. v. FERC*, 287 F.3d 1151 (D.C. Cir. 1992), to support this position, such insignificant and speculative evidence does not meet the test set forth by the Supreme Court, which requires a traditional navigable water to be a "highway of commerce." *The Daniel Ball*, 77 U.S. 557 (1870). According to the Supreme Court, use as a highway is the "gist of the federal test." *Utah v. United States*, 403 U.S. 9 (1971). An experimental canoe trip fails that test. Under the Commerce Clause, Congress also can regulate those activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Again, a canoe trip fails that test. (p. 3)

Agency Response: **The rule is consistent with caselaw and the Constitution. Technical Support Document, I.B and C and III.**

10.95 In contrast to the proposed rule, in a series of decisions starting with *Riverside Bayview*, 474 U.S. 121 (1985), the Supreme Court interpretations of the Clean Water Act have analyzed the scope of federal jurisdiction based on impacts to the quality of navigable waters. In *Riverside Bayview*, the Court found that a wetland that directly abuts a water of the U.S. is a continuation of such water. See 474 U.S. at 134 ("the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system," quoting 42 Fed. Reg. 37128 (1977). Thus, in situations where a wetland abuts a water of the U.S., *Riverside Bayview* stands for the proposition that the landward extent of that particular water of the U.S. includes the wetland. The Court simply held that: "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States - based as it is on the Corps' and EPA's technical expertise - is unreasonable." *Id*. at 134. So, in accordance with *Riverside Bayview*, adjacency determines the landward extent of open water ("where water ends and land begins"), and adjacent wetlands are included in the definition of jurisdictional waters to protect and maintain the quality of navigable waters. (p. 7-8)

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

10.96 In the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the Court declined to go beyond *Riverside Bayview* and assert jurisdiction over waters or wetlands that were not "inseparably bound up with the 'waters' of the United States." 531 U.S. at 167 (quoting *Riverside Bayview*). In its decision, the Supreme Court informed us that the term "navigable" cannot be read out of

the Act.[63] The Court recognized that the gravel quarry in Cook County, Illinois, was a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id*. at 173. The Court also overturned EPA's "Migratory Bird Rule" that it had crafted to expand its CWA jurisdiction, finding that use of a water body by migratory birds alone is not a basis for jurisdiction under the Act.[64] The rationale used to reach this conclusion severely called into question to legitimacy of federal jurisdiction over any isolated water, and since 2001 the Corps and EPA have not attempted to assert jurisdiction over isolated waters.[65] (p. 8)

Agency Response: The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.

10.97 In *Rapanos v. United States*, the Court addressed a third category of jurisdictional waters: tributaries (and their adjacent wetlands). 547 U.S. 715 (2006). The plurality held that to be subject to the CWA, water must be relatively permanent surface water.[66] The concurring opinion by Justice Kennedy held that to be subject to CWA jurisdiction, water must have a "significant nexus" to traditional navigable water.[67] The dissenting justices would apply jurisdiction more broadly, based on "entwined" ecosystems. 547 U.S. at 797. But all of the opinions recognized that the CWA's focus is protecting water quality, not drainage features.

Despite the Court's recognition that the CWA is a water quality protection statute, the proposed rule relies entirely on the opinion of Justice Kennedy, thus ignoring constraints imposed by the plurality opinion, and misapplies Justice Kennedy's opinion to assert the very broad federal jurisdiction described above, without staying focused on water quality connections. Accordingly, the proposed rule is not consistent with Supreme Court case law. (p. 7)

[63] "We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes:* holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import," 474 U. S., at 133, and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See e.g., *United States v. Appalachian Elec. Power Co*., 311 U. S. 377, 407-408 (1940)." *SWANCC*, at171-172

[64] See *SWANCC*, 531 U.S. at 173 (denying jurisdiction over water based on use by migratory birds based on the fact that the Clean Water Act regulates only navigable waters and declining to invoke the "outer limits of Congress' power"); see also *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (denying jurisdiction over water based on use by migratory birds because connection to interstate commerce is too speculative).

[65] EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction) (April 27, 2011).

[66] 547 U.S. at 733

[67] 547 U.S. at 780.

Agency Response: **The rule is consistent with the Supreme Court decisions. Technical Support Document, I.C.**

Steel Manufacturers Association, et al. (Doc. #15416)

10.98 Not only is the proposed definition unnecessarily burdensome, it is an impermissible construction of the CWA. This attempt to stretch the bounds of CWA jurisdiction to include even discrete, purely intrastate waters has already been unquestionably rejected in two previous Supreme Court decisions. This latest attempt by EPA and the Army Corps merely repackages the same twice-rejected statutory construction arguments and in no way reflects the Supreme Court's admonition that EPA and the Army Corps constrain their jurisdiction to the recognized boundaries of the CWA.

The definition fails to provide any additional clarity with respect to which waters are regulated as "waters of the United States," and complicates this analysis by proposing case-by-case "significant nexus" determinations. The "significant nexus" test itself has been interpreted in a number of ways, and in the proposed rule, EPA and the Army Corps have impermissibly elected to follow Justice Kennedy's interpretation in his *Rapanos* dissent because it allows for broader regulation of waters, despite the fact that the plurality in *Rapanos* rejected his interpretation.

The Supreme Court, in its two decisions, *Rapanos* and *SWANCC*, has previously addressed the proper scope of the CWA. EPA's effort to revise the definition of "waters of the United States" in a manner inconsistent with the holdings of these two cases introduces expansive new jurisdiction, is misguided, and constitutes an overreach of federal power.

The proposed definition fails to address the issues raised by the Supreme Court, and, in fact, strides well past the jurisdictional boundaries EPA and the Army Corps were twice admonished to recognize. Stretching the definitions of terms like "tributary" and "adjacent waters" to include, for instance, "floodplains" and "riparian areas" potentially allows EPA and the Army Corps to connect nearly any waterbody to the traditional navigable interstate waters over which they have jurisdiction. In doing so, EPA and the Army Corps are plainly attempting to claw back jurisdiction over waters for which the Supreme Court in *SWANCC* already denied jurisdiction. So too would EPA and the Army Corps' characterization of "tributaries" as having a bed, bank, and high water mark integrate a number of non-permanent, seasonal, or rarely-wet land features.

The Supreme Court has already rejected the sort of expansive definition of tributary and other contributory waters that EPA attempts in this proposed rule. Bodies of water that are intrastate and isolated are not considered "waters of the United States" per the Court's decision in *SWANCC*. Waters that are not relatively permanent, standing, or continuously flowing are excluded from CWA jurisdiction following the Court's decision in *Rapanos*. The Court has confirmed that "navigable waters" and "waters of the United States" are terms that should encompass a limited class of waters, and that the federal government should be restricted to waters of interstate interest so as to preserve the traditional right of states and localities over land and water use. EPA's and the Army Corps' proposed definition of "waters of the United States" fails to meet either of those elements.

Our associations are very concerned about these repeated attempts at CWA overreach because a number of waterbodies and land features are frequently present on EAF steel mill properties, such as stormwater and cooling water retention ponds and wetlands. Often these water features have no surface connection to interstate and navigable waterbodies, and so they should properly be regulated by local and state authorities. EPA's and the Army Corps' proposed rule seeks to assert CWA jurisdiction for these waters, and would saddle landowners with additional, and potentially costly, permitting requirements—often with no additional environmental benefit as many of these types of waters are regulated by state and local entities. Further, because EPA and the Army Corps seek to link these waters to traditionally navigable waters through subsurface or intermittent hydrologic connections, landowners would be forced to spend vast amounts of time, money, and resources in determining the jurisdictional status of their property and defending against any improper efforts at federal enforcement.

The Supreme Court was clear—the scope of CWA jurisdiction should properly be limited to those waterbodies that most directly affect the water quality of traditional navigable and interstate waters. This new definition of "waters of the United States" would lead to expansive federal power over land and bodies of water far removed from navigable and interstate waters. Consequently, it would also impinge upon the states' traditional power over land and water use. A great number of nonnavigable, isolated, intrastate waters that do not physically and proximately abut a navigable or interstate waterway would be brought under the jurisdiction of the CWA—an outcome which is completely misaligned with the intent of the statute and the holding in *SWANCC*.

EPA's and the Army Corps' overreach is most conspicuously represented by their decision to use Justice Kennedy's minority concurring test for "substantial nexus" in the *Rapanos* opinion, instead of the more widely supported plurality opinion. EPA and the Army Corps sidestepped the plurality in order to avail themselves of a single Justice's view that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (J. Kennedy, concurring).

In its notice, EPA and the Army Corps explain that "the agencies determined that it is reasonable and appropriate to apply the 'significant nexus' standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of waterbodies as well." 79 Fed. Reg. 22,192. The agencies, however, largely ignore that Justice Kennedy's singular view directly conflicts with the plurality.

The plurality noted that Justice Kennedy's interpretation was not grounded in prior CWA decisions such as *SWANCC*. *Rapanos*, 547 U.S. at 753-54. In fact, in *SWANCC* the Court rejected the sort of case-by-case determinations proposed in this rule and required by Justice Kennedy in his interpretation of significant nexus, instead determining that all physically connected wetlands are covered as waters of the United States. See *Rapanos*, 547 U.S. at 754 (citing *Riverside Bayview*, 474 U.S. at 135 n9).

The "significant nexus" test in *SWANCC* required a physical connection for wetlands to be considered "waters of the United States." EPA's and the Army Corps' choice to use a

significant nexus test that favors the expansive outcome it desires, despite the fact that it was supported by only one Justice and rejected by the plurality of Justices authoring the Court's opinion, is indefensible. Further, by electing to use Justice Kennedy's test, EPA and the Army Corps have introduced even more ambiguity and confusion over the "significant nexus" test and the determination of CWA jurisdiction over "waters of the United States." (p. 4-7)

The CWA allows any citizen to bring suit against alleged violators. 33 U.S.C. § 1365. The proposed definition of "waters of the United States" would create a large amount of confusion regarding regulated waters for both landowners and for concerned citizens, and creates a gaping opportunity for citizens to bring suit in what would be a poorly-clarified area of the law. Citizen suits are costly and time-intensive for all parties involved. In addition, should citizens bring suits, numerous courts will be required to interpret the provisions of the CWA, including the meaning of "waters of the United States," and a wide variety of interpretations will result that will likely develop a broader meaning to the rule than was intended by EPA. Citizen suits will further serve to encourage the ambiguous and unclear nature of the proposed rule. (p. 9)

Agency Response: **The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C. The agencies have concluded the benefits of the rule exceed the costs. Preamble, V and Economic Assessment in the docket. The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV.**

Landmark Legal Foundation (Doc. #15364)

10.99 Application of the "significant-nexus" test establishes only the barest connection between the Act and the constitutional power reserved to Congress to regulate interstate commerce. As noted in *Rapanos*, a regulation that "pushes the envelope of constitutional validity" should be subject to increased scrutiny. The attenuated link between the "waterways" defined in the proposed rule and the Agencies' authority to regulate pursuant to the Constitution's Commerce Clause does not survive constitutional muster. Regulating "riparian areas" and "ephemeral" tributaries falls outside the scope of the Commerce Clause. Filling these areas, which are not actual wetlands without a permit is not economic activity and bears no relation to actual channels of economic activity The proposed regulation does not regulate commerce. "Commerce" involves transactions or activity directly related to those transactions. The Agencies will regulate parcels of land that have only the barest connection to traditional waterways -filing these parcels without a permit is not inherently economic.

As stated before, EPA and the Corps have eschewed the requirement that the water be "navigable." Such broad authority is not authorized under the "channels of commerce" principle. Nor is the proposed regulation authorized under congressional authority to regulate those activities that "substantially affect" interstate commerce.

Regulation of "channels of commerce" assumes an actual regulation of a "channel." While the Supreme Court has ruled that "the authority of Congress to keep channels of interstatecommerce free from immoral and injurious uses has frequently been sustained ..." *Caminetti v. United States*, 242 U.S. 470, 491 (1917), those instances have been limited to regulation of actual "channels.' Under the proposed regulation, the Agencies

would have authority to regulate wetlands and ephemeral tributaries that cannot be characterized as channels.

In *SWANCC*, the Supreme Court noted that the legislative history of the Act shows congressional intent to limit commerce power over navigation. Congress used its authority to regulate channels, not activities that substantially affect commerce. It stated, "The term 'navigable has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made," *SWANCC*, 531 U.S. at 172.

This authority arises from the congressional authority to regulate the actual channels of interstate commerce, not activities that may substantially affect commerce. Nonetheless, the connection between the activity subject to regulation and its effect on interstate commerce is too attenuated to withstand scrutiny. To uphold this regulation, a court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States..." Further, the court would have to undertake "a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *United States v. Lopez*; 514 U.S. 549, 567 (1995). Approving this proposed regulation runs counter to the Supreme Court's admonition "that Congress may regulate noneconomic activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences" *Gonzales v. Raich*, 125 S.Ct. 2195, 2217 (Scalia, 1., concurring) The authority EPA and the Corps seek in the proposed rule is analogous to the undefined and unlimited authority it sought in the recent "Tailpipe Tailoring Rule." The Agencies should not ignore the Supreme Court's admonition in that case, which is equally applicable to the proposed "Waters of the United States" proposal: We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery [referring to the three step phase-in set forth in the Tailoring Rule]. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. Utility Air Regulatory Group v. Environmental Protection Agency, et al., No. 12-1146, slip op. at 23 (June 23, 2014). (p. 11-13)

Agency Response: **The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule is also consistent with the statute, caselaw and the Constitution. Technical Support Document, I. A and C.**

Atlantic Legal Foundation (Doc. #15253)

10.100 The proposed rule represents an expansion of federal regulatory authority beyond the language and intent of Congress in the Clean Water Act. Although your agencies assert that the rule is narrow and clarifies CWA jurisdiction, it in fact expands federal authority under the CWA significantly and aggressively and creates unnecessary ambiguity. The proposed rule is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a "jurisdictional wetland." (p. 2)

Agency Response: **The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV. The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and I.C.**

10.101 Rather than providing clarity and making identifying jurisdictional waters "less complicated and more efficient," the proposed rule increases ambiguity and regulatory discretion. For example, the rule heavily relies on undefined or vague concepts such as "riparian areas," "landscape unit," "ordinary high water mark" (– terms that are not found in traditional land use or property rights jurisprudence, but is jargon of recent vintage used by regulators) as determined by the agencies' "best professional judgment." The proposed regulation is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a "jurisdictional wetland." The proposed rule creates more confusion and will lead to more litigation. (p. 4)

Agency Response: **The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV. The agencies disagree that the rule is vague. Technical Support Document, I.C. In fact, the rule includes longstanding definitions for "Ordinary High Water Mark" and "High Tide Line" to provide greater clarity and certainty. The terms "riparian areas" and "landscape unit" are not terms used in the rule. Preamble, IV.**

Texas Chemical Council (Doc. #15433)

10.102 But it is imperative that the federal government be restrained within constitutional limits to preserve states' rights and autonomy under the Commerce Clause. The U.S. Supreme Court has on multiple occasions cautioned the federal government against such attempts at overreaching. While the Court in *Rapanos v. United States*[68] provided its directive to the EPA and Corps to clarify the extent of their jurisdiction by initiating – again – a rulemaking to define waters of the U.S., it is clear that under the most recent attempt, the agencies are misguided in their interpretation of the case law and the constitutional limits imposed upon them. (p. 1-2)

Agency Response: **The rule is also consistent with the statute, caselaw and the Constitution. Technical Support Document, I. A and C.**

10.103 The EPA & Corps lack legal authority to adopt the Proposed Rule and inappropriately shift the burden of proof to the regulated community. Although the EPA and Corps claim that the newly proposed rule will not expand regulatory jurisdiction and that it reflects current law, for which they reference the U.S. Supreme Court decisions in *SWANCC*[69] and *Rapanos*[70] in the preamble, the agencies clearly dismiss the limitations and cautions against expansion of federal jurisdiction the Court provides. The proposal would

[68] *Rapanos v. United States*, 547 U.S. 715 (2006).
[69] 531 U.S. 159 (2001).
[70] 547 U.S. 715.

incorporate water and land features that in no way meet the definition of "relatively permanent, standing, or flowing bodies of water."[71]

The agencies instead focus solely on the plurality's mentioning of "seasonal rivers," which, while not completely excluded from regulatory jurisdiction, are taken out of context in the proposal.[72] The agencies' reference to the Rapanos opinion suggests that certain waters would be jurisdictional even when they remain dry most of the year. This does not comport with the idea that waters must be relatively permanent to justify the regulatory reach of the federal government. More specifically, the Court in Rapanos indicated that "ephemeral" or "intermittent" streams are specifically excluded from jurisdiction of the agencies.[73]

The Court's opinions – and namely the plurality opinion – are somewhat tenuous and do not provide specific direction to the agencies in defining federal jurisdiction under the CWA. But by writing a broad rule with limited exclusions and asking the regulated community to suggest additional exclusions, the agencies unreasonably shift the burden of proof to the regulated community to claim and prove which waters are <u>not</u> jurisdictional. The agencies have a duty to provide direction and clarification as to what they intend to exert jurisdiction over, especially considering the regulatory implications of the CWA. The public deserves sufficient notice, and this proposal only provides additional uncertainty. The agencies even recognize this in portions of the proposed rule.[74]The EPA and Corps should instead provide narrowly-tailored definitions of key terms that are consistent with their intent to clarify jurisdiction, meaning that no new waters would be considered jurisdictional under the proposed rule. They have clearly not met this standard. (p. 3-4)

<u>Agency Response:</u> The rule does not shift the burden of proof to the regulated community; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule, promulgated under authority of Section 501 of the CWA, does establish a binding definition of "waters of the United States." The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C. The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV.

10.104 Notably, Justice Kennedy states in the *Rapanos* plurality opinion that "In applying the definition [of waters of the U.S.] to 'ephemeral streams,' … man-made drainage ditches,

[71] *Id*. at 733.

[72] *Id*. ("By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months--such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent…It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams --that is, streams whose flow is "[c]oming and going at intervals…[b]roken, fitful,"… or "existing only, or no longer than, a day…– are not.).

[73] See *id*.

[74] 79 Fed. Reg. 22203 ("[T]he agencies recognize that it may add an element of uncertainty to the definition of tributary to include features of tributaries which do not have a bed and bank and an [ordinary high water mark].")

and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this "Land Is Water" approach to federal jurisdiction."[75] Clearly, the EPA and Corps have gone too far in their attempt to define regulatory jurisdiction and it is imperative that the definition of waters of the U.S. be limited to that which is explicitly authorized under standing federal law. (p. 7)

Agency Response: The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C.

United States Steel Corporation (Doc. #15450)

10.105 The proposed rule unlawfully expands CWA jurisdiction beyond the limits intended by Congress and recognized by the U.S. Supreme Court. The proposed rule ignores the *Rapanos* plurality opinion and misinterprets Justice Kennedy's significant nexus standard. (p. 1)

Agency Response: The rule is also consistent with the statute, caselaw and the Constitution. Technical Support Document, I. A and C.

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

10.106 The proposed rule, as currently drafted, would effectively eliminate any constraints the term navigable" imposes on the EPA or the Corps. The CWA, which was enacted in 1972, limits jurisdiction in the Act to "navigable" waters of the United States. This definition has been challenged over the years, but two U.S. Supreme Court decisions over the past decade (2001 and 2007) have confirmed that the term "navigable waters" under the CWA does not include all waters. In those two cases, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*") and *Rapanos v. United States* ("*Rapanos*"), the Court rejected the notion that the jurisdiction of t he CWA extends to waters with "any" connection to navigable waters, regardless of how tenuous that connection, and rejected the agencies' "land is waters" approach. The current proposed rule on Waters of t he United States would override these two very consistent decisions by the Court and expand the jurisdiction of t he CWA to include all waters. In addition to t he two U.S. Supreme Court decisions, we would also point to the fact that, during this time, Congress has failed to pass language that would expand the authority of the CWA. Therefore, we are very concerned that this proposed rule would grant regulatory control of virtually all waters, and assumes a breadth of authority for the CWA that Congress has not authorized and likely exceeds the constitutional limitation on federal jurisdiction. (p.1-2)

Agency Response: The rule is also consistent with the statute, caselaw and the Constitution. Technical Support Document, I. A and C.

10.107 As discussed in these comments, the reality is that the proposed rule would increase jurisdictional waters by substantially more than the 3 percent proffered by the Agencies and, therefore, the administrative and economic impacts of the proposed rule are far greater than the Agencies claim . Since the U.S. Supreme Court decisions in *SWANCC*

[75] Rapanos, 547 at 734.

and *Rapanos* have consistently limited the jurisdictional scope of t he CWA and t he Agencies now wish to regulate an additional "60 percent of streams and millions of acres of wetlands across the country," there will be a significant expansion in jurisdiction and corresponding cost of oversight and compliance. Such an expansion would essentially override Supreme Court precedent and expand the jurisdiction of the CWA to include virtually all waters, thereby assuming a breathtaking scope of authority under the CWA that Congress did not intend. (p. 2)

Agency Response: The rule is narrower in scope than the existing regulations. Technical Support Document, I.B. The rule is also consistent with the statute and Supreme Court decisions. Technical Support Document, I. A and C. The agencies have provided an economic assessment of the rule. Preamble, V, and economic assessment in the docket.

10.108 Rather than automatically regulating most or all water bodies with a bed and a bank, the Agencies must adopt the approach described in Justice Scalia's plurality opinion in *Rapanos*. Consistent with *SWANCC's* limited view of CWA jurisdiction over non-wetland water bodies, the plurality opinion in Rapanos limited jurisdiction to "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams' 'oceans, rivers, [and] lakes." The Rapanos plurality further held that CWA jurisdiction does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The plurality opinion indicated that the Agencies' attempt to regulate manmade water bodies as tributaries is not supported by the CWA: In applying the definition to "ephemeral streams", "wet meadows", " storm sewers and culverts", "directional sheet flow during storm events", drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction. *Rapanos*, 547 U.S. at 734. (p. 3)

Agency Response: The rule is also consistent with the statute and Supreme Court decisions. Technical Support Document, I. A and C.

Coalition of Local Governments (Doc. #15516)

10.109 What the EPA and Corps ultimately propose goes outside the authority granted under the CWA and Supreme Court precedent, and unlawfully gives the EPA and Corps the discretion to assert CWA jurisdiction over virtually all waters in the Country. The agencies do not have the legislative authority to rewrite the rules and extend their authority past what was granted in the CWA by amending their regulations. The EPA and Corps are held to the laws as written and cannot rewrite the law. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768-69 (2014) Holding that HHS could not change the definition of a person by rulemaking. The Court emphasized that giving a word a different meaning for each section of a statute is the same as inventing the law, not interpreting it. (p. 5)

Agency Response: The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. There is only one CWA definition of "waters of the United States," although there may be other statutory factors that

define the reach of a particular CWA program or provision. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule is also consistent with the statute and Supreme Court decisions. Technical Support Document, I. A and C.

10.110 Therefore, the EPA and Corps' current attempt to increase their jurisdiction over "waters of the United States" exceeds the authority granted to it by the CWA and current Supreme Court precedent. Such attempt to change the law through its regulations is invalid absent the legislative authority to do so. (p. 5)

Agency Response: The rule is also consistent with the statute and Supreme Court decisions. Technical Support Document, I. A and C.

Dow Chemical Company (Doc. #15408)

10.111 First, as discussed in detail in the comments of the FWQC, while the statute and the regulations have not changed, the agencies in the past have attempted to expand their jurisdiction through guidance and permit decisions. Twice, the Supreme Court has ruled that these attempts to expand jurisdiction exceed the agencies' authority under the CWA. Broad assertions of jurisdiction based on factors such as use of water by migratory birds were never lawful and do not establish a baseline from which to compare the proposed rule. As such, the attempt to circumvent those Supreme Court decisions cannot be described as anything but an expansion of federal authority.

Finally, the proposed expansion of federal jurisdiction will significantly increase litigation and the burden on the regulated community, state and local governments, and regulators…We urge the agencies to withdraw the proposed rule and develop a new proposal that articulates legal and technical rationales for regulating water under the Clean Water Act that are consistent with the text, structure, and purpose of the Clean Water Act and Supreme Court precedent, and that reflect reasonable, constrained exercises of federal jurisdiction with deference to state control over land and water resources. The agencies must then make those rationales available for public comment. (p. 4-5)

Agency Response: The rule does not shift the burden of proof to the regulated community; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations. The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV. The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C.

National Association of Manufacturers (Doc. #15410)

10.112 Additionally, the proposed rule is completely inconsistent with Supreme Court precedents interpreting the scope of the Clean Water Act. The agencies have at best misunderstood, and at worst ignored or mischaracterized, the authoritative interpretations that the Supreme Court has given the agencies regarding the proper scope of the Clean Water Act. The proposed rule purports to propose rules that "narrow" the "scope of regulatory jurisdiction of the [Clean Water Act]" in order to bring the agencies' regulations into compliance with the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)

("*SWANCC*") and *Rapanos v. United States*, 547 U.S. 715 (2005). See 79 Fed. Reg. at 22192; see also *id*. at 22189, 22212. However, the proposed rule would extend federal jurisdiction to nonnavigable, intrastate waters that cannot be considered "navigable waters" under *SWANCC* and *Rapanos*…Indeed, the agencies' expansive reading of their jurisdiction is ultimately premised on the notion that land features can be regulated because they influence the flow of water, but the "plain language of the statute simply does not authorize this 'Land is Water' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734 (plurality).

The proposed rule is not only unlawful for the reasons mentioned above and described throughout these comments, it also fails to provide parties with "fair warning of the conduct [a regulation] prohibits or requires." *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2167 (2012) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 709 F.2d 154, 156 (D.C. Cir. 1986). The agencies fail to adequately define key terms in the proposed rule and assert the right to determine a Clean Water Act violation on the basis of an ad hoc, multi-factor balancing test that ultimately rests on the agencies' "best professional judgment." 79 Fed. Reg. at 22208. Such a "we know it when we see it" standard comports neither with the Due Process Clause of the Constitution nor the rulemaking requirements of the Administrative Procedure Act. (p. 2-3)

The proposed rule exceeds Congress's intent, is unconstitutional, and does not comport with the Supreme Court's authoritative guidance regarding the scope of the Clean Water Act. The proposed rule would regulate as "waters" subject to federal jurisdiction nearly every type of "water" imaginable: navigable waters, tributaries, adjacent waters, ditches, and even isolated intrastate waters with tenuous connections to waters that in turn have a tenuous connection to interstate commerce. A list of all of the specific "water" types included in this rulemaking would likely exceed the length of the proposed rule itself—it is that broad. The Constitution, the Clean Water Act, and Supreme Court jurisprudence do not comport with this expansion of federal authority.

The limits of Congressional authority are outlined in Article I of the Constitution, and Congress does not have power to legislate beyond the bounds of that authority. The Commerce Clause provides Congress the authority to "regulate commerce with foreign nations, among the several states, and with the . . . tribes." Article I, Section 8, Clause 3. While the Supreme Court has interpreted the Commerce Clause to grant broad authority to Congress to regulate interstate commerce, that grant is "not unlimited." *SWANCC*, 531 U.S. at 173. This authority has been interpreted in the context of the Clean Water Act already, and the Supreme Court has recognized there are bounds to waters that can be regulated under the Clean Water Act as intrastate waters that "substantially affect" interstate commerce such that their regulation under the Act is warranted. *Id*. Likewise, Congress does not have blanket authority to regulate all "waters" in the United States, and in turn, the agencies may not take their regulations beyond what has been authorized by Congress. The proposed rule plainly goes beyond not just what Congress intended, but also beyond Congress's actual authority, by regulating intrastate waters that cannot possibly have a substantial effect on interstate commerce, regulation that has been left to the states as recognized by Congress in the Clean Water Act. 33 U.S.C. § 1251(b); see also U.S. Constitution, Amendment X ("The powers not delegated to the United States by

the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

The Supreme Court in *SWANCC* emphasized that the agencies cannot regulate under the Clean Water Act in a way that goes beyond the bounds of the Constitution or that overrides this primary state authority. In *SWANCC*, the Court stated that were an administrative interpretation, such as this proposed rule, allowed to "invoke the outer limits of Congress' power, we [the Court] expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173. Here, as was the case in *SWANCC*, there is no clear indication from Congress that it intended for the agencies to regulate—as the proposed rule would here—at the bounds of Congress's power or to upend the federal-state framework. To the contrary, as noted, Congress has emphasized the primacy of State authority. The agencies must revise their proposed rule and re-propose a rule that stays within those powers Congress intended the agencies to wield when it enacted the Clean Water Act, remembering that the states retain the primary responsibility for regulating water resources.

In addition to protecting states' rights, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among other things, the Act prohibits the discharge of dredged or filled materials into "navigable waters"—defined as "the waters of the United States, including the territorial seas," *id*. § 1362(7)—unless authorized by a permit issued by the agencies or a State applying federally-approved standards, *id*. §§ 1311, 1344. The key term here—"waters of the United States"—is also a limitation on the reach of the agencies' regulatory authority with regard to numerous other programs under the Clean Water Act, including the NPDES permit program, the section 311 oil spill program, the section 303 water quality standards program, and the section 401 state water quality program. 79 Fed. Reg. at 22191.[76] Over the last thirty years, the Supreme Court specifically has addressed the meaning of that phrase in three cases whose holdings are controlling and whose analysis must inform the limits of any regulations promulgated under the Clean Water Act. (p. 5-6)

<u>Agency Response:</u> The rule is consistent with the statute, the caselaw, and the Constitution and is narrower in scope than the existing regulations. The rule is not vague. Technical Support Document, I.A., B., and C. The Supreme Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. Technical Support Document, IV.

10.113 In *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), the Court held that the Corps reasonably construed the Clean Water Act to apply to wetlands that were

[76] Because the term "navigable waters" is used in multiple instances in the Clean Water Act, the new definitions that the agencies propose would be implemented in multiple provisions of the Code of Federal Register. See 79 Fed. Reg. at 22262-74 (setting forth text of proposed changes to Title 33 and Title 40 of Code of Federal Register). For the sake of simplicity, these comments cite as exemplary the proposed rules to be implemented in Part 328 of Title 33 of the Code of Federal Register. This is also the section of the Code of Federal Register discussed in *Rapanos*.

contiguous to a navigable water (a creek in that case) and had "wetland vegetation" that "extended beyond the boundary of [the] property to [the] navigable waterway." *Id*. at 131. The Court reasoned that the statutory text, which defined "navigable waters" as "the waters of the United States" indicated that "Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability." *Id*. at 133.

The Court also deferred to the Corps' judgment that wetlands "adjacent to" navigable waters should be regulated as "navigable waters" under the Act because those wetlands are "inseparably bound up with" the navigable waters they abut. *Id*. at 131-32, 134. Finally, the Court found that Congress had acquiesced in the Corps' interpretation of the Clean Water Act in this context when it considered, but did not enact, legislation that would have limited the Corps' authority over wetlands adjacent to navigable waters. *Id*. at 135-39. (p. 6-7)

Agency Response: **The rule is consistent with Supreme Court decisions. Technical Support Document, I.C.**

10.114 In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court held that there are clear limits to the agencies' discretion to extend the Clean Water Act to nonnavigable waters. *SWANCC* raised the question whether the Corps properly asserted jurisdiction over nonnavigable, intrastate ponds that were ecologically connected to traditional navigable waters because they provided a habitat for migratory birds that "depend upon aquatic environments for a significant portion of their life requirements." *Id*. at 164-65, 171. This has been called the "Migratory Bird Rule." The Court held that the "text of the statute will not allow this." *Id*. at 168.

Although *Riverside Bayview Homes* allows regulation of some waters that may not meet the traditional definition of navigability, it does not permit the agencies to ignore the words "navigable waters" or read them out of the statute. *Id*. at 171-72. Instead, the concept of "navigable waters" must inform the agencies' construction of the phrase "waters of the United States," because it shows that "what Congress had in mind" in enacting the statute was its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id*. at 172. The Court emphasized that under "the Corps' original interpretation" in the 1974 regulations, promulgated just two years after the statute was enacted," it was "'the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.'" *Id*. at 168 (quoting 33 C.F.R. § 209.120(d)(1) (1974)) (emphasis in original). Finding "no persuasive evidence that the Corps mistook Congress' intent in 1974," the Court held that the statute is "clear" and refused to defer to the agencies' attempt to extend the statute to isolated nonnavigable intrastate waters. *Id*. at 168, 172.

As discussed above, the Court also went on to explain that even if the statute were not clear, it would not accept "an administrative interpretation" that "invokes the outer limits of Congress' power" in the absence of a "clear indication that Congress intended that result." *Id*. at 172. That concern "is heightened" where, as here, "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173. But "[r]ather than expressing a desire to readjust the federal-state balance" over land and water use, the Court found that Congress chose in

the Clean Water Act "to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .'" *Id*. at 174 (quoting 33 U.S.C. § 1251(b)). (p. 7-8)

Agency Response: **The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule is also consistent with the statute and Supreme Court decisions. Technical Support Document, I. A and C.**

10.115 In *Rapanos v. United States*, 547 U.S. 715 (2006), the Court again emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "waters of the United States." *Rapanos* raised the question of whether wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters" are "waters of the United States." *Id*. at 729. The court of appeals held they were, but the Supreme Court vacated and remanded that judgment.

Citing the ordinary meaning of "the waters of the United States," the four-justice plurality held that "the waters of the United States" includes "only relatively permanent, standing or flowing bodies of water," such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features." *Id*. at 732-33 (internal quotation marks omitted). In going beyond this "commonsense understanding" and classifying waters like "ephemeral streams," "wet meadows," "man-made drainage ditches" and "dry arroyos in the middle of the desert" as "waters of the United States," the Corps has stretched the statutory text "beyond parody." *Id*. at 734 (internal quotation marks omitted).

The plurality also rejected the view that wetlands adjacent to ditches, when those ditches do not meet the definition of "waters of the United States," may nevertheless be subjected to federal regulation on the theory that they are "adjacent to" the remote "navigable waters" into which the ditches ultimately drain. *Id*. at 739-40. In the plurality's view, a wetland is only subject to the Clean Water Act if it is adjacent to a channel that "contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters);" and "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. at 742 .

Justice Kennedy concurred in the judgment, but employed a different test. In his view, the Corps may deem a water or a wetland "a 'navigable water' under the Act" if it has a "significant nexus" to a traditional navigable water. *Id*. at 767. For "wetlands adjacent to navigable-in-fact waters," Justice Kennedy thought there is a "reasonable inference of ecologic interconnection" that is sufficient to sustain the Corps' "assertion of jurisdiction for those wetlands . . . by showing adjacency alone." *Id*. at 780. Justice Kennedy also said the Corps "may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely . . . to perform important functions for an aquatic system incorporating navigable waters." *Id*. at 781. But the agencies' regulations, which allow "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," were so broad that they could not be "the determinative measure of whether

adjacent wetlands are likely to play an important role in the integrity" of traditional navigable waters. *Id*. "Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id*. at 781-82. Given the over-breadth of the regulations, Justice Kennedy concluded that the Corps "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Id*. at 782. (p. 8-9)

Agency Response: The rule is consistent with Supreme Court decisions. Technical Support Document, I. C.

10.116 Below, these comments describe how the proposed rule's definitions of "tributary," "adjacent," and "other waters," would extend federal jurisdiction beyond that permitted by the Clean Water Act, as interpreted by the Supreme Court in the three cases discussed above. There is, however, a more fundamental flaw with the agencies' approach that transcends the defects in those definitions—the proposed rule is based on the erroneous legal premise that because water is essential to life and flows over land and into a wide variety of natural and man-made features, there is an "ecological" connection between most land and nonnavigable water that can in some manner influence traditional navigable waters. Based on this ecological connection, the agencies again seek to interpret "waters of the United States" so broadly as to be the "essentially limitless grant of authority" that the Supreme Court "rejected" in *Rapanos* and *SWANCC*. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

For example, the proposed rule observes that certain land features can influence whether run-off might ultimately flow to a traditionally navigable water. 79 Fed. Reg. at 22214. It also emphasizes that wetlands can help prevent flooding. *Id*. at 22213. To justify the proposed rule, the agencies must be interpreting the Clean Water Act to cover land, even though the "plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734 (plurality).

These ecological connections also form the proposed rule's justification for the expansive definition of tributaries,[77] and for extending federal jurisdiction to countless isolated nonnavigable waters. For example, the proposed rule classifies some isolated waters as "adjacent" to navigable waters, and therefore subject to Clean Water Act jurisdiction, on the grounds that "uplands separating two waters may not act as a barrier to species that rely on and that regularly move between the two waters." 79 Fed. Reg. at 22210. Other isolated waters will be considered "adjacent" to navigable waters if they are within the "riparian area" of the navigable water, which is any "area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." *Id*. at 22207. Finally, the proposed rule asserts that EPA and the Corps may assert jurisdiction over any "water" based on "biological

[77] See 79 Fed. Reg. at 22201 (justifying jurisdiction over all "tributaries" based on the "ecological functions" they serve); see also id. at 22197 (tributary streams are "biologically connected to downstream traditional navigable waters" because of, inter alia, importance of the water for the "life cycl[e]" of plant and animal species); *id*. at 22205 (tributaries provide "refuge from predators" for certain species and thus have a "biological" connection to navigable waters).

connections" including the "effects of the water" in question on the "life cycle" of "non-aquatic species" and "non-resident migratory birds." *Id*. at 22214.

These extenuated ecological connections do not satisfy even Justice Kennedy's "significant nexus" test from *Rapanos*. That test is derived from *SWANCC*—an opinion in which Justice Kennedy joined the Court majority in striking down the Migratory Bird Rule and held that the Clean Water Act does not apply to isolated, nonnavigable ponds, notwithstanding the dissent's assertion that the ponds provide habitat for birds that "serve important functions in the ecosystems" of navigable waters. 531 U.S. at 176 n.2 (Stevens, J., dissenting).

SWANCC's holding, in turn, was premised on the fact that a broad reading of "navigable waters" would raise constitutional questions and disregard the states' primary power over land and water use. Justice Kennedy reiterated these concerns in his concurring opinion in *Rapanos*, but said the "significant-nexus test" prevents such "problematic applications of the statute." 547 U.S. at 783 (Kennedy, J., concurring in judgment). That can only be true if the "significant nexus test is a demanding test that meaningfully restricts the assertion of federal jurisdiction" over nonnavigable intrastate waters and wetlands.

By using "ecological connections" to justify jurisdiction over waters that have no hydrological connection to a navigable water, the proposed rule asserts jurisdiction that Justice Kennedy made clear that the EPA and the Corps do not have. Cf. *id*. at 781-82 (the Clean Water Act cannot be read to cover "waters" that are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*"); *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007) (Clean Water Act does not cover pond nearby but not connected to navigable water because there is no "significant nexus"). Rather, as Justice Kennedy stressed, the "significant nexus" test must focus exclusively on the extent to which the upstream non-navigable water impacts "downstream water quality." *SWANCC*, 531 U.S. at 769. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. at 780. The proposed rule would impermissibly bring these "waters" within the term "waters of the United States," and thus, within the term "navigable waters." (p. 9-11)

<u>Agency Response:</u> Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that other certain waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

10.117 The Proposed Rule would extend federal jurisdiction to nonnavigable intrastate waters and wetlands that Congress did not intend to regulate under the Clean Water Act. Given the constitutional concerns raised by agencies' approach, the agencies should thus withdraw the proposed rule and promulgate one that adequately takes account of both the traditional meaning of "navigable waters" and the ordinary commonsense meaning of the phrase "the waters of the United States." Such a rule would give effect to both the congressional objective of protecting the chemical, physical and biological integrity of the nation's waters and the policy of preserving the primary responsibility of states to

plan the development and use of land and water resources. It would be consistent with the holdings of *Riverside Bayview Homes* and *SWANCC* and would raise no due process or Tenth Amendment questions. And it would provide a bright-line standard that reduces administrative costs and uncertainty about the scope of the federal permitting requirements of the Clean Water Act.

Even if the agencies persist in basing the final rule on Justice Kennedy's "significant nexus" test from *Rapanos*, which due to the Court's fragmentation in that case is not the appropriate holding of the case, see *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"), the rule still must be withdrawn and rewritten as key definitions in the proposed rule violate not only the *Rapanos* plurality opinion, but also Justice Kennedy's "significant nexus" test by extending federal jurisdiction to waters that are clearly not "waters of the United States" under the holding of *Rapanos*, and to waters that the agencies have not regulated in the past. (p. 11-12)

Agency Response: **The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV. The rule is consistent with the Clean Water Act and the Supreme Court decisions. Technical Support Document, I.A and I.C.**

10.118 The agencies cannot solve the vagueness of these definitions by promising to provide more specific standards in guidance documents promulgated after the proposed rule is finalized. The courts have become increasingly skeptical of attempts by federal agencies to promulgate "regulations containing broad language, open-ended phrases, ambiguous standards and the like" and then purport to "interpret" those regulations in "guidance documents" that purport to be authoritative but have not been subject to notice and comment. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). Deferring to the agency's subsequent "interpretation" of its regulations in such circumstances "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires." *Christopher*, 132 S. Ct. at 2167 (quoting *Gates & Fox Co.*, 709 F.2d at 156; see also *Talk America, Inc. v. Mich. Bell Tel. Co*., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) ("A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' That technique would circumvent section 553, the notice and comment procedures of the APA.") (citation omitted). (p. 13)

Agency Response: **The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C.**

Federal Water Quality Coalition (Doc. #15822.1)

10.119 First, as discussed below, while the statute and the regulations have not changed, the agencies in the past have attempted to expand their jurisdiction through guidance and permit decisions, relying on theories such as use of water by migratory birds to argue that water has an impact on interstate commerce, or so-called connections created by ditches or even tire ruts to argue that water is part of or adjacent to a tributary system. Twice, the Supreme Court ruled that these attempts to expand jurisdiction because they exceed the agencies' authority under the CWA. Broad assertions of jurisdiction based on factors such as use of water by migratory birds were never lawful and do not establish a baseline against which the proposed rule can be compared. As such, the attempt to circumvent those Supreme Court decisions cannot be described as anything but an expansion of federal authority. (p. 6)

Agency Response: The rule is consistent with the Clean Water Act and the decisions of the Supreme Court. Technical Support Document, I.A and .C.

10.120 Second, the agencies fail to recognize that the CWA addresses only water quality. In doing so, they attempt to expand their authority to include jurisdiction based on movement of animals and protection of habitat or based on the storage or flow of water. These are invalid foundations for the proposed rule. (p. 7)

Agency Response: The rule is consistent with Supreme Court decisions that rejected arguments that the Clean Water Act does not allow regulation of water quantity. Technical Support Document, I.A.

10.121 Third, the agencies attempt to expand their jurisdiction by citing an opinion joined by a single Supreme Court justice in the *Rapanos* case, Justice Kennedy's concurring opinion. In doing so they fail to respect the rule established by the Supreme Court that the judgment of the court is the narrowest grounds on which a majority of the judges who concurred in the decision agree. Fourth, the proposed rule does not recognize the limits established in Justice Kennedy's opinion, taking language of his opinion out of context to justify a determination that, in the aggregate, virtually all water can be federally regulated. In fact, the agencies have issued a proposal that, by abandoning the protection of the quality of navigable waters as the basis for federal jurisdiction, goes beyond even the broad scope supported by the justices who dissented in the *Rapanos* case. (p. 7)

Agency Response: The rule is consistent decisions of the Supreme Court. Technical Support Document, I.C. The dissent would have deferred to the existing regulations and the rule is narrower in scope than the existing regulations. Technical Support Document, I.B. and C.

10.122 The Proposed Rule is not supported by the text, structure, or purpose of the Clean Water Act or Supreme Court precedent. The agencies justify their assertion of jurisdiction over tributaries, adjacent waters, and other waters based solely on a "significant nexus" to navigable or interstate water or a territorial sea. "Significant nexus" is defined as an effect that is more than speculative or insubstantial on the chemical, physical, or biological integrity of a navigable or interstate water or territorial sea.[78] To support their

[78] See supra n. 28.

determination that all "tributaries," all "adjacent waters," and certain "other waters" have a so-called "significant nexus," the agencies evaluated scientific studies, many of which examined biological connections between bodies of water, or water retention, *without examining impacts on the quality of navigable water*. Jurisdiction based on these studies is not supported by the text, structure, or purpose of the CWA, or by Supreme Court precedent.

A. The Clean Water Act, which authorizes the protection of the quality of navigable waters, does not support jurisdiction based on the flow of water or on biota. The CWA establishes the objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, defined as the navigable waters of the United States. CWA § 101(a). To achieve this objective, the Act focuses on setting and achieving *water quality* goals for each jurisdictional water body. The Act does not more broadly seek to control human activities, land and water resource use, or the management of species and their habitat.

The text of the CWA declares that, *"consistent with the provisions of the Act*, it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 and it is the national goal that by July 1, 1983, wherever attainable, *water quality be achieved which provides for* the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." CWA § 101(a)(1)-(2) (emphasis added).

EPA or states with delegated authority under the Act are required to set water quality goals based on attainable uses of each water body. CWA § 303. To meet these water quality goals, the Act prohibits the discharge of pollutants except where authorized. CWA § 301(a). The discharge of pollutants is regulated under section 402, and the discharge of dredge and fill material is regulated under section 404. CWA §§ 402, 404.

All of these authorities are related to the protection of water quality. In contrast, Congress did not, in the CWA, give the agencies any authority to control water supply[79] or to protect species and their habitat.[80] In fact, Congress added section 101(g) to the Act in the 1977 amendments for the express purpose of preventing federal agencies from using the CWA to expand their authority into areas beyond water quality. According to its sponsor:

> "This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning

[79] CWA § 101(g). "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

[80] Even the Endangered Species Act, which does protect species and their habitat, applies only to certain species. See 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.").

> purposes. *This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only."* [81]

Despite this limitation on their authority, the agencies purport to assert jurisdiction over water features that restrict flow or hold water. For example, EPA cites irrigation, flood control, and farm ponds as examples of features that can be "connected" to downstream water due to the fact that they can hold water.

> "Nearly all river networks in prairie regions have been altered by impoundments for irrigation storage and flood control, from small farm ponds in headwaters to large reservoirs on river mainstems (Smith et al., 2002; Galat et al., 2005; Matthews et al., 2005). Decline in flood magnitude, altered flow timing, and reduced flow variability and turbidity are evident in many prairie rivers compared to historically documented conditions (e.g., Cross and Moss, 1987; Hadley et al., 1987; Galat and Lipkin, 2000)."[82]

Based on this rationale, the agencies could, through permitting, control the maintenance and use of any structure that is used to hold water, thereby controlling the supply of water. This would be a radical expansion in CWA authority.

Despite the limits of their authority, the agencies also purport to assert jurisdiction over water based on so-called "biological connectivity." According to the agencies:

> "Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semi-aquatic species present in the ''other water'' and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the ''other water,'' and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the ''other water."[83]

The Draft Connectivity Report states it this way:

> "These movements can result from passive transport by water, wind, or other organisms (e.g., birds, terrestrial mammals), from active movement with or against water flow (e.g., upstream fish migration), or from active movement over land (for biota capable of terrestrial dispersal) or through the air (for birds or insects capable of flight). Thus, biological connectivity can occur within aquatic ecosystems or across ecosystem or watershed boundaries, and it can be multidirectional. For example, biota can move downstream from perennial, intermittent, and ephemeral headwaters to rivers, upstream from estuaries to rivers to headwaters, or laterally between floodplain wetlands, geographically isolated wetlands, rivers, lakes, or other water bodies."[84]

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[81] 123 Cong. Rec. &. S19677-78, (daily ed., Dec. 15, 1977) (emphasis added) (floor statement of Senator Wallop).
[82] Draft Connectivity Report, at 4-45.
[83] 79 Fed. Reg. at 22214.
[84] Draft Connectivity Report, at 3-39.

Based on this rationale, the agencies could assert jurisdiction over almost any water located anywhere based on its use by biota. As discussed below, none of the Supreme Court cases reviewing CWA jurisdiction have ever suggested that the CWA addresses anything other than water quality.[85] Regulating water based on use by biota would be a radical expansion of CWA authority.

In a brief filed on September 11, 2014, EPA recognized the importance of avoiding an interpretation of the CWA that would assert expansive federal control over water use and allocation. According to EPA:

> The Act is a complex statute with a "welter of consistent and inconsistent goals." Catskill I, 273 F.3d at 494. To be sure, the Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 526 (1987). As this Court has acknowledged, the CWA also reflects Congress's desire to limit interference with traditional state control of water use and allocation. Catskill II, 451 F.3d at 79. Thus, the statute states "the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. 33 U.S.C. § 1251(g). More broadly, Congress emphasized its policy "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of . . . water resources . . . ." *Id.* § 1251(b). Elsewhere in the statute, Congress prohibits construction of the Act "as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Id. § 1370(2). These provisions do not, of their own force, "limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." PUD No. 1 of *Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720-21 (1994). They do, however, show that one of Congress's purposes was to avoid interference with state water allocation decisions.[86]

We agree. Unfortunately, the proposed rule does not respect these limits.

B. Jurisdiction based on a "significant nexus" is not supported by Supreme Court precedent. In contrast to the proposed rule, in a series of decisions starting with *Riverside Bayview*, 474 U.S. 121 (1985), the Supreme Court interpretations of the Clean Water Act have analyzed the scope of federal jurisdiction based on impacts to the quality of navigable waters.

1. Riverside Bayview.

[85] *See infra* pp. 23-28.

[86] *Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. EPA*, Docket No. 14-1823 (2d Cir), Brief for Defendant EPA, et al. (Sept. 11, 2014), at 29-30 (attached).

In *Riverside Bayview*, the Court found that a wetland that directly abuts a water of the U.S. is a continuation of such water. In doing so, the Court approved the rationale provided by the Corps when it included adjacent wetlands in the 1977 definition of waters of the U.S. *See* 474 U.S. at 134 ("the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of *this* aquatic system," quoting 42 Fed. Reg. 37128 (1977) (emphasis added)). As the Court noted:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which *water ends and land begins*. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs--in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.[87]

Thus, in situations where a wetland abuts a water of the U.S., *Riverside Bayview* stands for the proposition that the landward extent of that particular water of the U.S. includes the wetland. It does not address a wetland that is not physically connected to a water of the U.S. as part of a continuum. The Court did not express any opinion regarding "the authority of the Corps to regulate discharges of fill material that are not adjacent to bodies of open water" citing 33 CFR 323.2(a)(2) and (3). 474 U.S. at 131 n.8. The Court simply held that: "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States - based as it is on the Corps' and EPA's technical expertise - is unreasonable." *Id*. at 134.

Importantly, nothing in *Riverside Bayview* suggests that the CWA addresses anything other than water quality. Even if the purpose of maintaining and improving the quality of the water is to provide clean water for fish, birds, mammals, and insects, the focus is on the condition of the *water itself*, not on the biota that may live for part of its life in the water. As the Court noted:

> Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving *water quality*: as the House Report on the legislation put it, "the word 'integrity' ... refers to a *condition* in which the natural structure and function of ecosystems is [are] maintained." H.R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to *control pollution*, for "[w]ater moves in hydrologic cycles and it is essential that

[87] *Id*. at 132..

> discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742.57[88]

So, in accordance with *Riverside Bayview*, adjacency determines the landward extent of open water ("where water ends and land begins"), and adjacent wetlands are included in the definition of jurisdictional waters to protect and maintain the quality of navigable waters.

2. In the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the Court declined to go beyond *Riverside Bayview* and assert jurisdiction over waters or wetlands that were not "inseparably bound up with the 'waters' of the United States." 531 U.S. at 167 (quoting *Riverside Bayview*). *SWANCC* addressed the part of the current definition of waters of the U.S. that asserts jurisdiction over "other waters" "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). In its decision, the Supreme Court informed us that the term "navigable" cannot be read out of the Act.[89] The Court also noted that the gravel quarry in Cook County, Illinois, was a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id*. at 173. The Court distinguished *Riverside Bayview* by noting that:

> > It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." *Id*. at 131–132, n. 8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. *But we conclude that the text of the statute will not allow this.*[90]

Based on this analysis, the *SWANCC* Court determined that use of a water body by migratory birds alone is not a basis for jurisdiction under the Act.[91] The rationale used to

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[88] Id. at 132-33 (emphasis added).

[89] "We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import," 474 U. S., at 133, and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e. g., *United States v. Appalachian Elec. Power Co*., 311 U. S. 377, 407-408 (1940)." *SWANCC*, at 171-172.

[90] 531 U.S. at 167-68 (emphasis added).

[91] See *SWANCC*, 531 U.S. at 173 (denying jurisdiction over water based on use by migratory birds based on the fact that the Clean Water Act regulates only navigable waters and declining to invoke the "outer limits of Congress'

reach this conclusion severely called into question to legitimacy of federal jurisdiction over any isolated water, and since 2001 the Corps and EPA have not attempted to assert jurisdiction over isolated waters. [92]

3. In *Rapanos v. United States*, the Court addressed a third category of jurisdictional waters: tributaries and their adjacent wetlands. 547 U.S. 715 (2006). The plurality held that to be subject to the CWA, water must be relatively permanent surface water.[93] The concurring opinion by Justice Kennedy held that to be subject to CWA jurisdiction, water must have a "significant nexus" to traditional navigable water.[94] The dissenting justices would apply jurisdiction more broadly, based on "entwined" ecosystems. 547 U.S. at 797.

However, all of the opinions in *Rapanos* recognized that the CWA protects water quality. The plurality notes that the CWA is a "statute regulating water quality, rather than (for example) the shape of stream beds." 547 U.S. at 736 n.7. In his *Rapanos* concurrence, Justice Kennedy describes the CWA as "a statute concerned with downstream water quality." 547 U.S. at 769. Even the dissent focused on water quality. *Id*. at 796-97, 810 (arguing that "it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's *water quality*," and accusing the plurality of "needlessly jeopardize[ing] the *quality* of our waters.") (emphasis added).

Despite the Court's recognition that the CWA is a water quality protection statute, the proposed rule relies entirely on the opinion of Justice Kennedy, thus ignoring constraints imposed by the plurality opinion, and misapplies Justice Kennedy's opinion to assert the very broad federal jurisdiction described above, without staying focused on water quality protection. Accordingly, the proposed rule is not consistent with Supreme Court case law. (p. 22-29)

Agency Response: **The rule is consistent with the Clean Water Act and the decisions of the Supreme Court. Technical Support Document, I.A and .C. Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B., I.C., and II. Under the significant nexus standard it is necessary and appropriate to assess whether waters significantly affect the biological integrity of traditional navigable waters, interstate waters, or the territorial seas and the agencies' assessment of biological data and information was based on any effects on biological integrity. Preamble, III and IV and Technical Support Document, I.C. and VII. To the extent the commenter is asserting that there is no biological or**

power"); see also *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (denying jurisdiction over water based on use by migratory birds because connection to interstate commerce is too speculative).

92 EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction) (April 27, 2011).

93 547 U.S. at 733.

94 547 U.S. at 780.

physical component of water quality, the agencies' disagree. *See e.g.* CWA Sections 101(a), 303.

10.123 The brief cited by commenters is entirely consistent with the rule. As the brief states:"These provisions do not, of their own force, "limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." PUD No. 1 of *Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720-21 (1994)." Interpreting the statute does at times requiring balancing the goals of the statute but, again, as the brief states: "To be sure, the Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)." Moreover, the rule does not interfere with state water allocation decisions.The Agencies cannot rely on the Kenney opinion alone to establish jurisdiction. Under the Supreme Court's ruling in *Marks v. United States*, 430 U.S. 188, 193 (1977), when no opinion of the Court garners a majority, "the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments on the narrowest grounds.*" *Marks*, 430 U.S. at 193 (emphasis added). Several post-*Rapanos* courts have determined that the Kennedy opinion is the narrower of the opinions and therefore, following *Marks*, controlling, without looking for the narrower grounds that underlie both opinions jointly.[95] Other courts have gone even further and refused to apply Marks and have agreed with the United States that federal jurisdiction may be established under either the plurality opinion or the Kennedy opinion.[96]

To reach these conclusions, these courts have deviated from the guidance provided by the Supreme Court in *Marks*. To justify using either the plurality or the Kennedy opinion to establish jurisdiction, the First Circuit argues that if Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction and if the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction. *Johnson*, 467 F.3d at 64 (quoting the dissenting opinion in *Rapanos* suggesting that courts could uphold jurisdiction where the plurality test is met but the Kennedy test is not). The Seventh Circuit uses a similar argument to support its conclusion that the Kennedy test is controlling stating that: "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." *Gerke*, 464 F.3d at 725. These holdings ignore the fact that in *Rapanos* Justice Kennedy concurred with the plurality, not the dissent, and have the effect of turning the dissenting opinions into majority opinions. This result is not permissible under Supreme Court precedent.

A proper reading of Supreme Court precedent would apply the *Marks* test to require a water body to meet *both* the plurality and the Kennedy standards before jurisdiction is invoked. That would result in the application of the "narrowest grounds" as required by *Marks. See, e.g., King v. Palmer,* 950 F.2d 771, 781 (D.C. Cir. 1991) (requiring the test used to be one in which the plurality and the concurrence would reach the same conclusion to avoid the result where a single opinion that lacks majority support is turned

[95] See, e.g., *United States v. Gerke Excavating, Inc*., 464 F.3d 723, 724-25 (7th Cir. 2006), cert. denied, 552 U.S. 810 (2007).

[96] See, e.g., *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *U. S. v. Gonzalez-Lauran*, 437 F.3d 1128, 1134-1139 (11th Cir. 2006).

into national law). Thus, a water body should meet the relative permanence, continuous surface connection, and other requirements of the plurality opinion, *and* the significant nexus and other requirements of Justice Kennedy's opinion, to qualify as jurisdictional. Only thus would the water body meet the requirements set by the five Justice majority that issued the controlling decision to remand in *Rapanos*.

Under the analysis of the D.C. Circuit in *Marks*, it is invalid for the agencies to base their regulations on the opinion written by Justice Kennedy without regard to the plurality opinion. "When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *Id.* Yet, that is exactly the approach adopted by the proposed rule. According to one very frustrated district court judge trying to apply *Rapanos*, relying on Justice Kennedy's opinion would mean that the slogan that we are a "government of laws, and not of men" perhaps "should be amended to add that: 'Sometimes we are a government of one (man) (woman) and not of law.'"[97] That result is not legally defensible. (p. 29-31)

Agency Response: **The Courts of Appeals that have considered this issue have not adopted the position that jurisdiction exists only where both the plurality's and Justice Kennedy's standards are satisfied. Technical Support Document, 1C.**

10.124 The Proposed Rule goes beyond the jurisdiction supported by either the Rapanos plurality or the Kennedy opinion. Even if jurisdiction under the CWA could be based on just one of the concurring Supreme Court majority opinions in *Rapanos*, the proposed rule would not be valid because it exceeds the scope of jurisdiction supported by either the plurality or Justice Kennedy. And, as just noted, jurisdiction needs to be based on the two opinions taken together.

In his opinion, Justice Kennedy opines that a wetland "either alone or in combination with similarly situated lands in the region" could "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." 547 U.S. at 780. The agencies have taken that statement and based their entire rule on it. That is, the agencies justify jurisdiction over all "tributaries," all "adjacent waters," and, on a case-by-case basis, "other waters," by arguing that the cumulative or aggregate effects of all such waters located in the same watershed are demonstrated to have (or in the case of other waters can be demonstrated to have) a significant effect on navigable waters.[98] Further, they have argued, expanding Justice Kennedy's words, that a physical, or chemical or biological connection each is sufficient by itself to create a nexus that establishes jurisdiction, allowing the agencies to assert federal jurisdiction based on impacts to the life cycle of biota, not to the quality of navigable water.[99]

This expanded application of Justice Kennedy's words fails to acknowledge that Justice Kennedy himself recognized limits on federal jurisdiction. As a result, under the

[97] United States v. Robinson, (CV 04-PT-199-S) (U.S. Dist. Ct. No. Dist. Ala.) (mem. opinion Nov. 11, 2007), at 30.
[98] 79 Fed. Reg. at 22197.
[99] 79 Fed. Reg. at 22214.

proposed rule there is no water with an insignificant nexus because, in the aggregate or cumulatively, all effects would be significant. Thus, even if Justice Kennedy's "significant nexus" standard were the law of the land, the proposed rule is overly broad. As discussed above, the Kennedy opinion is not the law of the land so the agencies must incorporate the requirements of the plurality opinion into the rule as well. Indeed, the plurality opinion's requirements for waters to be relatively permanent, to have continuous surface connections to navigable waters, and so forth can be understood as indicia of significant nexus, thus reconciling the two opinions. (p. 31-32)

Agency Response: **The rule is consistent with caselaw and the decisions of the Supreme Court. Technical Support Document, 1C. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.**

10.125 The Proposed Regulation of tributaries is overbroad. Before *Rapanos*, the agencies had attempted to expand the jurisdiction of the CWA to anything that had a bed, a bank, and an ordinary high water mark through guidance and agency practices. Both the plurality and the Kennedy opinions disapproved this interpretation of the law and require more than that to establish federal jurisdiction. Under both opinions, there must be a surface water connection to navigable water. However, a surface hydrologic connection alone is not sufficient to establish jurisdiction. "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." 547 U.S. at 736 n.7 (emphasis in original) (plurality opinion). "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-85 (Justice Kennedy concurring). In fact, Justice Kennedy criticizes the plurality opinion for allowing jurisdiction to be based on a hydrologic connection involving relatively continuous flow, without requiring a significant nexus. *Id*. at 776-77 ("by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach").

The proposed rule would reinstate the Corps' practice of asserting jurisdiction over every so called tributary based on the presence of a bed, a bank, and an OHWM. While the rule also requires a tributary to contribute flow, that flow can be absent for any period of time and also can be supplied through groundwater. Not even Justice Kennedy would support this as a basis for jurisdiction. According to Justice Kennedy, the Corps' existing standard for tributaries provided no assurance that they (or adjacent wetlands) would significantly affect downstream navigable water. 547 U.S. at 781.

> [T]he breadth of this standard-which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it-precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system

> comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.[100]

The proposed rule for the first time also expressly includes manmade conveyances, such as ditches, in the regulatory definition of waters of the U.S.[101] and for the first time in a rule defining waters of the U.S., asserts jurisdiction over ephemeral waters.[102]

In *Rapanos*, the plurality cited Corps claims of jurisdiction over remote roadside ditches, irrigation ditches and drains with intermittent flows, dry land features such as "arroyos, coulees, and washes," occasionally flowing "drain tiles, storm drain systems, and culverts," and, "most implausibly of all," an arid development site "located in the middle of the desert, through which 'water courses . . . during periods of heavy rain'" as examples of agency overreaching. 547 U.S. at 727 (plurality opinion).

According to the plurality opinion:

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.[103]

Yet under the proposed rule, the features identified by the plurality and Justice Kennedy as examples of waters that are not subject to CWA jurisdiction all could meet the proposed definition of "tributary" (even a wet meadow with no ordinary high water mark) that is presumed to have a significant nexus to a navigable or interstate water or territorial sea.[104] Further, in contrast to Justice Kennedy's opinion (quoted above) that remote drains, ditches, and streams, or their adjacent wetlands, would not be jurisdictional because they lack a significant nexus to downstream navigable water, the proposed rule presumes that *all* such drains, ditches, and streams are tributaries that have a significant nexus to downstream waters based on the *aggregate or cumulative* effects.[105] This expansion of jurisdiction is not supported by either the plurality or the Kennedy opinion. (p. 32 – 34)

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[100] Id. at 781-82 (Justice Kennedy, concurring).

[101] The 1977 Corps regulations expressly *excluded* manmade conveyances. 33 C.F.R. 323.2(a)(3)(1977).

[102] As noted above, the Corps policy shift to include ephemeral streams in the definition of tributary came in the preamble to its 2000 § 404 permit regulations. *See supra* n. 15.

[103] 547 U.S. at 734.

[104] 79 Fed. Reg. at 22263 (proposed 33 C.F.R. 323.2(c)(5)).

[105] *See* 79 Fed. Reg. at 22227 ("The scientific literature clearly demonstrates that *cumulatively*, streams exert strong influence on the character and functioning of rivers. In light of these well documented connections and functions, the agencies concluded that tributaries, as defined, alone or *in combination with other tributaries in a watershed*, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.") (emphasis added).

Agency Response: **The rule narrows the waters that meet the definition of tributary by requiring both a bed and banks and another indicatory of ordinary high water mark. Preamble IV, and, Technical Support Document I.C. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered tributaries. Only ditches and drains that meet the definition of tributary in the final rule are jurisdictional. Preamble, III and IV and Technical Support Document, I.C. and VII.**

10.126 The Proposed regulation of adjacent water is overbroad. In *Rapanos*, the plurality expressed incredulity at the breadth of the assertion of jurisdiction under the existing, narrower, concept of adjacency, noting that: "One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a "significant nexus" to covered waters because, inter alia, they lay "within the 100 year floodplain of tidal waters." 547 U.S. at 728 (plurality opinion). Justice Kennedy also expressed skepticism over the Corps' expansion of the concept of "adjacency." "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id*. at 780 (emphasis added). Instead, Justice Kennedy suggested that the Corps assert jurisdiction over adjacent wetlands by identifying "categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Id*. at 780–81. This language recognizes that some tributaries in fact are not jurisdictional and wetlands adjacent to such tributaries do not have a significant nexus. Under the proposed rule, however, there is no such thing as an insignificant tributary, waters not just wetlands can be jurisdictional based on adjacency, and adjacency encompasses entire floodplains and riparian areas. The approach taken in the proposed rule thus fails the tests established under both the plurality and the Kennedy opinions. Instead, it embraces the rationale of the dissent, which would allow jurisdiction to be established based exclusively on biological connections.[106] According to the plurality: "The dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States.'" 547 U.S. at 749 (plurality opinion). Combining the use of biological connections with aggregate

[106] 79 Fed. Reg. at 22229 ("Waters and wetlands located in both riparian areas and floodplains support the biological integrity of downstream (a)(1) through (a)(3) waters in a variety of ways. They provide habitat for aquatic and water tolerant plants, invertebrates, and vertebrates, and provide feeding, refuge, and breeding areas for invertebrates and fish. Seeds, plants, and animals move between waters in the riparian zone and floodplains and the adjacent streams, and from there colonize or utilize downstream waters, including traditional navigable waters."). Relying in part on the connections endorsed by the *Rapanos* dissent, the agencies conclude that: "Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a substantial impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas." 79 Fed. Reg. at 22236.

effects, the agencies conclude that all "adjacent waters" are jurisdictional.[107] This expansion in jurisdiction related to adjacent waters also is not supported under either the plurality or the Kennedy opinion. (p. 34-35)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent water. Preamble, III and IV and Technical Support Document, I.C. and VIII.

10.127 The Proposed regulation of other waters is overbroad. In *SWANCC*, the Supreme Court invalidated the assertion of fede*ral ju*risdiction based on use of water by migratory birds and endangered species. None of the opinions in *Rapanos* purported to overturn *SWANCC*. However, the proposed *rule g*oes far beyond the inva*lid Mi*gratory Bird Rule. As discussed below, studies of both aquatic and terrestrial species as well as resident and migratory birds were used to make support the agencies' determination that all tributaries and all adjacent waters are subject to federal jurisdiction. The only deference the agencies have given to *SWANCC* is preamble language saying that, to establish juris*dictio*n over "other waters" on a case-by-case basis, the agencies will not rely on use of water by non-aquatic species or migratory birds."[108] However, this leaves the agencies free to use migration of aquatic species including insects as a foundation for jurisdiction over other waters, no matter how remote. This is another example of the very significant expansion of federal authority without support from the statute or any opinion in *Rapanos* and directly contrary to prior direction from the S*upreme* Court in *SWANCC*.[109] (p. 35-36)

Agency Response: The rule provides that for a limited categories of waters the agencies may make a case-specific significant nexus determination when such a water performs a function, including provision of life cycle dependent aquatic habitat for species located in specified waters. EPA's inclusion of such a function in the case-specific significant nexus determination is based on the agencies' careful examination of the science and the law. Preamble, III and IV and Technical Support Document, I.C. and II. For those limited waters for which the agencies will perform a case-specific significant nexus analysis, there is no authorization for considering migratory birds in the rule and the preamble is explicit that non-aquatic migratory species are not relevant considerations. Under the significant nexus standard it is necessary and appropriate to assess whether waters significantly affect the biological integrity of traditional navigable waters, interstate waters, or the

[107] 79 Fed. Reg. at 22236 ("Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a substantial impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.").

[108] 79 Fed. Reg. at 22214 ("Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semiaquatic species present in the ''other water'' and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds).... Non-aquatic species or species such as non-resident migratory birds that are not demonstrating a life cycle dependency on the identified aquatic resources are not evidence of biological connectivity for purposes of this rule.").

[109] *See* 547 U.S. at 741 (noting that "*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*- and upon which the dissent repeatedly relies today, see *post*, at 10-11, 12, 13-14, 15, 18-19, 21-22, 24-25- provided an *independent* basis for including entities like wetlands (or ephemeral streams) within the phrase the waters of the United States.") (plurality opinion) (emphasis in original).

territorial seas and the agencies' assessment of biological data and information was based on any effects on biological integrity. Preamble, III and IV and Technical Support Document, I.C. and VII.

10.128 The Proposed Rule is not supported by the record is not the result of reasoned decision-making. Under the CWA, EPA and the Corps can regulate only waters where a discharge will both have an impact on interstate commerce *and* pollute navigable waters. As interpreted by the Supreme Court in *Rapanos*, EPA and the Corps can only regulate waters that are both relatively permanent waters and have a significant nexus to navigable waters. However, the record created by the agencies does not demonstrate that the non-navigable waters covered by the proposed rule meets either *Rapanos* test or must be regulated to protect the quality of navigable water. Instead, the agencies rely on a Draft Connectivity Report summarizing studies of connections that are not relevant to CWA jurisdiction.[110] The record thus created by the agencies would not only read "navigable" out of the statute, it also in contravention of the *SWANCC* decision would turn the CWA from a specific grant of authority to protect the quality of navigable waters to an omnibus grant of authority to regulate land and water resources for the benefit of flora and fauna. No reading of the Act or Supreme Court case law supports this interpretation. (p. 36)

Agency Response: The rule and its supporting documentation demonstrate that agencies are asserting jurisdiction over traditional navigable waters, interstate waters and the territorial seas, and those waters that have a significant nexus after careful examination of the science and the law and consistent with decisions of the Supreme Court. Technical Support Document, I-IX and Preamble, III and IV.

10.129 If the officials charged with establishing the position of the agencies regarding the scope of federal jurisdiction under the CWA do not fully understand important provisions of the proposed rule, the rule cannot be said to be the result of reasoned decision-making and therefore is invalid. *See Motor Vehicle Manufacturers Ass'n v. State Farm Ins.*, 463 U.S. 29, 42 (1983) (an agency must provide adequate basis and explanation for its decision or it will be set aside as arbitrary and capricious). This concern further supports the recommendation below that the agencies withdraw the rule and develop a new proposal. (p. 56)

Agency Response: The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule and its supporting documentation demonstrate that agencies are asserting jurisdiction over traditional navigable waters, interstate waters and the territorial seas, and those waters that have a significant nexus after careful examination of the science and the law and consistent with decisions of the Supreme Court. Technical Support Document, I-IX and Preamble, III and IV.

10.130 **The failure to define or limit essential terms render the Proposed Rule impermissibly vague.** Under the proposed rule, the extent of federal control has been

[110] *See* Draft Connectivity Report. Although this report is still a draft, it forms the basis for the agencies' claim that all the waters covered by the proposed rule are subject to federal regulation. *See* 79 Fed Reg. at 22222-52. (Appendix A of the preamble to the proposed rule).

and would be decided by the regulators themselves, using their "best professional judgment." EPA and the Corps get to decide what part of the landscape is considered "land" and what is considered "water." They get to decide what part of the landscape is in the flood plain. They get to decide whether run off from rainfall is a "tributary" or "other waters" or simply rain. They get to decide if insects, birds or animals move around, establishing a "significant nexus" between waters.

This extreme degree of discretion invalidates the proposed rule. A rule that is so vague that it fails to constrain regulatory decision-making, is arbitrary and capricious, an abuse of agency discretion, and otherwise a violation of law. Atlas Copco, Inc. v. Environmental Protection Agency, 642 F.2d 458, 465 (D.C. Cir. 1979) ("We are well aware of the judicial disdain traditionally accorded standardless regulations."); *South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) ("The prospective applicant for a permit is utterly without guidance as to what he must prove, and how. And the standard is so vague that it invites arbitrary and unequal application."). (p. 56)

Agency Response: **The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C. The final rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. Preamble, IV, Technical Support Document, I.C., and General Compendium.**

10.131 **VI. The Expansion and Ambiguity in the Proposed Rule Will Significantly Increase Litigation and the Burden on the Regulated Community and the Regulators.**

A. Increased Litigation.

The lack of clarity discussed above places EPA and the Corps of Engineers, and activists who file citizen suits, in the position of deciding what economic activity is regulated and what is not. The proposed rule has already engendered citizen suits alleging connections to navigable water of the type proposed in the rule.[111] If the proposed rule is finalized, even more litigation can be expected. For example, currently only adjacent wetlands are regulated. So, standing water in a field is not jurisdictional if it is not a wetland. In a recent letter, a citizen group is asking EPA to regulate such standing water, alleging that the soil exhibits wetland characteristics, despite a contrary determination by the Corps of Engineers. If the

[111] *Galveston Baykeeper, Inc., v. Trendmaker Homes, Inc*., (Case No. 4:14-cv-01500 (S.D. Tex, May 30, 2014) (alleging that a prairie pothole is jurisdictional based on an allegation that the wetlands have unidirectional, and possibly bidirectional, hydrologic and biologic exchanges with waters of the United States, provide water storage function, and have biological connectivity with waters of the United States (a) through the movement of amphibians, aquatic seeds, macroinvertebrates, reptiles and mammals); *Wildearth Guardians v. The Western Sugar Cooperative*,, (Case 1:14-cv-01503-BNB) (D. Colo., May 29, 2014) (alleging on-site wastewater ponds are point sources that discharge to waters of the U.S. through groundwater that has a significant biological, chemical and physical nexus to the South Platte River).

proposed rule is finalized, the soil characteristics will no longer be relevant and the citizen group can try to force regulation of a field with standing water based on adjacency.[112] (p. 57)

Agency Response: The rule provides increased certainty and is consistent with caselaw. Preamble, IV, and Technical Support Document, I.C. Questions about the jurisdictional status of specific waters, and any related permitting requirements, should be addressed to permitting authorities.

Landmark Legal Foundation (Doc. #15364)

10.132 Usurping congressional authority by rewriting existing statutory authority, the proposal is an affront to the Constitution's Separation of Powers Doctrine and conflicts with the US Supreme Court's recent ruling in *Utility Air Regulatory Group v. EPA.* (p. 1)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.133 Article I of the Constitution's delegation of congressional power to regulate "interstate commerce" does not permit the type of regulation proposed. (p.1)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Western States Land Commissioners Association (Doc. #19453)

10.134 Whereas, the proposed rule seeks to expand federal jurisdiction over wholly intrastate water bodies, wetlands, intermittently wet features, and all tributaries, regardless of their size, function, amount, and regularity of flow and relationship to traditional navigable waters, in contravention of Supreme Court precedent and the current scope of federal authority under the Clean Water Act (p. 3)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.135 WSLCA calls upon the EPA to respect the limits of Supreme Court precedent and the scope of federal authority under the Clean Water Act, and to refrain from any efforts to extend regulatory jurisdiction to reach tributaries, waterways, wetlands, and other water bodies and systems that lack a significant nexus to navigable waters as traditionally understood. (p. 4)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Southpace Properties, Inc. (Doc. #6989.1)

10.136 The proposed regulation broadens the scope of CWA jurisdiction beyond statutory and constitutional limits established by Congress and affirmed by the Supreme Court. Southpace is concerned that the proposed rule's categories of "waters of the U.S." and

[112] *See* Public Employees for Environmental Responsibility letter dated August 20, 2014, to EPA Region 3, "Petition for Review of "Camp Property" Wetlands Delineated by the Corps of Engineers, Norfolk District Regulatory Office (attached).

associated definitions are overbroad and ambiguous, suffer from a variety of legal infirmities, and are not supported by the science. (p. 1)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C. The rule and its supporting documentation demonstrate that agencies are asserting jurisdiction over traditional navigable waters, interstate waters and the territorial seas, and those waters that have a significant nexus after careful examination of the science and the law. Technical Support Document, I-IX and Preamble, III and IV.

Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938.1)

10.137 The Clean Water Act was enacted as a means for Congress to exercise its traditional commerce power over navigation. The proposal's attempt to expand the CW A's reach to isolated, non-navigable waters, among others, is a far cry from the navigable waters the statute intended to cover.

In both *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* and *Rapanos v. United States & Carabell v. United States (Rapanos),* the Supreme Court made it clear that there are limits to federal authority under the CW A. By proposing to expand coverage to include areas that are rarely wet or exhibit characteristics of regular flooding or flow, the Agencies are plainly ignoring these limits and Supreme Court precedent. (p. 1-2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Homebuilders Association of Michigan (Doc. #7994)

10.138 The Clean Water Act was enacted as a means for Congress to exercise its traditional commerce power over navigation. The proposal's attempt to expand the CWA's reach to isolated, non-navigable waters, among others, is a far cry from the navigable waters the statute intended to cover.

> The Agencies have erroneously stated, "This proposed rule is narrower than that under the existing regulations…fewer waters will be subject to the CW A under the proposed rule than are subject to regulation under the existing regulations." On this flawed basis the agencies concluded, "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. Thus, the agencies' certification and economic analysis contradict each other.

Additionally, the proper baseline from which to assess the rule's impact is current practice. 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. (p. 2)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C.

10.139 At a 2011 meeting with Margaret "Meg" Gaffney-Smith, Chief Regulatory Program, U.S. Army Corps of Engineers, and David Evans, Director, Wetland Programs, U.S. Environmental Protection Agency on the new rules, Lee Schwartz, the Executive Vice President for Government Relations of the Home Builders Association of Michigan asked the two federal representatives if "Under these proposed rules the EPA and Corps could regulate any property they wanted?" The response to his question was "Technically, yes but we wouldn't do that." Such an admission by representatives of the Agencies indicates the unprecedented and unlimited scope of regulatory authority granted under this proposed rule.

In both Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), and *Rapanos v. United States & Carabell v. United States*, the Supreme Court made it clear that there are limits to federal authority under the CWA. In this proposed rule, the Agencies are plainly ignoring these limits and Supreme Court precedent. The proposal's ambiguous terms, ill-defined limits, and assertion of federal jurisdiction over waters that exhibit little or no connection to traditional navigable waters will only create more, not fewer questions. The Agencies' claim that the proposed rule creates clarity and certainty is a fallacy because it only does so by illegally asserting jurisdiction over every possible wet feature. (p. 3)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C.

Construction Industry Round Table (Doc. #8378)

10.140 Rule-Making Beyond Court Mandate[113]: The agencies above captioned contend that their rule-making is justified if not mandated by U.S. Supreme Court rulings. Interestingly, many have interpreted those same cases as being an outgrowth of EPA and the Corps "over reaching" under the CWA – thereby requiring the Court to step-in and attempt to put some constraints or parameters around the federal agencies activities. Critics have contended that the federal agencies have slowly increased the scope of their jurisdiction,

[113] The rule-making claims to be proposed "in light of" the U.S. Supreme Court cases in U.S. v. Riverside Bayview; Rapanos v. United States; and Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC). [79 Fed. Reg. at 22,188 (April 21, 2014)]

pushing the limit through guidance documents and/or regulatory enforcement actions based on ever-broader interpretations of "waters of the U.S."[114]

To that end, many would contend that the 2006 *Rapanos* ruling went against EPA's assertion of jurisdiction, albeit the decision was not clear-cut.[115] The justice casting the "swing vote" wrote that jurisdiction might exist where there is a "significant nexus" between non-navigable water (such as a wetland or small stream) and traditional navigable water. BUT Justice Kennedy did not define significant nexus in detail, although he did say that "remote and insubstantial" waters that "eventually may flow" into navigable waters would not qualify.[116] So, it is a stretch at best and an over statement at minimum for the EPA and Corps to point to the U.S. Supreme Court cases as they do for this rule-making to contend that the decisions mandate/require the extensive all-inclusive, wide ranging reinterpretation or definition of "navigable waters" that can easily be "exploited" by this proposal. If anything, it would be fairer to contend the Supreme Court was seeking a clear, concise, well defined and defensible definition that respected the state-federal balance as well as the rights of ordinary citizens. This proposal FAILS in all respects to meet such an objective. (p. 3)

Agency Response: **The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C.**

DreamTech Homes, Inc. (Doc. #11012)

10.141 The Clean Water Act was enacted as a means for Congress to exercise its traditional commerce power over navigation. The proposal's attempt to expand the CW A's reach to isolated, non-navigable waters, among others, is a far cry from the navigable waters the statute intended to cover.

In both *Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers (SWANCC),* and *Rapanos v. United States* & *Carabell v. United States (Rapanos*), the Supreme Court made it clear that there are limits to federal authority under the CWA. By

[114] For example, in 1986 EPA and the Corps used the "migratory bird rule" to assert authority over isolated waters by saying those waters that are or could be used by migratory birds, which cross state lines, are "waters of the U.S." The regulated community, including agriculture, has pushed back, resulting in Supreme Court decisions clarifying and limiting the scope of the agencies' jurisdiction. In two cases—*Solid Waste Agency of Northern Cook County* (*SWANCC*) *v. U.S. Army Corps of Engineers*, in 2001, and *Rapanos v. United States*, in 2006—the Supreme Court rendered decisions that reaffirmed the CWA's limit on federal jurisdiction, reminding the agencies that Congress used the word "navigable" for a reason.

[115] Eight justices divided evenly between supporting broad federal jurisdiction over any waters with any connection to navigable waters, or a much narrower jurisdiction over waters with relatively permanent flow into navigable waters. [*Id*. at footnote 2]

[116] Congress passed the Clean Water Act (CWA) in 1972, with the goal of improving water quality across the nation. CWA established a system of federalism that preserves primary state authority over land and water uses, but prohibits certain "discharges" into "navigable waters" from a "point source" (i.e., a pipe or other conveyance) unless authorized by federal permit. The law says that "navigable waters" are "waters of the U.S." Over the years, the U.S. Supreme Court has established that this includes interstate waters, plus waters that are navigable, wetlands adjacent to navigable waters and other waters with a substantial connection to navigable waters. State and local governments have jurisdiction over smaller, more-remote waters, such as many ponds and isolated wetlands. [See, Waters of the U.S. Proposed Rule; paper at www.gfb.org/ditchtherule/WOTUS_information_toolkit.pdf]

proposing to expand coverage to include areas that are rarely wet or exhibit characteristics of regular flooding or flow, the Agencies are plainly ignoring these limits and Supreme Court precedent. (p. 1-2)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C.

Building Industry Association of Washington (Doc. #13622)

10.142 The Supreme Court in its latest rulings has made clear that there are limits to federal authority under the CWA. By expanding the CWA to include areas that are rarely wet or exhibit characteristics of regular flooding or flow, the EPA is plainly ignoring these limits and Supreme Court precedent. The proposal's ambiguous terms, ill-defined limits, and assertion of federal jurisdiction over waters that exhibit little or no connection to traditional navigable waters will only create more, not fewer, questions for Courts to litigate. Stated another way, the EPA's definition of navigable waters attempts, through inadequate non-peer reviewed science, to conclude that all water is subject to federal jurisdiction—and the EPA does so without Congress' approval in violation of both the CWA and the United States Constitution. Because the significant nexus test has become "labyrinthine process in which competing scientific opinions opinion are interpreted by regulators without clear congressional guidance," new rules should not "cement this fact-specific test into law," (Bloomberg BNA Daily Environmental Report,Waters of the US, Lowell Rothschild, October 16, 2014). New rules in regards to jurisdiction should simplify the analysis with the dual goals of creating transparency in the law and reducing potential litigation; new rules should not be hastily drafted to ensure more conflicting decisions. (p. 3-4)

Agency Response: The rule demarcates the boundaries of CWA jurisdiction and provides for increased clarity and certainty. Preamble, II and IV. The consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C. The Science Report is a peer-reviewed review and synthesis of more than 1,200 publications from the peer-reviewed scientific literature. Science Report, Executive Summary.

Pennsy Supply, Inc. (Doc. #15255)

10.143 EPA has indicated this proposed rulemaking is for clarification. However, there is no regulatory failure that justifies this proposed rulemaking. In fact, on two separate occasions, (*SWANCC* and *Rapanos*), the Supreme Court has ruled against this type of agency efforts. (p. 1)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

Associated General Contractors of America (Doc. #14602)

10.144 At the most fundamental level, the proposal is inconsistent with congressional intent, the language of the CWA, and U.S. Supreme Court precedent. Twice the Supreme Court has affirmed a limit to federal jurisdiction and rejected, first, the agencies' broad assertion of jurisdiction based on the potential use of isolated waters by migratory birds and, second, the agencies' assertion of jurisdiction based on "any hydrological connection." Yet, the

proposed rule defines jurisdiction as broadly as these theories rejected by the Supreme Court, and does so to such an extent that the agencies have to specifically exempt swimming pools and ornamental ponds from being regulated as a WOTUS. (p. 2-3)

Agency Response: The rule is consistent with the statute and decisions of the Supreme Court. Technical Support Document, I.C.

10.145 The proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the Supreme Court. In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented. (p. 19)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Home Builders Association of Mississippi (Doc. #19504)

10.146 Fails to Adhere to Supreme Court Holdings: In both *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*,[117] and *Rapanos v. United States* & *Carabell v. United States* (*Rapanos*),[118] the Supreme Court made it clear that there are limits to federal authority under the CWA. By proposing to expand coverage to include areas that are rarely wet or exhibit characteristics of regular flooding or flow, the Agencies are plainly ignoring these limits and Supreme Court precedent. (p. 5)

Agency Response: The rule is consistent with Supreme Court decisions. Technical Support Document, I.C.

10.147 Impermissibly and Unnecessarily Expands Federal Jurisdiction. Despite the Agencies' claims that this rule is narrower in scope than existing regulations, the proposed rule contains changes that will expand federal jurisdiction, triggering substantial and additional expensive and time-consuming permitting and regulatory requirements while delivering minimal environmental benefit, (p. 2)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C. The agencies have concluded the benefits of the rule exceed the costs. Preamble, V and Economic Assessment in the docket.

Kansas Independent Oil & Gas Association (Doc. #12249)

10.148 In 1985, the Supreme Court of the United States first considered whether the CWA, and the regulations promulgated under its authority by USACE, authorizes USACE to require landowners to obtain permits from USACE before discharging fill materials into wetlands adjacent to navigable bodies of waters and their tributaries. *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 123 (1985). In *Riverside Bayview*, respondent Riverside owned eighty acres of low-lying marshy land in Michigan, and in 1976, began to place fill material on its property in preparation for the construction of a

[117] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001),
[118] *Rapanos v. United States*, 547 U.S. 715 (2006).

housing development. USACE believed that this was an "adjacent wetland" under its jurisdiction as a "water of the United States." USACE filed suit seeking to enjoin Riverside from filling the property without USACE's permission.

The Court held that USACE's jurisdiction extended to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands are lands that "are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The Court opined that USACE has jurisdiction over adjacent wetlands, including those lands on respondent's property. In short, the Court has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case. *Riverside Bayview* established for the first time that wetlands that abut navigable waters could themselves be considered navigable waters under the CWA. (p. 6)

Agency Response: **The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.**

10.149 Following its decision in *Riverside Bayview*, the Supreme Court was asked to again determine USACE's jurisdiction under the CWA. In *Solid Waste Agency of N. Cook Cnty.("SWANCC")*, twenty-three suburban Chicago cities and villages engaged in an effort to locate and develop a disposal site for nonhazardous solid waste. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001).The cities and villages decided that a 533- acre parcel of land that was formerly a sand and gravel mining operation would be appropriate for the disposal of nonhazardous solid waste. Because operation of the disposal site required the filling of permanent and seasonal ponds, *SWANCC* contacted USACE to determine if a permit was required under the CWA. USACE initially concluded that it had no jurisdiction over *SWANCC* because the site contained no wetlands or areas that "support vegetation typically adapted for life in saturated soil conditions." USACE later changed its decision, asserting jurisdiction tinder the "Migratory Bird Rule:"

> "[T]he Corps formally "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States' . . . based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed natural character; and (3) the waters areas are used as habitat by migratory bird [sic] which cross state lines."

The Court held that the "Migratory Bird Rule" was not sufficient to establish USACE jurisdiction under the CWA. The Court opined:

> "We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview*. Homes: holding that isolated ponds,

> some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute . . . does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import," 474 U.S. at 133, and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

The use of the phrase "significant nexus" appeared in *SWANCC* for the first time. The Court held:

> "It was the "significant nexus" between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes;* indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." Although the Court in *SWANCC* did not elaborate as to what constitutes a "significant nexus," the phrase becomes an important component in a later decision, *Rapanos v. U.S.,* and in the agencies' proposed rule for the definition of "waters of the United States." (p. 6-7)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

10.150 In 2006, the Supreme Court issued, *Rapanos v. U.S.,* the most recent decision interpreting USACE's jurisdiction under the CWA. This decision, however, only muddied the waters, as it was a plurality decision, with the Court splitting 4-1-4. Justice Anthony Kennedy joined the Court only in its decision to remand the cases to the Sixth Circuit for further proceedings. The result from *Rapanos* is the emergence of two different standards that could be controlling: Justice Scalia's, The Chief Justice's, Justice Thomas's, and Justice Alito's plurality standard ("plurality"), and Justice Kennedy's "significant nexus" standard."

In *Rapanos,* petitioner backfilled land that contained sometimes-saturated soil conditions. *Rapanos v.U.S.*, 547 U.S. 715, 720 (2006). "The nearest body of navigable water was eleven to twenty miles away" from the saturated lands, yet petitioner was informed by USACE that his saturated lands were "waters of the United States," and he would need a permit to fill said lands. The Supreme Court granted certiorari in order to determine if USACE had jurisdiction over the petitioner's saturated lands.

The plurality standard- The plurality in *Rapanos* held that channels through which water flows intermittently or ephemerally, or those channels that periodically allow drainage of rainfall, are not "waters of the United States:

> "In sum, on its only plausible interpretation, the phrase, "waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams . . . oceans, rivers, and lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "waters of the United States" is thus not "based on a permissible construction of the statute."

The plurality next considered whether a wetland may be considered "adjacent to" remote "waters of the United States," because of mere hydrologic connection to them:

> "[O]nly those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC.*

The "significant nexus" that the plurality alludes to from *SWANCC* is the standard advanced by Justice Kennedy in his concurring opinion, and which appears to be the standard the EPA and USACE attempt to adopt in the "other waters" category proposed in the new definition of "waters of the United States." (p. 8-9)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

The Mosaic Company (Doc. #14640)

10.151 A federal agency may not enact a regulation with a retroactive effect unless Congress conveys that authority in express terms. *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988). Some courts have held that an administrative rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *National Mining Ass'n v. U.S. Dep't of Interior,* 177 F.3d 1 (D.C. Cir. 1999); *Assoc. of Accredited Cosmetology Schs. v. Alexander,* 979 F.2d 859,864 (D.C. Cir. 1992). The proposed rule would change the standards for defining the reach of CWA jurisdiction. To avoid unlawful retroactive application and to foreclose a point of entry in the event of project opponents, the agencies should clarify that previously issued JDs and CWA permits will not be reopened to reconsider jurisdiction under the new standards. (p. 4)

Agency Response: This rule is effective on 60 days after publication in Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble makes clear that the agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations made after the effective date will be made consistent with this rule.

10.152 The Court's *Marks* decision requires identifying a single holding from *Rapanos* that reconciles the two opinions to find their common ground. Under *Marks v. United States*, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. 188, 193 (1977) (internal quotations omitted). The *Marks* Court's reference to "the holding" and "that position" taken by the concurring Justices reinforces the principle that a plurality decision, like all other Supreme Court decisions, must be read to produce a single holding on the point of law at issue in the case.

Supreme Court precedent and basic common law principles require that the agencies identify a "single" common holding from *Rapanos*. That holding is the readily identifiable common logic of the plurality and Justice Kennedy that was "necessary" and "pivotal" to the decision in the case.[119] The judgment of the *Rapanos* Court, announced by Justice Scalia and with which Justice Kennedy concurred, was to "vacate the judgments" against *Rapanos* and *Carabell*, and remand for further proceedings. The plurality opinion and Justice Kennedy's opinion rejected the Corps's assertion that the CWA regulates any non-navigable water that has "any hydrological connection" to navigable waters. *Rapanos*, which was decided by a plurality of four Justices and a separate concurring Justice, provided a common framework and several limiting principles that determine the agencies' jurisdiction under the CWA. This is the holding the agencies should follow in any rulemaking to define CWA jurisdiction.

The agencies cannot rely solely on Justice Kennedy's significant nexus standard as the governing holding of *Rapanos*. Throughout the proposed rule, the agencies rely only on their interpretation of Justice Kennedy's "significant nexus" standard. This approach ignores the limits on CWA jurisdiction that Justice Kennedy and the plurality agreed upon, and disregards the plurality's "relatively permanent waters" or "continuous surface connection" standards. Additionally, the proposed rule completely reverses the agencies' previous interpretations. In both the 2008 Guidance and the Draft 2011 Guidance, the agencies found jurisdiction if either the plurality's or Justice Kennedy's standards were satisfied. But even this "either/or" approach is not true to *Marks*.[120] Now, the without explanation why the significant nexus test should be treated as controlling.[121]

The agencies cannot selectively choose which Supreme Court opinion to rely on. *Marks* precludes reading *Rapanos* in a manner that produces multiple and potentially

[119] See Black's Law Dictionary 749 (8th ed. 2004) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"); see also *United States v. Garcia*, 413 F.3d 201, 232 n. 2 (2d Cir. 2005) (Calabresi, J., concurring) (defining a holding as "what is necessary to a decision").

[120] Interpreting *Rapanos* as supporting jurisdiction if either the plurality or Justice Kennedy's test is satisfied results in the Supreme Court's decision being interpreted as having two inconsistent holdings. *Marks* cannot be interpreted as allowing cases such as *Rapanos* to have multiple holdings, as evidenced by its use of the phrases "the holding" and "that position."

[121] The preamble does not explain why the agencies are relying solely on Justice Kennedy's standard. They do not claim that the significant nexus standard is the "narrowest" ground from *Rapanos* or that they are following the reasoning of any particular circuit court decisions. Rather, without explanation, the agencies create a new jurisdictional standard without relying on or abiding by the *Rapanos* plurality opinion. This is hardly reasoned decision making.

inconsistent holdings and instead seeks a single holding reconciling the views of the Members of the Court who concurred in the judgment. See *Marks*, 430 U.S. at 193. The four-Justice *Rapanos* plurality rejected the "significant nexus" test. *Rapanos*, 547 U.S. at 755. It is contrary to judicial law to select one concurring opinion as the single "winner" when a majority of the Court has explicitly or implicitly rejected that opinion's approach. Under Marks and common law practices, the agencies cannot ignore the plurality and treat Justice Kennedy's opinion as the sole controlling holding of *Rapanos*.

Nor can the agencies rely on dissenting Justices to support the proposed rule's adoption of only Justice Kennedy's significant nexus standard. The preamble notes that the four dissenting Justices in *Rapanos* would have upheld CWA jurisdiction for "all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy." 79 Fed. Reg. at 22,192. The opinions of the dissenting Justices, however, are irrelevant. Only those opinions that "concur in the judgments" count toward determining the "holding of the Court."[122] The dissenting Justices did not concur in the judgment and, therefore, the agencies cannot head-count across all of the opinions to come up with a majority.

Rather, as directed by *Marks*, the agencies must find a single holding based on the common elements of the plurality's and Justice Kennedy's opinions. Although finding the common ground between the plurality and concurring opinions is more complicated than adopting wholesale one opinion or the other, this is what *Marks* requires.[123] Chief Justice Roberts recognized that it would be complicated to apply the holding of *Rapanos*, noting that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). (p. 6-8)

[122] See *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("Dissenters, by definition, have not joined the Court's decision ... *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented . . . It would be inconsistent with Marks to allow the dissenting *Rapanos* Justices to carry the day."); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

[123] Indeed, this is likely why the Circuit Courts of Appeals are not uniform as to the controlling standard for "waters of the United States" under *Rapanos*. The crux of the circuit split is how one defines "narrower." In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the case interpreted by the *Marks* Court, the narrowest judgment is clear because it is a subset of the other two positions. In *Memoirs*, a plurality found that a particular book was not obscene. *Id*. at 424. Two concurring Justices also found the book was not obscene, but would have gone further regarding absolute First Amendment protections. *Id*. Thus, *Marks* held that the plurality opinion was based on the narrowest grounds and therefore constituted the holding of the Court and provided the governing standard. *Marks*, 430 U.S. at 194. Identifying the narrowest reasoning is not as straightforward with *Rapanos* because the two opinions do not create a nice, clear subset of jurisdictional waters-the concurring rationales do not fit within each other like Russian dolls. See *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); Joseph M. Cacace, Plurality Decisions in the Supreme Court of the United States: A Reexamination of the *Marks* Doctrine After *Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 98 (2007). Instead the plurality's and Justice Kennedy's opinions overlap in some cases and would lead to opposite results in other cases. Some courts argue that Justice Kennedy's is the narrower decision because it reins in federal authority less (e.g., *United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2006)) while others suggest that the plurality could be the narrower decision because it is most restrictive of government authority and avoids the expansion of the Commerce Clause (e.g., Johnson, 467 F.3d at 63). These circuit courts miss the mark, however. *Marks* does not require that we determine which opinion is narrowest. It requires determining the narrowest "position" taken by those members who concurred in the judgments. *Marks*, 430 U.S. at 193. Because the legal standards set by the two opinions create overlapping universes of jurisdictional waters, there is a clear narrow judgment that received the "assent of five Justices" in *Rapanos.*

Agency Response: **The foundation of the rule is the significant nexus standards established by the Supreme Court in *SWANCC* and refined in Justice Kennedy's opinion in *Rapanos*. All nine of the United States Courts of Appeals to have considered the issue have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.**

10.153 The single holding of *Rapanos* is the restriction of CWA jurisdiction based on limiting principles articulated by both the plurality and Justice Kennedy. The single holding from *Rapanos* is the plurality's and the concurrence's common reasoning on the boundaries of CWA jurisdiction. Although the plurality and Justice Kennedy did not agree on the specific tests for CWA jurisdiction, both found that the Corps had gone too far in its "any connection" theory, and both articulated principles that were intended to limit CWA jurisdiction.

Both the plurality and Justice Kennedy opinions start from a common understanding of traditional navigable waters (TNWs)-i.e., the waters that were subject to regulation under the Rivers and Harbors Act (RHA) prior to the passage of the CW A. See *Rapanos*, 547 U.S. at 731 (plurality), 767 (Kennedy, J., concurring). Both further agreed that "Congress intended to regulate at least some waters that are not navigable in the traditional sense," *id*. at 767 (Kennedy, J., concurring), 731 (plurality), but that "the qualifier 'navigable' is not devoid of significance," *id*. at 731 (plurality), and must be given "some meaning," *id*. at 779 (Kennedy, J., concurring).

With respect to tributaries, both opinions would allow jurisdiction over certain tributaries that are not navigable-in-fact, but both the plurality and Justice Kennedy were concerned about far-reaching jurisdiction over features distant from navigable waters and carrying only minor volumes of flow. Justice Kennedy criticized the "existing standard" which "deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark" because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it." See *id*. at 781 (Kennedy, J., concurring). Similarly, the plurality criticized extension of jurisdiction to "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert." *Id*. at 734 (plurality). Although Justice Kennedy did not agree with the plurality's relatively permanent waters standard for tributaries, both opinions agreed that the Corps had gone too far in its assertion of jurisdiction over tributaries and that "mere adjacency to a tributary" is insufficient. *Id*. at 786 (Kennedy, J., concurring).

With respect to wetlands, both opinions require the agencies to demonstrate a meaningful relationship between non-abutting wetlands and TNW s for those nonabutting wetlands to be jurisdictional. Both the plurality and Justice Kennedy agreed that a mere hydrological connection between a wetland and a TNW is not sufficient to establish jurisdiction. See *id*. at 732 (plurality), 784 (Kennedy, J., concurring). Beyond this starting point, the plurality found that only wetlands with "a continuous surface connection" to waters of the United States, which make it "difficult to determine where the 'water' ends and the 'wetland' begins," are covered by the Act. *Id*. at 742. Justice Kennedy would require that there be a "significant nexus" such that wetlands "significantly affect the chemical,

physical and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. Wetlands with "speculative or insubstantial" effects on water quality do not satisfy this standard. *Id*. The plurality found Justice Kennedy's standard also would require a continuous surface connection. Again, although the opinions did not agree on a list of detailed standards for tributaries and wetlands, the combined impact of these limiting principles is that the agencies must demonstrate that wetlands have a significant relationship with TNWs to be jurisdictional.

Under *Marks* and basic common law principles, the agencies are obligated to develop a "single holding" from *Rapanos* that the agencies would then be legally bound to follow.

The proposed rule should deem waters jurisdictional only where they satisfy both the *Rapanos* plurality's and Justice Kennedy's tests. In light of *Marks*, only those waters that would be jurisdictional under elements common to both the plurality and Kennedy opinions are jurisdictional under *Rapanos*. To implement the holding of the *Rapanos* Court, only those waters that would meet both the plurality and Kennedy tests are jurisdictional; waters that meet only one test are not jurisdictional "waters of the United States." The proposed rule does not properly implement *Rapanos* because it ignores the plurality decision and does not require that waters meet both tests to be subject to jurisdiction. (p. 8-9)

Agency Response: **Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.**

10.154 The Proposed Rule is predicated on the broad theories of jurisdiction rejected by the Supreme Court in *SWANNC* and *Rapanos*. The agencies have explained that the proposed rule is not intended to broaden the historical coverage of the CWA.[124] But, the agencies' interpretation of "historical coverage" has twice been determined by the Supreme Court to be incorrect and overbroad. In *SWANCC*, the Supreme Court rejected the agencies' attempts to assert jurisdiction over an abandoned sand and gravel pit based on the theory that the isolated pond was used by migratory birds, i.e., jurisdiction on the basis of the Migratory Bird Rule. *SWANCC*, 531 U.S. at 174. And in *Rapanos*, five Justices rejected the agencies' attempts to assert jurisdiction over wetlands not adjacent to navigable waters based on the theory that CWA jurisdiction extends to any nonnavigable water that has "any hydrological connection" to navigable waters. *Rapanos*, 547 U.S. at 729. The proposed rule allows for sweeping jurisdiction based on connections as tenuous as the Migratory Bird Rule that was rejected in *SWANCC*, and essentially amounts to the "any

[124] See, e.g., EPA, Questions and Answers About Waters of the U.S. (July 2014), http://www2.epa.gov/si tes/prod ucti on/files/2014-07 /documents/questi o ns_and_answers_about_wotus_0.pdf.

hydrological connection" theory that was rejected in *Rapanos*. Thus, the assertions that the rule is not "changing" anything or "expanding" jurisdiction are without support.

Further, the preamble to the proposed regulations does not explain the reversal in interpreting the *Rapanos* opinion, or why the 2008 Guidance that has applied the *Rapanos* opinion for years is no longer appropriate. The confusion amongst the regulated public is not created by the Supreme Court rulings, but rather by the reversal and rejection of the six+ year precedent without scientific explanation.

With the proposed rule's broadened concept of "tributary," the agencies seek to extend CWA jurisdiction to any feature (e.g., ditches, ephemeral drainages, stormwater conveyances), wetland, lake, or pond that directly or indirectly contributes flow to navigable waters, with no consideration of the volume, duration or frequency of flow or proximity to navigable waters. See 79 Fed. Reg. at 22,201. The proposed rule also extends jurisdiction to "adjacent waters," which can include any wet feature located in an undefined floodplain or riparian area, or that has a subsurface hydrologic connection to navigable waters. *Id*. at 22,206. If jurisdiction cannot be asserted under these broad "tributary" or "adjacent waters" categories, there is a catch-all "other waters" category that would cover isolated waters and wetland……s that, when aggregated with all other waters in the entire watershed, have a "more than speculative or insubstantial" effect on traditional navigable waters. *Id*. at 22,211. This jurisdiction can be found whether or not any impacts are proposed to these "aggregated" waters. Further, under the proposed rule, ditches, groundwater and erosional features (i.e., gullies, rills, and swales) can serve as a surface or subsurface hydrological connection that would render a feature jurisdictional "adjacent water" or demonstrate that a feature has a "significant nexus" and is therefore a jurisdictional "other water." *Id*. at 22,219. The agencies have gone as far to assert that even wetlands or waters with no connection can be claimed as jurisdictional, see discussion in Section 4 below.

Essentially, under this proposed rule, the authority to assert jurisdiction is without limit. It will reach features that are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). The proposed rule would apply the "waters of the United States" definition to a whole host of features that are remote from traditional navigable waters and carry minor water volumes, including ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and arroyos, all of which the *Rapanos* Court made clear are beyond the scope of federal jurisdiction. *Id*. at 734 (plurality); *id*. at 781 (Kennedy, J., concurring). See also discussion of playa lakes in Section 3.E., below. Once again, the term "waters of the United States" "cannot bear this expansive meaning. *Id*. at 731 (plurality). (p. 10-11)

Agency Response: **All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C. Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific**

determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

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10.155 In interpreting fragmented decisions like *Rapanos*, the Supreme Court has explained how lower courts should determine the case's controlling legal principles: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds…'"[125] This doctrine is known as the "*Marks* Rule." Despite the relevance of the *Marks* Rule to interpreting fragmented opinions like Rapanos, the agencies' 2014 Proposed Rule and preamble do not discuss or even cite to the *Marks* Rule. The agencies also fail to discuss any legal principles applicable to determining the controlling legal rule from fractured opinions like *Rapanos*. Applying the *Marks* Rule, Justice Kennedy's concurrence does not establish the sole controlling legal standard from *Rapanos*. Although the 2014 Proposed Rule does not explain why the agencies believe the significant nexus test is the controlling jurisdictional test from *Rapanos*, it is possible that the agencies believe that application of the *Marks* Rule results in the significant nexus test being the only binding jurisdictional test from *Rapanos*. Applying the *Marks* Rule to Rapanos, the Seventh and Eleventh Circuits have found that Justice Kennedy's significant nexus test is the only controlling 9 2014 jurisdictional test from *Rapanos*. [126] In *U.S. v. Gerke Excavating*, the Seventh Circuit justified this holding on the basis that the "narrowest ground" in the *Rapanos* decision under the *Marks* Rule was Justice Kennedy's significant nexus test. The court reasoned that the "narrowest grounds" are those grounds of the decision that constrain federal jurisdiction the least.[127] The court found that the Kennedy test would find more waters to be jurisdictional than would the plurality's test, and therefore the Kennedy test was the narrowest ground for the holding under *Marks*.[128] The Eleventh Circuit in *U.S. v. Robison* took the same analytical approach.[129] The rationale in support of those holdings was flawed, however, and the agencies would be arbitrary and capricious in relying on them to find that the Kennedy test is the sole and exclusive jurisdictional test under *Rapanos*. The flawed rationale arises from the court's interpretation of Marks's instruction to find the "narrowest grounds" among the opinions in the majority. The operative Marks language was quoted from *Gregg v. Georgia*, where the Court analyzed its prior decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman* addressed the constitutionality of the death penalty applied under a Georgia statute. In a fractured opinion, the points of law on which the plurality and concurrence agreed happened to be the least restrictive of federal power. So, too, was the result in Memoirs v.

[125] *Marks v. United States*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).
[126] *U.S. v. Gerke Excavating*, 464 F.3d 723 (7th Cir. 2006); *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007); see also *U.S. v. Freedman Farms, Inc*., 786 F. Supp. 2d 1016 (E.D.N.C. 2011) (finding only significant nexus test may be used)
[127] Gerke, 464 F.3d at 724
[128] *Id*.
[129] *Robison*, 505 F.3d at 1219-22.

Massachusetts, which *Marks* also discussed.[130] In Memoirs, six justices of the U.S. Supreme Court reversed a lower court decision that found a particular novel obscene and therefore not protected by the First Amendment to the U.S. Constitution. Among the six justices in the majority, three justices agreed with the lower court's conclusion that obscene materials lack constitutional protection. However, the same justices also found that the lower court's test for obscenity was too strict and articulated a different test to determine obscenity. Two other justices concurring in the opinion concluded that the First Amendment protects all speech, even obscenity. A sixth justice concurred in the judgment on the grounds that all obscenity other than hardcore pornography is constitutionally protected. The *Marks* Court examined these disparate opinions, and found that the rule announced by the three justices in the majority constituted the "narrowest grounds" of the decision. Even though the First and Seventh circuits have cited *Marks*, Memoirs, and *Furman* for the proposition that the "narrowest grounds" of a fractured opinion are the grounds least restrictive of federal jurisdiction, none of those cases ever addressed which opinion was more or less restrictive of federal authority when interpreting the phrase "narrowest grounds." Those cases did not even consider this issue. The fact that the "narrowest grounds" from those cases resulted in holdings that are less restrictive of government authority is simply incidental. In fact, the "narrowest grounds" cannot mean the opinion in the majority that is least restrictive of federal authority. Not every case involves the question of federal authority. Even in the cases that do, however, one could just as easily imagine a scenario where the "narrowest grounds" among the opinions are those that are the most restrictive of federal jurisdiction. By way of example, consider a hypothetical 5-4 decision where the Supreme Court upholds a federal statute that prohibits certain types of commercial speech. Four justices in the plurality uphold the statute on the basis that it survives intermediate scrutiny. The sole concurring justice and fifth vote for the majority upholds the statute on the basis that it survives strict scrutiny. The narrowest ground is the concurrence—because every statute that passes strict scrutiny also passes intermediate scrutiny, but not vice versa. Yet strict scrutiny is more restrictive of government authority than intermediate scrutiny is. Even if, however, a decision's "narrowest grounds" under *Marks* relates to the scope of federal authority, some courts have recognized that the narrowest grounds in *Rapanos* are those that are the most restrictive of government authority: "given the underlying constitutional question presented by *Rapanos*, it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)…"[131] Courts have recognized other reasons why the significant nexus test cannot be the sole controlling jurisdictional test from *Rapanos* under the *Marks* Rule: "[I]f Justice Kennedy's test is the single controlling test (as advocated by the Seventh and Ninth Circuits), there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters)—would all agree that federal authority should extend to such a situation."[132] For example, consider a small wetland that has a continuous surface connection to a

[130] Memoirs v. Mass., 383 U.S. 413 (1966).

[131] *U.S. v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006).

[132] *Id*. at 64.

continuously-flowing but very small tributary that ultimately empties into the Mississippi River, 50 miles away. The wetland would likely satisfy the jurisdictional tests articulated by the *Rapanos* plurality and dissents, but would probably fail Justice Kennedy's significant nexus test since the small wetland does not significantly affect the water quality of the Mississippi River. It is also possible that the agencies believe that the *Marks* Rule gives the agencies a choice to base jurisdiction under either the plurality's test or Justice Kennedy's significant nexus test from *Rapanos* (it is unclear whether this is the agencies' position, since they do not articulate their legal rationale for their Kennedy-only approach to jurisdiction). Some federal circuit courts of appeal have indeed found that the agencies may establish jurisdiction on a case-by case basis 19 under either the plurality's test or the Kennedy test.[133] Several other federal circuit courts have not decided which *Rapanos* test governs.[134] If the agencies believe that the legal principles articulated in the cases that allow an "either/or" approach to jurisdiction provide legal support for the agencies to choose between the Kennedy test and the plurality test as a foundation for this rulemaking, the agencies must say so, and must defend that choice. Their failure to do so in the 2014 Proposed Rule is arbitrary and capricious because it does not give interested parties an opportunity to comment on that decision. For the reasons discussed in the next section of this comment letter, the *Marks* Rule does not support an "either/or" approach to jurisdiction. (p.9-12)

Agency Response: **All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.**

10.156 Turning back to the *Marks* analysis, the *Marks* Rule does not allow courts or agencies to pick and choose among plurality and concurring opinions in a fractured decision for the rule of law that the court or agency likes best. The 2014 Proposed Rule indicates that the agencies are combining the views of the dissenting justices in Rapanos to those in the majority in order to determine the controlling rule of law from *Rapanos*.[135] But dissenting opinions are irrelevant under *Marks*: "the holding is the narrowest position taken by those members who concurred in the judgment…."[136] Dissenting judges do not, of course, concur in the judgment,[137] and are not part of the judgment of the court.[138] Therefore,

[133] The First, Third, and Eighth Circuits have concluded that jurisdiction exists if either Justice Kennedy's standard or the plurality's standard is met. Johnson, 467 F.3d at 66; *U.S. v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011); *U.S. v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009).

[134] The Second, Fourth, Fifth, Sixth, and D.C. Circuits have not decided which Rapanos test governs. See *Cordiano v. Metacon Gun Club, Inc*., 575 F.3d 199 (2nd Cir. 2009); Precon *Dev. Corp. v. United States Army Corps of Eng'rs*, 633 F.3d 278, 296 (4th Cir. 2011); *United States v. Roberts*, 830 F. Supp. 2d 372, 379 (M.D. Tenn. 2011); *U.S. v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008); *U.S. v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) see also Donovan, 661 F.3d at 182 n. 7 (collecting cases from the Fourth, Fifth, Sixth, and Ninth Circuits and noting "[s]everal Circuit Courts of Appeals have expressly reserved the issue of which Rapanos test or tests, governs CWA enforcement actions."). See also *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007) (applying Kennedy's approach but not ruling out plurality).

[135] *United States v. Garcia*, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, J., concurring)

[136] *Marks*, 430 U.S. at 193.

[137] *Gibson v. American Cyanamid Co*., -- F.3d --, 2014 WL 3643363, at *17 (7th Cir. July 24, 2014); *Robison*, 505 F.3d at 1221 ("We are controlled by the decision of the Supreme Court. Dissenters, by definition, have not joined

under *Marks*, "the positions of dissenting judges 'are not counted in trying to discern a governing holding from divided opinions.'"[139] As the D.C Circuit noted in an en banc opinion, courts are not "free to combine a dissent with a concurrence to form a *Marks* majority."[140] Some courts have interpreted the Seventh Circuit's decision in *Gerke* as support for including dissenting opinions in determining the holding of Rapanos under *Marks*. In *Gibson v. American Cyanamid Co.*,[141] the Seventh Circuit recently revisited its earlier decision in *Gerke*, and flatly rejected the notion of adding in the *Rapanos* dissenting opinions in a *Marks* analysis, noting that any discussion of dissents in *Gerke* was dicta and unnecessary to resolving the appeal at issue.[142] The assertion of jurisdiction if either the plurality test or the significant nexus test is met is an incorrect reading of *Rapanos* for another reason. The adoption of two inconsistent holdings is incorrect under *Marks*, which requires that only the plurality and concurring judges' opinions be considered to form a single holding.[143] Moreover, under Article III of the U.S. Constitution, federal courts are authorized to interpret the law only to the extent that the opinions they issue are tied to a judgment that resolves an actual case or controversy under the U.S. Constitution. Dissenting justices have no part in disposing of an actual case or controversy, so therefore whatever opinions they express as to the controlling rule of law in the case are without effect.[144] (p. 14)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

10.157 Finally, allowing dissenting justices to determine the controlling rule of law from the case under an "either/or" test that only four justices would endorse ultimately allows a nonmajority to establish binding precedent.[145] In *Rapanos*, for example, only the four dissenting justices would apply either the Kennedy test or the plurality test. But neither the plurality nor Justice Kennedy would apply the other's test, of course. Four judges—particularly four dissenting justices—is not a majority. To allow the *Rapanos* dissent's "either/or" approach to prevail would improperly disregard the express intent of the justices in the majority and would result in a legal standard with which the majority of the

the Court's decision. In our view, *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented.").

[138] "Stare decisis does not apply to dissenting opinions." 18 James Wm. Moore et al., Moore's Federal Practice §134.05[2] (3d ed. 2006).

[139] *Gibson*, 2014 WL 3643363, at *17 (interpreting *Marks*).

[140] *King*, 950 F.2d at 783; see also *Bailey*, 571 F.3d at 799; *Johnson*, 467 F.3d at 62-64; *Donovan*, 661 F.3d at 181-82

[141] *Gibson*, 2014 WL 3643363, at *17.

[142] *Id*.

[143] *United States v. Garcia*, 413 F.3d 201, 232 n.2 (2d Cir. 2005) (Calabresi, J., concurring).

[144] See *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (Federal courts may not "declare principles or rules of law which cannot affect the matter in issue in the case before it"); see also *Robison*, 505 F.3d at 1221.

[145] *Robison*, 505 F.3d at 1221

Supreme Court would not agree. [146] In *United States v. Robison*, the Eleventh Circuit recognized that "[i]t would be inconsistent with Marks to allow the dissenting Rapanos Justices to carry the day and impose an 'either/or' test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied."[147] Allowing the dissenters to combine with the plurality or the concurring opinion also violates the consensus view of the majority of the Justices in *Rapanos*—that the Corps overstepped its jurisdictional authority under the Clean Water Act. A proper application of the *Marks* Rule requires that among the opinions in the majority, one opinion be a "logical subset" of the other opinions. The controlling rule of law from *Rapanos* depends, then, on which opinion in the majority is a logical subset of the other opinion. Several courts have recognized that a judgment's "narrowest grounds" means that one opinion in the majority must be a "logical subset" of another opinion in the majority. The D.C. Circuit has interpreted "narrowest grounds" to mean "a common denominator of the Court's reasoning: it must embody a position implicitly approved by at least five Justices who support the judgment."[148] In other words, the holding of a fractured opinion can be determined under *Marks* when "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position."[149] Under this framework, one opinion must be a complete subset of the other: *Marks* is workable—one opinion can meaningfully be regarded as 'narrower' than another only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.[150] Courts routinely hold that Marks does not apply when the plurality or concurring opinion is not a logical subset of the other:[151] "*Marks* becomes problematic, however, when 'one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others.'"[152] In a related context, the D.C. Circuit recognized: When ... one opinion supporting the judgment does not fit entirely within situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be. The [Supreme] Court itself does not appear to apply *Marks* in cases of this type.[153] On this basis, the D.C. Circuit has held that, in a splintered opinion similar to *Rapanos*, where eight justices other than the concurring justice did not agree with the rationale expressed in the concurring opinion, "the concurring opinion is not controlling in this circuit."[154] Instead, the D.C. Circuit considers the underlying case to determine "which, if any, of the rationales in [the case]

[146] See generally Ryan J. Niehaus, Sustaining A Jurisdictional Quagmire(?): Analysis and Assessment of Clean Water Act Jurisdiction in the Third Circuit, 19 J. Envt'l. & Sustainability L. 473, 493 (Spring 2013).
[147] *Robison*, 505 F.3d at 1221.
[148] *King*, 950 F.2d at 781.
[149] *Id*. at 782
[150] *Id*. at 784-85.
[151] *Id*. at 781.
[152] *Bailey*, 571 F.3d at 798 (citing King, 950 F.2d at 782).
[153] *King*, 950 F.2d at 782 (emphasis added); see also *United States v. Epps*, 707 F.3d 337, 349 (2013).
[154] *Epps*, 707 F.3d at 351

is persuasive."[155] In *Rapanos*, neither Justice Kennedy's concurrence nor the plurality opinion is a logical subset of the other.[156] In fact, both justices heavily criticized the other's approach.[157] There are several examples of waters that may be found jurisdictional under the plurality's test, but not under Kennedy's test, and vice-versa.[158] For example: Justice Kennedy's test would find jurisdiction over wetlands adjacent to navigable waters regardless of a surface connection between the wetland and the navigable water, whereas the plurality's test would find jurisdiction over wetlands that have a continuous surface connection to the navigable water. The plurality's test would find jurisdiction over non-navigable tributaries to navigable waters only if such tributaries are relatively permanent. Justice Kennedy's test for jurisdiction has no such criterion. Under the agencies' interpretation of Justice Kennedy's test as described in the 2014 Proposed Rule, "other waters" that are geographically remote from navigable waters could be deemed jurisdictional if they, together with other nearby waters, have a significant nexus to a navigable water. The plurality's test would not find jurisdiction over such waters. A continuously-flowing stream that carries a low volume of water to a downstream navigable water may lack a significant nexus with that downstream water, and therefore may not be jurisdictional under Kennedy's test, but would be jurisdictional under the plurality's test because it is a relatively permanent tributary to a navigable water.[159] Because neither jurisdictional test is a "logical subset" of the other, neither opinion standing alone is the exclusive controlling rationale under *Marks*.[160] (p.15-17)

Agency Response: **The Courts of Appeals that have considered this issue have not adopted the position that jurisdiction exists only where both the plurality's and Justice Kennedy's standards are satisfied. Technical Support Document, 1C. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.**

10.158 For the past seven years, the United States has—in permitting decisions, litigation, and in official regulatory guidance—interpreted *Rapanos* to convey jurisdiction when either Justice Kennedy's or Justice Scalia's test is met.[161] Although this interpretation of

[155] *Id*.
[156] See, e.g., *Bailey*, 571 F.3d at 798 (There is "little overlap between the plurality's and Justice Kennedy's opinions," and therefore "it is difficult to determine which holding is the narrowest."); Cundiff, 555 F.3d at 210 ("[T]here is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's view."); see also *Rapanos*, 547 U.S. at 756 (Scalia, J., plurality opinion) ("[Justice Kennedy's] test simply rewrites the statute."); *id*. at 778 (Kennedy, J., concurring) ("[T]he plurality reads nonexistent requirements into the Act.").
[157] *Rapanos*, 547 U.S. at 753-54 (Scalia, J., plurality opinion); id. at 768-76 (Kennedy, J., concurring).
[158] See, e.g., *Johnson*, 467 F.3d at 64 ("The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction").
[159] *Johnson*, 467 F.3d at 64; *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring) (under plurality's test, "[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation"); see also id. at 776-77.
[160] See, e.g., *Epps*, 707 F.3d at 350; *Cundiff*, 555 F.3d at 209 ("[w]here no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down.").
[161] 2007 Guidance at 3; 2008 Guidance at 3.

Rapanos is itself erroneous, the agencies fail to explain their basis for dispensing with that interpretation and taking a very different approach in the 2014 Proposed Rule. Without any—let alone an adequate—reasoned explanation for adopting this new interpretation of *Rapanos*, the agencies' 2014 Proposed Rule is arbitrary and capricious. Deference is particularly inappropriate here given the agency's change in its position of the last seven years. The agencies cannot simply eschew any responsibility for their 2008 Guidance by claiming the guidance did not impose legally binding requirements on EPA, the Corps, or the regulated community.[162](p. 35-36)

Agency Response: The agencies explained their rationale for the rule as compared to the 2008 Guidance. Technical Support Document, I.C.

Ohio Oil and Gas Association (Doc. #15122)

10.159 The last Supreme Court ruling to address what is a "water of the United States" was provided in *Rapanos v. United States*, 547 U.S. 715 (2006). Although there was no majority decision provided by the Court, there was a plurality decision. Chief Justice Roberts, along with Justices Scalia, Thomas and Alito, provided a plurality opinion. Justice Kennedy provided a concurring opinion. It appears that the proposed rule attempts to pick and choose between these two opinions (the plurality opinion and the Kennedy opinion). The agencies must implement the plurality decision and implement both the plurality opinion and the Kennedy opinion. The agencies cannot pick and choose what they like from one opinion and ignore the other opinion. For instance, the plurality opinion made clear that intermittent or ephemeral water that flows through channels and channels that periodically allow drainage of rainfall are not waters of the United States. *Id*. 739 (citing *Chevron v. NRDC* 467 U.S. 837, 843 (1984). Yet, the proposed rule attempts to use the Kennedy "significant nexus" test to provide that these exact waters (ephemeral channels or periodic flows) do qualify as waters of the United States. The agencies must define what qualifies as a water of the United States by using both opinions – the entire plurality decision. (p. 2-3)

Agency Response: The Courts of Appeals that have considered this issue have not adopted the position that jurisdiction exists only where both the plurality's and Justice Kennedy's standards are satisfied. Technical Support Document, 1C. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

[162] 2008 Guidance at 4, n.17. The 2008 Guidance, which interpreted *Rapanos* broadly, was a legislative rule. The June 2007 Guidance was subject to public notice and comment as would a rulemaking: EPA and the Corps received over 66,000 public comments, and revised the Guidance in 2008 after considering these comments. 2008 Response to Comments at 1. The entire purpose of the 2008 Guidance was to "ensure that jurisdictional determinations, permitting actions, [administrative enforcement actions,] and other relevant agency actions are consistent with the [*Rapanos*] decision and supported by the administrative record." 2008 Guidance at 3, 4. Further, the agencies issued the guidance "to ensure nationwide consistency, reliability, and predictability in [their] administration of the statute." 2008 Guidance at 3, 4. The 2008 Guidance did not merely interpret Rapanos, but established new policy positions that the agencies would treat as binding when making jurisdictional determinations. Labeling the agencies' action as "guidance" does not make it so and does not change the fact that this was a legislative rule.

Sinclair Oil Corporation (Doc. #15142)

10.160 Case law prior to Rapanos sets clear limits on the extent of "waters of the United States." In 1974, the Corps promulgated regulations which defined "waters of the United States" using the traditional judicial interpretation of navigable waters under the Rivers and Harbors Act. [163]See *Rapanos*, 547 U.S. at 723. Shortly thereafter, several environmental groups sued and the district com1 for the District of Columbia enjoined this regulatory definition as "too narrow."[164] *Id*. at 724. In response, in 1977, the Corps adopted new regulations which defined "waters of the United States" broadly, extending jmisdiction under the CWA to the practical extent of Congress' authority under the Commerce Clause. See 42 Fed. Reg. 37,144.

The Supreme Court subsequently delineated the scope of jurisdictional waters in *United States v. Riverside Bayview Homes*, where the Court rnled that wetlands abutting a navigable water met the definition of"waters of the United States" under the CW A. 474 U.S. 121, 133 (1985). Following the decision in *Riverside Bayview Homes*, the Agencies continued to interpret "waters of the United States" as extending to the limit of Congress' Commerce Clause authority. It is important to note, however, that the Court did not endorse the Agencies' position that the definition of "waters of the United States" must extend federal jurisdiction to the limit of congressional authority under the Commerce Clause. *Id*. at 133. Instead, the Court took a more tempered approach, stating that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Id.

Nearly two decades later, the Supreme Court once again took up the definition of "waters of the United States," holding that the definition did not include "ponds that are not adjacent to open water." *SWANCC*, 531 U.S. 159. In reaching its decision, the Comi found that a permissible definition of "waters of the United States" avoids "the significant constitutional and federalism questions raised" by a definition extending the scope of jurisdiction to the limits of Congress' Commerce Clause authority. *Id*. at 174. The Comi noted that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we require a clear indication that Congress intended that result." Id. at 172. The Court found no evidence of such a clear intent from Congress in passing the CWA, and thus determined that an interpretation of "waters of the United States" that pushed the definition to the limits of Congress' Commerce Clause Authority was not

[163] The Corps stated that the terms "navigable waters of the United States" under the Rivers and Harbors Act and "navigable waters" under the CW A "should be treated synonymously" and defined the terms as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg.12, 112 and 12, 119

[164] That court ruled that Congress intended to assert "federal jurisdiction over the nation's water to the maximum extent permissible under the Commerce Clause of the Constitution." Natural Resource Defense Co1111sel, Inc. v *Callaway*, 392 F.Supp. 685, 686 (D. D.C. 1975). The Supreme Court subsequently rejected this analysis in *SWANCC*, 531 U.S. 159, when it held that it did not need to analyze whether Congress could exercise authority over the ponds at issue under the Conunerce Clause because the CWA was "written to avoid the significant constitutional and federalism questions raised by" that interpretation. 531 U.S. at 174.

allowed. *Id*. at 173-17 4. In short, the Court held that the scope of "waters of the United States" is narrower than the limits of Congress' Commerce Clause authority.

In its decisions in *Riverside Bayview* and *SWANCC*, the Court provided the Agencies with clearly demarcated sideboards within which the definition of "waters of the United States" must fall: the definition must be broader than traditional navigable waters and must be narrower than the limits of Congress' authority to regulate under the Commerce Clause. In practical terms, the two decisions leave the boundary between land and water somewhere between wetlands physically abutting a traditional navigable water and isolated, intrastate ponds whose only connection to traditional navigable waters was their use by migratory birds.

It is only between these margins that any confusion exists and to which the Agencies' clarification in the proposed rule is appropriately directed. However, one of the primary problems with the proposed rule is that it divorces the concept of "significant nexus" from the Commerce Clause analysis from which it originated. The Agencies should reevaluate the legal basis for the proposed rule and clarify that neither the plurality nor Justice Kennedy's opinion in Rapanos removed the limits placed on the Agencies' jurisdiction by the Court's decisions in *Riverside Bayview Homes* and *SWANCC*. (p. 5-6)

Agency Response: **The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.**

Illinois Coal Association (Doc. #15517)

10.161 Despite the Agencies' assertions, it is clear that, if finalized as proposed, the Proposed Rule would substantially expand the scope and reach of the CWA to waters that historically have not been regulated. In particular, the Proposed Rule would make jurisdictional all tributaries, regardless of flow and duration, as well as all adjacent waters, broadly defined to include waters with a shallow hydrologic or subsurface connection, even where separated by uplands or wholly man-made features. These are not insignificant changes. Rather, when combined with broad and unlimited theories of connectivity, they constitute abrupt and arbitrary deviations from longstanding regulatory meanings. We fail to see how such sweeping changes align with the Agencies' purported goal of promoting clarity and consistency. In any event, whatever the Proposed Rule might have accomplished in terms of added clarity is undone by the fact that it rests on an erroneous assertion of jurisdiction that runs afoul of the seminal Supreme Court holdings in *Solid Waste Agency of N. Cook County v. Us. Army Corps ofEngr's*, 531 U.S. 159 (2001) ("*SWANCC*") and *Rapanos v. United States*, 547 U.S. 715 (2006). Indeed, though the Agencies provide lip service to Justice Kennedy's concurrence in R*a*panos, the Proposal fails to comply with his basic admonition that the connection between a regulated site and traditionally navigable water must be substantial in order to establish jurisdiction. *Rapanos*, 547 U.S. at 778780,782.

Congress explicitly sought to limit federal jurisdiction under the CWA to only certain "navigable" "waters of the United States." See 33 U.S.C. §§ 1311(a), 1342(a) and 1362(7). This clearly underscores the fact that certain other waters necessarily fall beyond the Act's reach. See 33 U.S.C. §§ 1311(a), 1342(a) and 1362(7). Over the last several decades the U.S. Supreme Court has sought to provide meaning to the concept of "waters of the U.S." and has shed light on where, along the continuum of the landscape,

from wet to dry land, the federal government's authority under the Act must begin and end. See generally, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); SWANCC, 531 U.S. 159; and *Rapanos*, 547 U.S. 715. And although that line in the landscape has, in some cases, proven to be difficult to ascertain, here it is clear that the Agencies' attempts to exert ever increasing control over an ever decreasing volume of water would push this line far beyond the point where the term "navigable" retains any meaning. It goes without saying that Congress did not intend for this definition to be subsequently read out of the CWA by agency regulation. (p. 5)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C

Independent Petroleum Association of New Mexico (Doc. #15653)

10.162 It is IPANM's position, as well as that of several other associations that the plurality opinion of *Rapanos* should govern implementation of the Clean Water Act "waters of the United States." The agencies have over-stated the Kennedy standard which clearly only applies to wetlands, to apply the standard to waters which tenuous nexus results in impermissibly expanding the proposed definition beyond the scope of the Clean Water Act. (p. 9)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

Marcellus Shale Coalition (Doc. #18880)

10.163 The Clean Water Act was enacted pursuant to Congress's authority to regulate interstate commerce under Article I, section 8 of the U.S. Constitution. Historically, Congress has used the term "navigable waters" to assert its power to regulate commerce among the states. This is how Congress enacted the Federal Water Pollution Control Acts, and ultimately the 1972 version of the Clean Water Act. Thus, the Clean Water Act was not intended to regulate all waters of the United States, only those associated with commerce among the states, (33 CFR, Part 328).

As is clear from the historical context of Congress' authority over waters of the United States, the Agencies proposed regulation goes far beyond what Congress intended when it enacted the Clean Water Act. For example, the Agencies' proposed definition for "other waters" violates the Constitution as it extends the authority under the Clean Water Act beyond the regulation of interstate commerce. Some of these "other waters" in the proposed rulemaking purported to be subject to Clean Water Act jurisdiction, are not, under a proper commerce clause analysis, subject to federal authority. As a result, these waters fall outside the scope of Congress's, and therefore the Agencies', constitutional authority."

Moreover, the Agencies proposed a significant nexus test which would result in regulatory overreach beyond the jurisdiction of the Clean Water Act. This would result in jurisdiction over features which are not navigable waters and carrying only minor volumes of flow. This was not what Congress intended and goes beyond even the broadest interpretation of recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* , 531 U.S. 1595 172 (2001)

(*SWANCC*), and *Rapanos v. United States* , 547 U.S. 715 (2006). As majority opinion in *SWANCC* held "[T]he term 'navigable' has ... the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

The Agencies' attempt to address both *SWANCC* and *Rapanos* must be based upon the clear constitutional limits under which they operate. The proposed rule, as currently written, clearly exceeds Congress' commerce power over navigation and wholly ignores those limits recognized by the Supreme Court. (p. 1-2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Snyder Associated Companies, Inc. (Doc. #18825)

10.164 EPA has indicated this proposed rulemaking is for clarification. However, there is no regulatory failure that justifies this proposed rulemaking. In fact, on two separate occasions, (*SWANCC* and *Rapanos*), the Supreme Court has ruled against this type of agency efforts. (p. 1)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

Halliburton Energy Services, Inc. (Doc. #19458)

10.165 The Agencies' categorical assertion of jurisdiction over tributaries and adjacent waters is inconsistent with Supreme Court precedent. As noted above, the proposed definition of tributaries captures non-adjacent, non-navigable tributaries of limited flow on a per se basis based on a blanket generalization that tributary systems are (of course and unsurprisingly) at some level connected to navigable waters. The Agencies assert that this connectivity constitutes a "significant nexus" for tributary systems as a whole. But even Justice Kennedy's concurring opinion in *Rapanos* does not support this new and expansive definition of tributary that reaches to the most remote and ephemeral stretches of the hydrological system.

In fact, Justice Kennedy's opinion is replete with language demonstrating that he did not contemplate that all tributaries would be considered jurisdictional. For example, according to Justice Kennedy, the CWA does not go so far as to establish federal jurisdiction "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that may eventually flow into traditional navigable waters."[165] He further explained that an OHWM standard for what constitutes a "tributary" presumably provides a rough measure of the volume and regularity of flow, and so "assuming it is subject to reasonably consistent application" [but citing a study suggesting otherwise], "it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the [CWA]."[166] Moreover, Justice Kennedy stated that a "[m]ere hydrological connection should not be sufficient [to establish jurisdiction] in all cases; the connection may be too

[165] 547 U.S. at 778 (Kennedy, J., concurring).
[166] *Id*. at 781 (emphasis added).

insubstantial for the hydrological linkage to establish the required nexus with navigable waters as traditionally understood."[167]

Moreover, under the Agencies' construct, the extension of CWA jurisdiction to all tributaries no matter how ephemeral in nature automatically gives the Agencies jurisdiction over all wetlands and water bodies considered to be adjacent to these "tributaries" under the Agencies' expansive definition. However, Justice Kennedy made clear that such blanket assertions of jurisdiction go too far:

> [T]he breadth of this standard [i.e., the use of an OHWM alone to establish jurisdiction over a tributary] – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated pools held to fall beyond the Act's scope in SWANCC.[168]

The proposed rule ignores these limits on federal jurisdiction. Instead, the Agencies are attempting to hurdle these statutory limits, as interpreted by the Supreme Court, by latching onto the concept of a "significant nexus," untethering it from the underlying opinions, and using aggregation to avoid any specific analysis or reasonable limits, such as breaks in the OHWM. The proposed definition of tributaries reaches too far and therefore is not supported by the CWA. (p. 9-10)

Agency Response: **The rule narrows the waters that meet the definition of tributary by requiring both a bed and banks and another indicatory of ordinary high water mark. Preamble IV, and, Technical Support Document I.C. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered tributaries. Preamble, III and IV and Technical Support Document, I.C. and VII.**

10.166 The Agencies' failure to recognize the limits of federal jurisdiction over isolated waters is even more pronounced. Before SWANCC, the Agencies asserted jurisdiction to the full reach of the Commerce Clause of the U.S. Constitution, including waters visited by migratory birds such as the isolated pond at issue in the case. In SWANCC, the Supreme Court not only held that "the 'Migratory Bird Rule' is not fairly supported by the CWA"[169] and "exceeds the authority granted to respondents under § 404(a) of the CWA,"[170] but expressly explained at least one firm limit on jurisdiction imposed by the CWA:

[167] *Id*. at 786.
[168] *Id*. at 781-82.
[169] 531 U.S. at 167.
[170] *Id*. at 174.

> In order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude ***the text of the statute will not allow this.***[171]

Consistent with that language, a majority of the Rapanos Court read SWANCC as not just invalidating the Migratory Bird Rule, but holding that the Agencies cannot assert jurisdiction over isolated waters under the CWA. In discussing SWANCC, the plurality opinion states that "we held that 'nonnavigable, isolated, intrastate waters' . . . were not included as 'waters of the United States.'"[172] Justice Kennedy's concurring opinion is hardly less clear, explaining that "[b]ecause [a significant] nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action,"[173] and further referring to "SWANCC's holding that 'nonnavigable, isolated, intrastate waters' ... are not 'navigable waters' . . . ."[174]

Thus, as interpreted by the Court, the CWA simply does not extend to isolated waters. This is a matter of statutory interpretation grounded in the Court's understanding of the intent of Congress. The report on connectivity of streams and wetlands to downstream waters that the Agencies rely on to argue that their broad claims of jurisdiction are scientifically justified does nothing to alter this understanding of the limits of the statute's reach. Therefore, the Agencies' attempt to apply the significant nexus test to isolated waters – an application not contemplated by Justice Kennedy – is fundamentally at odds with the statute as interpreted by the Court. As a result, the Agencies should withdraw the proposed rule and issue a new proposal that conforms with the intent of Congress as interpreted by the Supreme Court. (p. 10-11)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Georgetown Sand & Gravel (Doc. #19566)

10.167 EPA has indicated this proposed rulemaking is for clarification. However, there is no regulatory failure that justifies this proposed rulemaking. In fact, on two separate occasions, (*SWANCC* and *Rapanos*), the Supreme Court has ruled against this type of agency efforts. (p. 2)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C

Montana Wool Growers Association (Doc. #5843.1)

10.168 The Agencies should allow Congress to determine the Agencies' jurisdiction and duties by amending the CWA. If the Agencies believe their jurisdiction should be expanded, they should petition Congress to amend the CWA and offer guidance in that process. The Agencies' rulemaking power should be used to explain how the Agencies will execute duties within their jurisdiction, not to redefine the jurisdiction itself. (p. 2)

[171] *Id*. at 168 (first emphasis in original; second emphasis added).
[172] *Rapanos*, 547 U.S. at 726.
[173] *Id*. at 767.
[174] *Id*. at 774. See also id. at 782 (referring to "the isolated ponds held to fall outside the Act's scope in SWANCC").

Agency Response: **This rule is promulgated pursuant to Section 501 of the CWA and is consistent with the statute. Technical Support Document, I.A.**

10.169 The Proposed Rule would replace the twelve current regulations defining WOTUS with twelve nearly identical definitions. Courts are instructed to interpret statutes to give meaning to each section and each word. Yule Kim, *CRS Report for Congress, Statutory Interpretation: General Principles and Recent Trends*, http://fas.org/sgp/crs/misc/97-589.pdf (Aug. 31, 2008).The same principle applies to interpreting agency rules. To give meaning to each definition here, courts must consider each definition within the context of its surrounding regulation and ignore the language in Section (a) of the Proposed Rule, which says the definition applies to "all sections of the Clean Water Act." For instance, to give separate effect to the definition under 40 C.F.R. § 122.2, it must only "apply to parts 122, 123, and 124" of the Code of Federal Regulations, which in turn apply to "sections 318, 402, and 405 of the CWA." If the Agencies intended the Proposed Rule's definition of WOTUS to apply uniformly throughout the CWA, eleven of the twelve definitions are "mere surplusage" and actually impede that interpretation. The Code of Federal Regulations should include only one definition of WOTUS and specify that the definition applies to the entire CWA. (p. 12)

Agency Response: **As the agencies stated in the preamble to the proposed rule, the term "navigable waters" is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process. While there is only one CWA definition of "waters of the United States," there may be other statutory factors that define the reach of a particular CWA program or provision.**

10.170 The Preamble alternately cites to the United States Code and the Public Law amendments when referring to the CWA. Even for someone trained in legal research, the mixed citations make research difficult without a copy of the CWA that provides the United States Code and Public Law amendment citations simultaneously. The United States Code is publicly available, easy to access, and easy to use; the Public Law amendments are not (although they can be accessed in sections or in one PDF on the EPA website). The Preamble and Proposed Rule should cite only to the United States Code. (p. 12)

Agency Response: **Both citation forms are commonly used to refer to the CWA and are publicly available.**

National Sorghum Producers (Doc. #10847)

10.171 In appraising the proposed rule, we believe it is noteworthy that the EPA and the Corps acknowledge that the rule would expand their jurisdictional reach, according to the Congressional Research Service (CRS), despite two separate rulings of the Supreme Court holding that the federal government had already exceeded its authority under the Clean Water Act. While we recognize that a majority on the Supreme Court has been unable to agree on the definition of "waters of the United States", we believe that definition provided under the proposed rule would not only run afoul of the plurality

opinion in *Rapanos v. United States* but also of Justice Kennedy's concurring opinion. (p. 1)

Agency Response: The rule is narrower in scope than the existing rule and consistent with the decisions of the Supreme Court. Technical Support Document, I.B. and C. For example, while the existing rule established no limitations of the scope of tributary, the rule for the first time provides a definition of tributary that includes the requirement that a water have a bed and banks and another indicator of ordinary high water mark. Preamble, IV.

United Farm Credit System (Doc. #12722)

10.172 The expanded definition and jurisdiction of WOTUS established by the proposed rule will significantly increase the risk of litigation against farmers and ranchers. Furthermore, the costs of such litigation is very expensive and beyond the resources of most farmers and ranchers. As we have seen, the citizen lawsuits under the Clean Water Act have led to certain classes of pesticides needing a federal Clean Water Act permit in order to be applied according to their already federally approved label. Lawsuits using the same logic will be brought against farmers and ranchers for use of pesticides and fertilizers when they are used on farms with drainage features. (p. 2-3)

Agency Response: The agencies have provided an economic assessment of the rule. Preamble, V, and economic assessment in the docket.

Louisiana Cotton and Grain Association (Doc. #12752)

10.173 The LCGA believes that the proposed rule, as written, goes well beyond the limits set by Congress and the United States Supreme Court by greatly expanding federal jurisdiction under the Clean Water Act. The proposed rule fails to reach its goal of clarity, and the text of the rule invites unpredictable enforcement while providing ample leeway for federal agencies to assert jurisdiction. The proposed rule, as written, illegally assumes control over lands and waters that have been and should continue to be under state jurisdiction. Most importantly, the consequences of the proposed rule will force Louisiana farmers and landowners out of business, whether it is from endless litigation caused by the ambiguous guidance of the rule, excessive fines resulting from confusion created by the loosely written rule, or from overly burdensome permitting procedures limiting, delaying and preventing activity on private lands. (p. 4)

Agency Response: The rule provides for increased clarity and certainty. Preamble, II and IV. The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Colorado Farm Bureau (Doc. #12829)

10.174 A proposal to revise the Agencies' regulations defining "waters of the U.S." must clearly identify the limits to CWA jurisdiction articulated by the Supreme Court in *SWANCC* and *Rapanos*. In those cases, the Supreme Court rejected the notion that CWA jurisdiction extends to nonnavigable, isolated, intrastate waters or to any area with a hydrologic connection to navigable waters. The Court disagreed with the Agencies' "land is waters" approach. (p. 8)

Agency Response: **The rule provides for increased clarity and certainty. Preamble, II and IV. The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.**

Bayless and Berkalew Co. (Doc. #12967)

10.175 The Supreme Court has reaffirmed the Act's limits in stating that remote and insubstantial waters that eventually may flow into navigable waters do not qualify for regulation. This would be descriptive of almost all "tributaries" in Arizona, yet the EPA has ignored both representative government and judicial review and through implementation of this rule will dictate all land-use across the entire country regardless.

Congress wrote many exemptions to prevent federal permit requirements for farming; however, Congress used language that assumed farming happens on land, not in WOTUS. By defining land to be WOTUS, the rule would result in federal permit requirements for countless farming and ranching activities nationwide. (p. 5)

Agency Response: **The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C. The agencies disagree that Congress used language that assumed farming happens on land. To the contrary, Section 404(f) exempts specified discharges of dredged and fill material to waters of the United States from requiring permits; it does not exempt the waters into which those discharges occur from the definition of waters of the United States.**

Pershing County Water Conservation District (Doc. #12980)

10.176 In the Federal Register filing, the EPA states that these rules are away of clarifying and codifying the rulings in a number of recent United States Supreme Court decisions on this issue. It is the District's contention that the very opposite is in fact true. While the EPA contends that the rules are consistent with the rulings of the Supreme Court, the Court in each cited case has limited the jurisdiction of the EPA in cases where they tried to assert their jurisdiction over water they should not have. Yet, somehow the EPA attempts to use such decisions to expand their jurisdiction once again. (p. 3)

Agency Response: **The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C**

Nebraska Cattlemen (Doc. #13018.1)

10.177 The proposed rule represents the EPA and the U.S. Army Corps of Engineers (Corps) interpretation of the current jurisdictional reach of the CWA. The proposed rule will supersede a 2003 Joint Memorandum which provided clarifying guidance on the *Supreme Court's Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers (SWANCC)* and a 2008 Joint Guidance memo issued after another Supreme Court case of *Rapanos v. United States (Rapanos).* Both of those cases involved wetlands issues with the Corps under §404.

As noted, the proposed rule addresses the definition of "waters of the United States" for all CWA purposes. And yet, the model for the regulatory approach here is the Existing Guidance which was limited on its face to §404 determinations.

One stated purpose of the proposed rule is to reduce the use of the Corps' Wetlands Delineation Manual of 1987 and its supplements. The Manual is the tool the agencies use

to determine whether water bodies are subject to CWA jurisdiction on a case-by-case basis. Case-by-case determinations using the Manual are frequently difficult, time consuming, and bureaucratic. (p. 7)

Agency Response: While the Supreme Court decisions were in the context of section 404 permitting, the decisions addressed the definition of "waters of the United States" that applies to the Clean Water Act. That said, there may be other statutory factors that define the reach of a particular CWA program or provision. It is not the stated purpose of the rule to reduce the use of the delineation manual. The rule does not change the definition of wetland and does not address or change use of the delineation manual.

10.178 The proposed rule does codify existing policies and categorically exempt areas from federal CWA jurisdiction in a specific listing of the policies and areas. However, the net effect of the proposed rule is that never before regulated smaller and more remote upstream bodies of water will fall with certainty within federal CWA jurisdiction. It is the position of Nebraska Cattlemen that the proposed rule has expanded the jurisdiction of the CWA to waters that the Supreme Court has ruled are beyond its scope. (p. 9)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute and caselaw. Technical Support Document, I.A., B., and C.

North Dakota Soybean Growers Association (Doc. #14121)

10.179 The North Dakota Soybean Growers Association refutes the agencies' reliance on the Rapanos interpretation and the alleged version of "significant nexus" by Justice Kennedy in particular, because, either separate or combined, they do not provide valid legal justification for the expansive redefinition of WOTUS in the proposed rule. In fact we believe that the agencies' rationale stands in direct contrast to Justice Kennedy's actual opinion in Rapanos as well as his (and the majority) opinion rendered in *Riverside Bayside Homes* and *SWANCC*. The court has consistently upheld the states' right to regulatory jurisdiction that is prescribed in the CWA. (p. 4)

Agency Response: The rule is consistent with the statute and Supreme Court decisions. Technical Support Document, I.A. and C.

Sugar Cane Growers (Doc. #14283)

10.180 The Clean Water Act makes clear that Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of the States." 33 U.S.C. § 1251(b). Congress chose not to stretch – and then exceed – the outer limits of its powers under the Commerce Clause. See *id*. The proposed rule would do precisely that which Congress chose not to do itself. (p. 5)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Wyoming Farm Bureau Federation (Doc. #14406)

10.181 WyFB questions if EPA and the Corps have the legal authority to go forward with these proposed rules. Changing the definition of Waters of the U.S. seems to go against U.S. Supreme Court rulings and the intent of the U.S. Congress. Others, such as American

Farm Bureau Federation, have covered the legal issues at the federal level so WyFB will defer to their comments and lend strong support to those comments. (p.1)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

LeValley Ranch, Ltd. (Doc. #14540)

10.182 We are also disappointed in the proposed rule's lack of clarity due to ambiguous or undefined terms and phrases. As it stands, it is extremely unclear how far the agencies intend federal jurisdiction to extend and if taken to the maximum extent possible the proposed rule wraps in virtually every feature across the nation, which contravenes not only the CWA itself but also the Commerce Clause of the U.S. Constitution. This is very troublesome for Colorado and those states downstream that rely on water originating in Colorado. (p. 5)

Agency Response: The rule is not vague and is consistent with the statute and the Constitution. Technical Support Document, I.A., B., and C.

California Association of Winegrape Growers (Doc. #14593)

10.183 Notwithstanding various interpretations on the definition of "waters of the United States," U.S. Supreme Court precedent to date is clear that a fundamental limit on the Corps' and the EPA's jurisdiction under the CWA is the "reasonableness" of a jurisdictional determination, particularly in light of the outer limits of congressional and executive power under the Commerce Clause and the basic principles of federalism that are the foundation for our system of government. (p**. 6)**

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.184 We believe the proposal errs by looking only to the most favorable language in the law as the basis for justification, leaving out the limiting requirements. A full statement of the law limits jurisdiction more narrowly than in the proposal. For example, the proposal ignores the touchstone requirement of navigability. This constitutes a key omission and is a fundamental tenet of Congressional intent. As a result EPA reaches faulty conclusions that don't meet Supreme Court standards for jurisdiction, and the proposed rule misapplies the significant nexus test of significant and substantial. (p. 10)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

American Soybean Association (Doc. #14610)

10.185 With this rule, EPA risks taking federal action that stretches the limits of Congress's commerce power by adopting the wrong Rapanos test – the Kennedy "nexus" test – and applying it nationwide. This nexus test has been applied by a few U.S. Circuit Courts of Appeal, but is not the law of the land. Indeed, the nexus test is so vague that it is no surprise that courts and agencies are finding it difficult to apply in actual hydrological settings. (p. 3)

Agency Response: The rule is not vague and is consistent with the statute and the Constitution. Technical Support Document, I.A., B., and C.

National Alliance of Forest Owners (Doc. #15247)

10.186 The Agencies improperly fail to give weight to the Rapanos plurality's holding and instead tailor the Proposed Rule to meet Justice Kennedy's concurring opinion and dissent. The proposed rule improperly assumes that Justice Kennedy's opinion in conjunction with the dissenting opinion provide the jurisdictional guideposts, when in fact, Justice Kennedy's concurrence places important limits on jurisdiction and should be considered in concert with the plurality opinion. The Agencies do not shy away from the fact that they have tailored the proposed rule to what Justice Kennedy and the four dissenting Justices would accept as a permissible exercise of Clean Water Act authority. For example, the Agencies attempt to justify their categorical assertion of jurisdiction over all tributaries by arguing that such an approach is "consistent with Rapanos because five Justices did not reject the current regulations that assert jurisdiction over nonnavigable tributaries of traditional navigable waters and interstate waters." The Agencies, however, must reel in their jurisdictional reach through regulations that align with the actual result in *Rapanos*, which rejected the Corps' jurisdictional overreach and placed important limits on the scope of federal CWA jurisdiction. The Agencies must also interpret *Rapanos* in a manner that is consistent with the Supreme Court's direction in *Marks v. United States* regarding the interpretation of fractured opinions.[175] In *Marks*, the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."[176]As such, the Agencies must look to both the plurality opinion and Justice Kennedy's concurring opinion to find a common holding because those are the only opinions that actually concurred in the judgment. The Agencies must not rely solely on Justice Kennedy's opinion, and they certainly cannot combine Justice Kennedy's opinion and the dissenting opinion to arrive at a "holding" under *Marks*. (p. 6-7)

Agency Response: **All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.**

Ranchers - Cattlemen Action Legal Fund USA (Doc. #15440)

10.187 The Proposed Rule undermines the Constitution's balance of powers by substituting the more restrictive jurisdictional constraints established by Congress with a standard employed by the judiciary branch to decide a narrow, fact-specific case, thereby rendering the Proposed Rule arbitrary and capricious. Congress limited EPA et al.'s jurisdictional scope under the Clean Water Act by declaring that scope to be "navigable waters." 79 Fed. Reg., at 22,191. As mentioned above, regulatory creep and fact-specific

[175] See 430 U.S. 188 (1977).
[176] *Id*. at 193.

case law has resulted in the agencies' assertion that its jurisdiction has increased somewhat beyond what are viewed traditional navigable waters.

Importantly, the agencies' unilaterally effected those expansions without any Congress-enacted amendments to the Clean Water Act, through regulations codified in 1986 and by the deference certain courts granted EPA et al. when deciding complaints under the Clean Water Act. At least that was the case until recently when two U.S. Supreme Court decisions effectively halted EPA et al.'s crusade to continually expand their control over waters never contemplated by Congress. (p. 5)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Multiple Agricultural Associations (Doc. #16357.1)

10.188 The Agencies repeatedly state throughout the preamble and in their marketing campaign that the proposal merely codifies longstanding agency practice. We have no doubt that the Agencies have asserted broad jurisdiction over waters outside the proper scope of the CWA in the past. Such agency practice, however, does not legitimize the proposed overbroad assertion of jurisdiction. The Agencies' expansive assertions of jurisdiction have been debated and litigated for decades. With a few notable exceptions, the Agencies have largely escaped judicial review of their unlawful assertions of jurisdiction because of their insistence (upheld by some courts) that jurisdictional determinations are not subject to judicial review. Only in cases where EPA brought (or threatened in the case of the *Sackett* litigation) an enforcement action could a landowner challenge the Agencies' assertion of jurisdiction in court.[177] After decades of evading judicial review, the Agencies now appear to believe that unchecked past agency practice validates the proposed rule. It does not. (p. 18)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute and caselaw. Technical Support Document, I.A., B., and C.

10.189 The vagueness of the proposed rule as described above also creates a Due Process problem because of the heavy civil fines and criminal penalties carried by the CWA. Civil and administrative penalties can equal $37,500 per day, per violation 33 U.S.C. **§** 1319(d),(g) (last adjusted to reflect inflation at 78 Fed. Reg. 66,843). A "knowing" violation carries potential criminal penalties of up to $100,000 and six years in jail time. *Id.* at **§** 1319(c)(2). Even a "negligent" violation can result in fines of $50,000 per day and two years in jail. *Id* at **§** 1319(c)(1). The permit application process also presents further peril: a false statement, representation or certification can bring fines up to $20,000 per day and four years in jail. *Id.* at **§**1319(c)(4). (p.21)

Agency Response: The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C.

10.190 Instead of providing clarity and certainty so that law abiding farmers can understand and comply with the law, the proposed rule categorically defines "waters of the U.S."

[177] *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

amorphously, turning on so many vague terms that no one can know what conduct is criminal and what conduct is lawful. Yet an incorrect guess can result in criminal liability and even incarceration. Consequently, the rule violates the basic Due Process requirement that criminal statutes provide a fair warning that the common world will understand. *United States v. Bass*, 404 U.S. 336, 348 (1971). As proposed, there is little in the rule that the "common world" will understand—indeed most of the preamble and even the regulatory text is scientific jargon. No farmer, or any other landowner, can reasonably be expected to understand and carry out scientific determinations (such as the identification of an OHWM, or the distinction between an ephemeral stream and an erosional feature, or the aggregate impact of all "similarly situated" features in "the region") that agency officials themselves find daunting. (p. 22)

Agency Response: The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C.

10.191 In addition, decades of Supreme Court precedent have established that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Universal CIT*, 344 U.S. 218, 222 (1952) (The courts will "not derive criminal outlawry from some ambiguous implication."); *United States v. Cardiff*, 344 U.S. 174, 176 (1952)("The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited"). Likewise, the Agencies must avoid any regulatory interpretation that would impose a loss of liberty over terms so vaguely defined. (p. 22)

Agency Response: The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C.

10.192 The Supreme Court has in recent decisions warned against deferring to agencies' interpretations of their own vague regulations in situations, like this one, where deference would "encourage[e] agencies to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." *Decker v. Nw. Env'tl Defense Ctr*., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part). Put another way, the Supreme Court will not "permit [an] agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011). Yet that is just what EPA proposes to do here: to issue a hopelessly vague regulation, the concrete meaning of which it will provide later on, in case-by-case "interpretations" and presumably further "guidance" without the notice-and-comment procedures mandated by the APA. (p.22-23)

Agency Response: The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C.

10.193 Indeed, even in cases where there is "no reason to suspect that the [agency's] interpretation does not reflect [its] fair and considered judgment" (*Chase Bank*, 131 S. Ct. at 881), justices of the Supreme Court have expressed serious doubts about the practice of deferring to agencies' interpretations of their own ambiguous regulations under any circumstances. See *Decker*, 133 S. Ct. at 1339 ("there is some interest in reconsidering" Auer deference) (Roberts, C.J., joined by Alito, J., concurring). The reason for those doubts is evident: When "the power to prescribe is augmented by the power to interpret," it encourages agencies "to speak vaguely and broadly, so as to retain a 'flexibility' that

will enable 'clarification' with retroactive effect," turning the motivating rationale for Administrative Procedure Act (APA) notice-and-comment rulemaking on its head. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part). EPA's adoption of that suspect strategy could not be any more obvious than it is in this case. (p. 23)

Agency Response: The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C.

10.194 The undersigned groups would like to respond to misleading statements made by EPA in its marketing campaign suggesting that our organizations requested this proposed.[178] For many years, agricultural organizations and numerous other stakeholders have asked the Agencies to stop relying on non-binding guidance as a basis for asserting and expanding federal jurisdiction. We publicly made these comments several times, including in letters and comments to EPA.[179] In those materials, agricultural groups and others stressed that: A proposal to revise the Agencies' regulations defining "waters of the U.S." must clearly identify the limits to CWA jurisdiction articulated by the Supreme Court in *SWANCC* and *Rapanos*. In those cases, the Supreme Court rejected the notion that CWA jurisdiction extends to nonnavigable, isolated, intrastate waters or to any area with a hydrologic connection to navigable waters. The Court disagreed with the Agencies' "land is waters" approach. A proposed rule should not allow for the watershed aggregation approach contained in the Agencies' 2011 draft Guidance. Consistent with *SWANCC*, the proposed rule should explicitly state that isolated (or "non-physically proximate") waters are not subject to CWA jurisdiction. A proposed rule must not simply adopt confusing legal standards such as "significant nexus," but rather establish clear and reasonable jurisdictional lines to assist the regulated public and regulators in implementing the CWA on the ground. (p. 26)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II. By identifying waters that are jurisdictional, waters that are not jurisdiction and a limited set of waters for which case-specific significant nexus analysis is performed the rule provides and provides for increased clarity and certainty. Preamble, II and IV.

Pershing County Water Conservation District (Doc. #16519)

10.195 The primary case on this issue is that of *Rapanos v. United States*.[180] This case involved wetlands near ditches that eventually drain to "traditional navigable waters." The United States brought suit against certain private individuals for backfilling some of the wetland areas without a permit. The District Court, and Sixth Circuit Court of Appeals found that

[178] See U.S. EPA, "Persons and Organizations Requesting Clarification of 'Waters of the U.S.' by Rulemaking," available at http://www2.epa.gov/sites/production/files/2014-03/documents/ wus_request_rulemaking.pdf; attached herein as Appendix T.
[179] *See* letter from the Waters Advocacy Coalition to EPA on Feb. 12, 2013, attached as Appendix U.
[180] *Rapanos v. United States*, 547 U.S. 715 (2006).

the EPA had jurisdiction over the water, however, the United States Supreme Court reversed and found no jurisdiction existed. The plurality opinion found that only waters or wetlands with "relatively permanent, standing or continuously flowing bodies of water" such as "oceans, rivers, lakes," with connection to navigable waters could be under the jurisdiction of the EPA.[181] And the term "Waters of the United States" does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[182] Additionally, it was stated that water is not under the jurisdiction of the United States "based on a mere hydrologic connection."[183] Instead, there must be a "continuous surface connection."'[184] The "significant nexus" standard used in the proposed rule clearly over-steps the constraints placed on the EPA's jurisdiction by the Supreme Court. (p. 3-4)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C

Glenn-Colusa Irrigation District (Doc. #16635)

10.196 GCID appreciates the Agencies' attempt to bring greater certainty to decisions on whether particular waters will be jurisdictional in light of the U.S. Supreme Court's decisions in *Rapanos v. United States (Rapanos)*, 547 U.S. 715 (2006), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes (Bayview)*, 474 U.S. 121 (1985). However, the Proposed Rule proposes new definitions for key terms, such as "tributary" and "adjacent" that impermissibly expand the jurisdictional scope of the CWA. Further, the Proposed Rule's failure to resolve issues involving the interpretation of WOTUS will frustrate the regulated community's attempt to comply with the new regulation and definitions included therein until the courts weigh in to provide sufficient guidance.

10.197 In *Rapanos*, the Court held in favor of tightening the definition of WOTUS; however, in so doing, the plurality failed to provide guidance on the proper interpretation to be applied when the Agencies consider whether a waterbody is a WOTUS. Four of the justices comprising the plurality interpreted the WOTUS definition to cover "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right . . . ."[185] In his concurring opinion, Justice Kennedy, however, concluded, "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[186] Justice Kennedy opined that wetlands fall within the definition of WOTUS when "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.' " Because the plurality in *Rapanos* could not agree on a single test to determine whether a particular waterbody is a WOTUS, neither the plurality opinion nor Justice Kennedy's concurring opinion is considered

[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Rapanos*, 547 U.S. at 742.
[186] *Rapanos*, 547 U.S. at 779.

authoritative, and the appellate courts have had to determine the appropriate standard on a case-by-case basis. (p. 2-3)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C

10.198 Moreover, Justice Kennedy's inclusion of the phrase "either alone or in combination with similarly situated land in the region" should not be read to allow the Agencies to assert jurisdiction by rule over waters merely because they are geographically located on lands similar to land where traditional navigable waters are also located. Again, this approach eliminates the case-by-case analysis required under the Court's relatively permanent and significant nexus tests. Rather, to assert jurisdiction over a particular water based only on it being similarly situated, the Agencies must be required to affirmatively demonstrate on a case-by-case basis that the regional geography supports a finding that the particular waterbody has or will have a significant effect on the chemical, physical, or biological integrity of the navigable water. (p. 5)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

Goehring Vineyards, Inc. (Doc. #19464)

10.199 Specific examples of improper expansion of jurisdiction include:

• Applies a broadened view of Justice Kennedy's significant nexus standard not only to wetlands but also to all waters including tributaries and isolated waters;

- Finds that a hydrological connection is not necessary to establish a significant nexus;
- Allows the Agencies to "aggregate" the contributions of all similar waters (small streams, adjacent wetlands, ditches or certain otherwise isolated waters) within an entire watershed, thus making it far easier to establish a significant nexus between these small intrastate waters and traditional navigable waters;
- Regulates all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet any of five listed characteristics;
- Gives new and expanded regulatory status to "interstate waters," equating them with traditional navigable waters, thus making it easier to find jurisdiction for adjacent wetlands and waters judged by the significant nexus test; and
- Makes all waters not in any of the other categories (also known as the "other waters") subject to the significant nexus standard.

This sweeping expansion of federal jurisdiction exceeds federal authority, contradicts with explicit U.S. Supreme Court directives, and abrogates existing state authority. (p. 5)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.200 The Proposed Rule's examination of separate chemical, biological, and hydrological connection, especially in the preamble's discussion of "other waters," ignores the Supreme Court's earlier direction in SWANCC, as well as Justice Kennedy's test for a significant nexus in Rapanos. (p. 6)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

Iowa Poultry Association (Doc. #19589)

10.201 Not only does the proposed rule expand the federal government's jurisdiction beyond the Congressional authority granted in the CWA, the proposed rule also eviscerates jurisdictional limitations of the CWA as provided by the United States Supreme Court. In two different decisions, the Supreme Court placed limitations on the federal agencies authority and told the federal agencies that their interpretation of the CWA was beyond the scope of the CWA. In *Rapanos*, the Supreme Court found that "waters of the United States" did not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[187] However, the proposed rule would make all tributaries jurisdictional by defining tributaries to encompass any water that has a bed, bank and ordinarily high water mark that may contribute flow directly or through another water to a traditional navigable water, an interstate water or wetland, or territorial sea. Additionally, all tributaries under the proposed rule would be jurisdictional without regard to a site specific analysis of whether the tributary had a significant nexus to a navigable water as required by the concurring opinion in *Rapanos*.

The definition of tributary in the proposed rule, by the plain meaning of its terms, could encompass ponds, ditches, isolated wetlands, etc. Under the proposed rule even a ditch that only has intermittent flow once a year could be jurisdictional if it could drain into another jurisdictional water. These are all waters which have not traditionally fallen within the jurisdiction of CWA or the authority of EPA and the Corps and are outside the limitations expressed by the Supreme Court in not only *Rapanos* but also in *SWANCC*. The federal agencies have stated that it is not their intention to regulate every ditch, yet, the plain language of the rule would allow them to do just that. If the federal agencies were truly following the limitations set by the Supreme Court, the rule would only make those tributaries with relatively permanent, standing or continuous flow to be jurisdictional pursuant *Rapanos*. (p. 2-3)

Agency Response: The rule is consistent with the statute and Supreme Court decisions. Technical Support Document, I.A., B., and C.

[187] *Rapanos v. U.S.*, 126 S. Ct. 2208 at 2225 (2006)

New Mexico Cattle Growers Association (Doc. #19595)

10.202 The CWA was enacted pursuant to Congressional authority to regulate interstate commerce under Article I, section 8, clause 3 of the United States Constitution—i.e. the "Commerce Clause," which states that Congress may "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." See *Riverside Bayview Homes,* 474 U.S. at 133 ("In adopting th[e] definition of navigable waters, Congress evidently intended to repudiate the limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause."). Accordingly, the scope of jurisdictional authority under the CWA is limited to the scope of federal authority under the Commerce Clause. (p. 7)

Agency Response: The rule is consistent with the Constitution. Technical Support Document, I.C.

Association of American Railroads (Doc. #15018.1)

10.203 The Proposed Rule relies on the Water Transfer Rule, which has questionable validity. The proposed rule relies on the regulatory status of water transfers that existed before the release of the pre-proposal draft on March 25, 2014. On March 28, the United States District Court for the Southern District of New York issued an order purporting to vacate EPA's water transfer rule, 73 Fed. Reg. 33,697 (June 13, 2008). *Catskill Mountains Chapter of Trout Unlimited Inc., et al. v. EPA* consolidated case Nos. 08-cv-0560 and 08-cv-9430 (S.D.N.Y., March 28, 2014). The reliance on the vacated water transfer rule is a procedural flaw that makes the proposed rules invalid. (p. 14)

Agency Response: The rule is not based on the Water Transfer Rule. The foundation of the rule is the significant nexus standard established by the Supreme Court in *SWANCC* and refined in Justice Kennedy's opinion in *Rapanos*. The agencies have also utilized the plurality standard, primarily in support of the exclusions from the definition of "waters of the United States." Technical Support Document, I.C.

10.204 The Proposed Rule cannot apply retroactively. Absent express Congressional language permitting the Agencies to apply the definition of Waters of the United States retroactively, the Agencies are constitutionally prohibited from retroactively applying the proposed rule's definition.[188] The Agencies must make clear that the applicability of the proposed rule is limited to post-rule activities and any prior activities or features would not be subject to the proposed rule. (p. 15)

Agency Response: This rule is effective on 60 days after publication in Federal Register. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble makes clear that the agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations made after the effective date will be made consistent with this rule.

[188] *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994). See also 33 C.F.R. § 322.4 (Activities not requiring permits).

10.205 The Proposed Rule Incorrectly Applies Only Justice Kennedy's *Rapanos* Opinion and Ignores the Plurality Decision. The proposed rule (and preamble) misinterprets *Rapanos* in several key respects and sets forth a "Waters of the United States" definition that does not comport with a true reading of the case law. As EPA notes in its preamble, most Circuit Courts of Appeals considering *Rapanos* have held that CWA jurisdiction is governed by both Justice Kennedy's standard and the plurality's standard. *Id*. at 22,252. However, the plurality decision is only referenced, not applied. EPA has clearly based the proposed rule entirely on Justice Kennedy's opinion. To comply with Supreme Court and common law precedent, the proposed rule should only find jurisdiction where both the plurality's and Justice Kennedy's standards are satisfied. (p.15)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

10.206 Section 311 Does not Include Waters of the United States The Agencies have proposed to revise the definition of Waters of the United States for the purpose of Section 311 of the CWA. See 40 C.F.R. Part 117. Section 311 addresses "discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." 33 U.S.C. § 1321(b)(3). In using the term "navigable waters" and "adjoining shorelines," Congress has expressed the clear intent that Section 311 not be applied to the scope of "Waters of the United States" which are subject to regulatory provisions. Legislative history regarding Section 311 supports the interpretation that Section 311 applies to releases from vessels and facilities to traditional navigable waters. (p. 15-16)

Agency Response: While section 311 uses the phrase "navigable waters of the United States," EPA has interpreted it to have the same breadth as the phrase "navigable waters" used elsewhere in section 311, and in other sections of the CWA. *See United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). In 2002, EPA revised its regulatory definition of "waters of the United States" in 40 CFR part 112 to ensure that the actual language of the rule was consistent with the regulatory language of other CWA programs. *Oil Pollution & Response; Non – Transportation-Related Onshore & Offshore Facilities*, 67 FR 47042, July 17, 2002. A district court vacated the rule for failure to comply with the Administrative Procedure Act, and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F.Supp. 2d 165 (D. D.C. 2008). However, EPA interprets "navigable waters of the United States" in CWA section 311(b), in the pre-2002 regulations, and in the 2002 rule to have the same meaning as "navigable waters" in CWA section 502(7).

American Road and Transportation Builders Association (Doc. #15424)

10.207 The Proposed Rule runs counter to Supreme Court precedent. ARTBA has been also actively involved in CWA litigation concerning federal jurisdiction over the nation's waters and wetlands for the better part of the past two decades. Most recently, the

Supreme Court's decision in *Rapanos v. United States*[189] benefited the transportation project delivery process by setting limits on Corps' jurisdiction.

At issue in *Rapanos* were two separate wetlands cases which were consolidated for the Court's review. The Court was asked to decide whether the Clean Water Act allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether or not a tenuous connection between a wetland and "navigable water" is enough to allow regulation by the Corps, or if there is a minimal standard that should be applied. Once again, ARTBA explained the CWA's legislative scheme of state and federal shared responsibility to the Court:

> "By federalizing any wet area, no matter how remote from navigable waters, [this Court would adopt] an unprecedentedly broad jurisdiction of the geographic scope of CWA jurisdiction. As this Court held in *SWANCC*, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources…In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA."[190]

The Court's split decision in *Rapanos* preserved the CWA's essential jurisdictional balance by preventing sweeping federal authority over isolated wetlands and man-made ditches or remote wetlands with finite connections to navigable waters. However, because the Court's decision was not issued by a majority of the justices, these issues are currently being examined by lower courts on a case-by-case basis. While ARTBA applauds the fact the decision prevented an expansion of already inefficient federal wetlands regulation, we also recognize the need for clarity in *Rapanos'* wake in order to preserve the necessary balance between federal and state jurisdictions that is essential to the continuation of the CWA's success.

In decisions such as *Rapanos* where four justices agree in both the plurality opinion (authored by Justice Scalia) and the dissenting opinion (authored by Justice Stevens) and one Justice (Justice Kennedy) writes a concurrence, the effects of the opinion should be taken from the areas where the plurality and the concurrence agree. The Supreme Court has spoken to this point specifically, stating:

> [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by the members who concurred in the judgments on the narrowest grounds.'"[191]

In *Rapanos*, the five justices who agreed in the final judgment of the case were Justices Scalia, Thomas, Alito, Roberts and Kennedy. Thus, in responding to the *Rapanos* decision, the focus should be on those areas where agreement can be found among these five justices.

[189] 547 U.S. 715 (2006).
[190] *Rapanos v. United States*, 547 U.S. 715 (2006), Amicus Curiae Brief of the American Road and Transportation Builders Association, p. 25.
[191] *Marks v. United States*, 430 U.S. 188, 193 (1977).

The Scalia plurality and the Kennedy concurrence agree on several points which should guide any regulatory or legislative response to the *Rapanos* decision. Most importantly, both Scalia and Kennedy disagreed with the existing Corps theory of jurisdiction that a wetland with tenuous and questionable connections to navigable water can be subject to federal jurisdiction if one molecule of water flows between both points. This has been termed by some as the "migratory molecule" theory of jurisdiction. Justice Kennedy specifically rejects the idea of the "migratory molecule" by noting that a "central requirement" of the Clean Water Act is "the requirement that the word 'navigable' in 'navigable waters' be given some importance."[192]

Justice Kennedy also explains the CWA's establishment of certain basic recognizable limits to the Corps' excluding man-made ditches and drains by refuting portions of Justice Stevens' dissent:

> "[t]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote and insubstantial, that eventually flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[193]

Further, Justice Kennedy notes such an over-expansive view of the Corps' authority is incompatible with the CWA:

> "Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact-water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters that the isolated ponds held to fall beyond the Act's scope in *SWANCC*."[194]

This leads to a central point of *Rapanos* echoed by members of the plurality, dissent and Justice Kennedy—there needs to be some sort of regulatory response from the Corps reflecting these limits on its jurisdiction. In his concurrence, Justice Kennedy states:

> "Absent more specific regulations, however, the Corps must establish a specific nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to navigable tributaries. Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute."[195]

Chief Justice Roberts was more direct with his wording, noting a regulatory response from the Corps has been long overdue, and should have been promulgated after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United*

[192] *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J. concurring).
[193] *Id*.
[194] *Id*., referring to the holding in *SWANCC*.
[195] *Id*.

States Army Corps of Engineers[196] (*SWANCC*) decision first recognized the jurisdiction of the Corps needed to be limited:

> "Rather than refining its view of its authority in light of [the Court's] decision in *SWANCC*, and providing guidance meriting deference under [the Court's] generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[197]

Finally, Justice Breyer's dissent warns a refusal from the Corps to issue a regulatory response to *Rapanos* will only result in more litigation:

> "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[198]

Thus, the lesson of the *Rapanos* decision is the need for a response recognizing the limits of Corps jurisdiction and clarifying existing wetlands regulations. It is essential for any administrative clarification of federal wetlands jurisdiction to preserve the federal-state partnership embodied in the CWA. As both *Rapanos* and *SWANCC* stressed, a scheme of shared jurisdiction is necessary to carry out the original intent of the CWA. States need to be allowed to maintain full control over intrastate water bodies in order to allow them the flexibility to balance their own environmental needs with unique infrastructure challenges. (p. 2-5)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with statute and caselaw. Technical Support Document, I.A, I.B. and I.C. Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

North Carolina Aggregates Association (Doc. #6938.1)

10.208 The proposed rule disregards congressional intent and is not consistent with three rulings by the Supreme Court regarding the limits of federal jurisdiction. (p. 1)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

[196] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).
[197] *Id*. (Roberts, C.J., concurring).
[198] *Id*. (Breyer, J., dissenting).

Associated Equipment Distributors (Doc. #13665)

10.209 This NPRM seeks to clarify the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA)…The proposed rule drastically expands this definition and results in the new definition of "waters of the U.S." including adjacent non-wetlands, riparian areas, flood plains and other waters. Such changes contravene both the intent and scope of the CWA as well as Supreme Court precedent.[199]

In drafting this rule, the EPA failed to follow existing law on numerous counts. Consequently, AED requests that the agency withdraw this rulemaking. Should the agency desire to amend the definition of "waters of the U.S." in the future, AED requests that it fully comply with CWA authorization, Supreme Court precedent, and RFA mandates. (p. 1-2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

American Electric Power (Doc. #15079)

10.210 When the *Rapanos v. United States Army Corps of Engineers, et al*., 547 U.S. 715 (2006) decision was issued in 2006, Justice Roberts warned that the conflicting opinions provided by the nine justices created far more confusion in determining what waters fall within the definition of "waters of the United States." *Id*. at 758 (Roberts, J., concurring). However, instead of gleaning the limits of the decision and bringing much needed clarity to this area, the agencies, although perhaps well intended, have failed to provide meaningful instruction within the parameters provided by *Rapanos*, and the prior *SWANCC* and *Riverside Bayview* decisions. [200] By issuing the proposed rule, the (See *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)(SWANCC); *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985) (Riverside Bayview) agencies are inappropriately attempting to regulate outside the statutory limits of the Supreme Court precedent and the Clean Water Act. Justice Scalia writes for four justices and Justice Kennedy penned his own opinion to form the basis for the reversal of the consolidated Rapanos and Carabell cases (both cases dealt with isolated wetlands). In a situation in which there is no clear majority, Constitutional and common law principles require interpreting the opinion on the narrowest grounds. *Marks v. United States*, 430 U.S. 188 (1977) (This case was referenced in Chief Justice Roberts concurring opinion, *Rapanos*, 547 U.S. at 758). Apparently, ignoring this principle, the agencies appear to have selected one opinion in which to base their proposed rule - Justice Kennedy's opinion - and they provide no clear, adequate or legal support for doing so.(p.6-7)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA.

[199] See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that nonnavigable, isolated, intrastate waters that do not actually abut a navigable waterway do not constitute "water of the United States" for the purposes of CWA jurisdiction.).

[200] See *Solid Waste Agency of Northern Cook Cty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)(*SWANCC*); *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985) (*Riverside Bayview*).

The rule is consistent with statute and caselaw. Technical Support Document, I.A, I.B. and I.C.

10.211 Indeed, the opinion can be reduced to a single holding on the narrowest grounds. First, Justices Scalia and Kennedy agreed that when evaluating wetlands, the Corps had gone too far in applying the "any connection" theory to jurisdiction. *Id*. at 742 (plurality) and at 780-781, (Kennedy, J., concurring). Further, the plurality and Kennedy opinions agreed that Congress intended to regulate waters in the traditional sense and, therefore; the term "navigable" must be given significance and meaning. *Id*., at 730-731 (plurality), 779 (Kennedy, J., concurring). The opinions also agreed that "at least some waters that are not navigable in the traditional sense" can be regulated. *Id*. at 731-732 (plurality), 770 (Kennedy, J., concurring). Both Justices also expressed concern over expanding jurisdiction over features that were distant and remote from "navigable" waters and carried minimal flow and warned that mere adjacency is insufficient for establishing jurisdiction. *Id*. at 732 (plurality), 778 (Kennedy, J., concurring). Specifically, with respect to wetlands, both opinions required a meaningful relationship between non-abutting wetlands and traditional navigable waters such that there exist more than a mere hydrological connection between a wetland and a TNW. *Id*. at 739 (plurality), 781 Kennedy, J., concurring). However, the test for evaluating this connection is where the plurality and Kennedy opinions part ways with the plurality requiring a relatively permanent, standing, or a continuously flowing surface connection to a covered water and Kennedy requiring that there be a "significant nexus," i.e., such wetlands significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. *Id*. at 733 (plurality) and 780. (Kennedy, J., concurring). The *Marks* principle requires that both tests be met. *Marks*, 430 U.S. at 193. In developing the rule the agencies should have followed Marks and identified a single holding as the basis of their rule. For reasons not adequately explained, the agencies have instead proposed a rule using Justice Kennedy's opinion as a starting point. See 79 Fed. Reg22,192. The agencies seem to justify ignoring the limits of the plurality opinion by pointing to a footnote to the term "relatively permanent." *Id*. In that reference, the plurality states that in using the term "relatively permanent" they do not intend to exclude seasonal rivers or features that "might dry up in extraordinary circumstances". *Rapanos*, 547 U.S. at 2221; 79 Fed. Reg. 22,292. The agencies grasp at these statements as evidence of the plurality's departure from the continuously flowing requirement. This footnote of the plurality opinion by any reading does not justify the agencies' departure from the plurality opinion and segue to reliance on Kennedy's significant nexus test. By taking this action, the agencies failed to adhere to the *Marks* decision and consequentially proposed rulemaking beyond the authority of the applicable precedent and the bounds of the Clean Water Act as set forth in *Rapanos*. However, even though the agencies claim to base their proposed rule on the "significant nexus test" as further defined by Kennedy, they clearly expand their rulemaking beyond Justice Kennedy's discussion of jurisdiction over wetlands and take the proposed rule's coverage to nonwetland waters. The agencies justify expanding the Kennedy opinion to these non-wetland waters by stating that "[b]ecause Justice Kennedy identified `significant nexus' as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the "significant nexus" standard for CWA jurisdiction that Justice Kennedy applied to adjacent wetlands to other categories of water bodies (such as to tributaries of traditional

navigable water or interstate water, and to "other waters") to determine whether they are subject to CWA jurisdiction either by rule or on a case-specific basis." 79 Fed. Reg. 22192. (p.6-7)

Agency Response: **The Courts of Appeals that have considered this issue have not adopted the position that jurisdiction exists only where both the plurality's and Justice Kennedy's standards are satisfied. Technical Support Document, 1C. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.**

10.212 The agencies also justify the expansion of their proposed rule to apply to "other waters" by relying on the opinion of the four dissenting Justices who concluded that "`waters of the United States' "encompasses, inter alia, all tributaries and wetlands that satisfy either standard, the plurality's standard or that of Justice Kennedy." 79 Fed. Reg. 22192 (quoting Rapanos, 547 U.S. at 810 & n. 14 (Stevens, J. dissenting)). This reference also seems to explain the agencies' adoption of the either/or opinion approach suggested by the dissent; clearly in violation of *Marks*. Under no terms should the dissent opinion be the basis for such a sweeping rulemaking. The rule is legion with examples of the agencies' proposing to exceed the authority provided by the plurality and Justice Kennedy. In *Rapanos*, Justice Kennedy directed the Corps to "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." *Rapanos*, 547 U.S. at 782. Justice Kennedy also suggested that the Corps "may choose to identify categories of tributaries that, due to their volume of flow, their proximity to navigable water, or other relevant considerations are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." Rapanos, 547 U.S. at 781. Notwithstanding Justice Kennedy's directions, the agencies have exceeded Justice Kennedy's guida.nce and direction beyond wetlands and proposed to extend jurisdictional status to all tributaries and adjacent waters, as the agencies propose broadly defining, as well as extend the "significant nexus" case-by-case test to "other waters." (79 Fed. Reg. 22201-22206 and 22211 - 22214). Additionally, in contradiction of the *Rapanos* holding, the agencies are proposing to aggregate features or determine "similarly situated" waters in a significant nexus analysis claiming that this is the guidance suggested by Justice Kennedy. Justice Kennedy, however, was discussing wetlands only, with no reference to the other features over which the agencies are proposing to assert jurisdiction by rule. See 79 Fed. Reg. 22211 (in which the agencies discuss defining "other waters" as those waters, including wetlands). The proposed end result gives the significant nexus analysis more importance and broader application tha.n intended by the plurality or Justice Kennedy. (In fact, one can interpret the plurality opinion as a rejection of the "significant nexus" test altogether as applied to the facts in the *Rapanos* case. Rapanos, 547 U.S. at 741-742.) In one last example of overreaching, the agencies claim to have carefully considered available scientific literature as documented in the agencies' draft connectivity report: "[t]his proposal is also supported by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity

of these downstream waters." 79 Fed. Reg. 22190. How the agencies were justified in proposing a rule based on a draft report is not explained. A review on the adequacy of this report was issued by the SAB panel only recently (October 17), however a final version of the draft connectivity report has not been issued by the agencies considering such comments of the SAB panel or the public. We believe that the agencies should not have proposed a rule until the draft connectivity report was final. Proposing a rule in this manner goes beyond the agencies' authority, and is in violation of the Administrative Procedures Act and manifests serious due process concerns. While there are numerous other examples reflected in the proposed rule of the agencies' limitless approach to Rapanos and noted in other comments endorsed by AEP, these examples demonstrate the un substantiated and expansive interpretation by the agencies of the CWA. Such a broad reading and extrapolation bears no resemblance to Justice Kennedy's or the plurality's intent or prior Supreme Court precedent on the CWA. See 79 Fed. Reg. 22201-22206 and *Rapanos*, 547 U.S. at 782. (p.7-9)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

The agencies have promulgated a rule consistent with the notice and comment requirements of the Administrative Procedure Act. The rule reflects careful examination of the science, including the SAB report. The SAB report and separate review of the rule were supportive and the agencies extended the comment period on the rule after issuance of the SAB reports to allow the public further opportunity to comment on the Science Report in light of the reports.

Western States Water Council (Doc. #9842)

10.213 The report should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA's and the Corps' pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* "status quo," using the report's findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. (p. 30)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain

other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

San Juan Water Commission (Doc. #13057)

10.214 By using the term "navigable waters" in the Clean Water Act, Congress clearly intended to limit federal authority to its traditional Commerce Clause jurisdiction, which, although broad, is not limitless. Initially, the Corps regulated only traditional navigable waters. Later, the Corps adopted regulations expanding its jurisdiction over navigable waters to cover wetlands adjacent to navigable waters. Not until the Corps' adoption of the "Migratory Bird Rule" in 1986 did the federal government assert jurisdiction over isolated, private waters such as waters that collect in abandoned gravel pits that are not located near streams or rivers. The Supreme Court correctly struck down the Migratory Bird Rule in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S 159 (2001), and the Agencies are bound by this and other Supreme Court decisions limiting federal Clean Water Act jurisdiction to navigable waters, their tributaries and wetlands with a significant nexus to such waters. For example, in *Rapanos v. United States*, the Supreme Court held there is no Clean Water Act jurisdiction over wetlands with no adjacency or "significant nexus" to a traditional navigable waterway. 547 U.S 715 (2006). (p. 2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Florida Power & Light Company (Doc. #13615)

10.215 It is improper for the proposed rule to rely solely on Justice Kennedy's opinion, but the proposed rule fails to apply even its hallmark test correctly. The proposed rule's construction is problematic because it misconstrues and misapplies the significant nexus standard, resulting in much broader assertions of jurisdiction than Justice Kennedy's *Rapanos* opinion allows.

Under Juslice Kennedy's standard, the wetlands in question must "significantly affect the chemical, physical, and biological integri ty of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780. The proposed rule provides, "For an effect to be significant, it must be more than speculative or insubstantial." 79 Fed. Reg. at 22,265. (p. 2-3)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

Utility Water Action Group (Doc. #15016)

10.216 Challenges to the Agencies' attempts to stretch CWA jurisdiction already have reached the Supreme Court three times. In 1985, EPA presented a jurisdictional theory in a memorandum concluding that waters could be deemed WOTUS based on their use by migratory birds.[201] According to a Federal Register notice a year later, the memorandum "clarified" that WOTUS include waters that "are or would be used as habitat by [i] birds

[201] Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Assistant Adm'r, EPA, "Clean Water Act Jurisdiction Over Isolated Waters" (Sept. 12, 1985).

protected by Migratory Bird Treaties; or . . . [ii] other migratory birds which cross state lines . . . ." 51 Fed. Reg. 41,206, 41,217 col. 1 (Nov. 13, 1986). A 1995 study by the Corps demonstrated just how far this theory extended. Under the theory, greater than eight million isolated wetlands smaller than half an acre in size across 41 states would be jurisdictional because they could be used by migratory birds.[202] After the Fourth Circuit in 1989 overturned the so-called "Migratory Bird Rule" because EPA had not issued it through notice-and-comment rulemaking,[203] the Agencies brushed aside the decision as "incorrect," promising to conduct a rulemaking and "expect[ing] [field] offices . . . to continue to regulate isolated waters" in the meantime.[204] In 1990 guidance, the Agencies stated that they would conduct a rulemaking to address jurisdiction over isolated waters "as soon as possible." *Id*. ¶ 2. They did not follow that promise, however.

The Migratory Bird Rule remained one of the Agencies' dominant jurisdictional theories supporting broad CWA jurisdiction for the next decade, until the Supreme Court's decision in *SWANCC*. In *SWANCC*, the Supreme Court evaluated the Corps' determination of jurisdiction over small isolated ponds, which were created when rain filled abandoned sand and gravel pits, based on use of the ponds by migratory birds. Rejecting jurisdiction over these ponds – and the Migratory Bird Rule more generally – the Court explained that the CWA's use of the term "navigable waters" demonstrates Congress' understanding that its "authority for enacting the CWA [was] its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. The Court acknowledged that jurisdiction extends beyond TNWs, but found that the Corps' attempt to assert jurisdiction over isolated waters because they were used as habitat by migratory birds was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id*. at 173. The Court further explained that it was the "significant nexus between the wetlands and the 'navigable waters'" to which they abutted that informed its prior holding on the reach of the CWA in United States v. *Riverside Bayview Homes*, 474 U.S. 121 (1985), and that *Riverside Bayview* did not establish that the Corps' jurisdiction "extends to ponds that are not adjacent to open water." *SWANCC*, 531 U.S. at 167-68.

Following *SWANCC*, the Corps and EPA were not dissuaded from asserting broad jurisdiction under the CWA. The Agencies did not amend their CWA jurisdictional regulations, but instead asserted in litigation and in guidance documents that if a water has "any connection" to navigable waters, it could be regulated as a WOTUS. The Agencies interpreted *SWANCC* in a manner that cabined its holding to "isolated waters."[205] In an example of remarkably selective reading, the Agencies asserted that if a water was not "isolated" – if it connected in any way to navigable waters – the water

[202]Corps, 1995 Wetlands Delineation Field Evaluation Forms (June 1995).
[203] *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (4th Cir. Sept. 19, 1989) (per curiam) (unpublished disposition).
[204] Memorandum from John Elmore, Chief, Dep't of the Army, Directorate of Civil Works, and David G. Davis, Dir., EPA, Office of Wetlands Protection, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" ¶ 5 (Jan. 24, 1990).
[205] Memorandum from Gary S. Guzy, Gen. Counsel, EPA, and Robert M. Andersen, Chief Counsel, Corps, to EPA Assistant Adm'r for Water, et al., "Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters" (Jan. 19, 2011) (providing the Agencies' interpretation of *SWANCC*).

could be regulated as a WOTUS consistent with *SWANCC*. This "any connection" theory in effect expanded upon the assertion of CWA jurisdiction that the Agencies had relied upon prior to *SWANCC*. Ditches, previously excluded from jurisdiction,[206] became the "connection" of choice. Farm ditches, roadside ditches, flood control ditches – all common and abundant across the U.S. landscape – became "tributaries," itself a term undefined in the regulations. These ditches provided the "connection" to areas previously considered "isolated," and therefore provided the Agencies with the "hook" to regulate what were in reality still isolated waters. Like the migratory bird test that preceded it, the "any connection" theory reached virtually all wet areas – no matter how small or remote – because, as a matter of basic science, all water is connected to all other water through the hydrological cycle.

In California's Central Valley, for example, the Corps determined prior to *SWANCC* that two cattle waste ponds were WOTUS because they were used by migratory birds, while acknowledging that a nearby farm ditch was non-jurisdictional.[207] After *SWANCC*, the property owner asked the Corps to disclaim jurisdiction over the ponds, only to be told that the ditch was now a tributary subject to jurisdiction and, thus, that the waste ponds remained jurisdictional – this time because they were "adjacent" to a tributary (the previously non-jurisdictional ditch).[208] Thus, the Corps expanded its assertion of CWA jurisdiction after *SWANCC* to reach not only the cattle waste ponds but also the farm ditch. This change in jurisdictional status was made without any alteration in the regulatory definition of WOTUS, demonstrating the extent to which the jurisdictional status of features has been established by the exercise of discretion (or "judgment") by the Agencies rather than by the plain language of the CWA or its implementing regulations.

This broadened jurisdictional theory continued even in light of government reports showing that the Agencies' new theories were being used to regulate "isolated" waters. A 2004 study by the U.S. General Accounting Office documented numerous instances, post-*SWANCC*, in which Corps districts used underground drain tiles, storm drain systems, pipes, and even sheet flow (i.e., rainfall runoff moving across the landscape) to establish a hydrological connection and thereby assert (or recapture) jurisdiction over otherwise isolated features.[209] (p. 33-36)

Agency Response: **The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.**

[206] See 40 Fed. Reg. 31,320, 31,321 col. 1, 31,324-25 (July 25, 1975); 42 Fed. Reg. at 37,127 col. 3, 37,144 cols. 2-3.
[207] Letter from Justin Cutler, Project Manager, Delta Office, Corps Sacramento Dist., to James Gibson, Gibson & Skordal at 1 (Aug. 24, 2000); Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, Corps Sacramento Dist. at 3 (Aug. 17, 2000).
[208] Letter from Michael S. Jewell, Chief, California/Nevada Section, Corps Sacramento Dist., to James Gibson, Gibson & Skordal at 1 (Aug. 13, 2001).
[209] U.S. General Accounting Office, GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction at 24-26 (Feb. 2004), available at http://www.gao.gov/assets/250/241520.pdf.

10.217 The "any connection" theory was eventually challenged and rejected by the Supreme Court in *Rapanos*. 547 U.S. at 734 (plurality); *id*. at 781 (Kennedy, J., concurring). The plurality rebuffed the Corps' "'Land is Waters' approach to federal jurisdiction." *Id*. at 734 (plurality opinion). Justice Kennedy's concurrence likewise criticized the Agencies for leaving "wide room for regulation of drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it," and for asserting jurisdiction over wetlands "little more related to navigable-in-fact waters" than the isolated ponds in *SWANCC*. *Id*. at 781-82.[210]

While both the *Rapanos* plurality and Justice Kennedy's concurrence rejected the "any connection" theory, they did so on different grounds. The plurality (authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito) held that the CWA confers jurisdiction over only "relatively permanent bodies of water." *Id*. at 734. Justice Kennedy concluded that the Agencies' CWA jurisdiction extends only to waters with a "significant nexus" to traditional navigable waters. *Id*. at 767. Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id*. at 787.

The *Rapanos* decision, with no one opinion joined by a majority of the Justices, presents an unusual but not unprecedented situation. The manner for determining the controlling effect of a plurality decision is set forth in an earlier Supreme Court decision in *Marks v. United States*, 430 U.S. 188 (1977). As explained in *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Id*. at 193-94 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). As explained in fuller detail in the WAC Comments, the two *Rapanos* opinions that reached the same judgment (collectively, joined by five justices) together establish the precedential effect of the decision.

The plurality and Justice Kennedy applied separate tests to reach the conclusion that the "any connection" theory exceeded CWA jurisdiction. The plurality vacated the judgments against the *Rapanos* and Carabell defendants, and Justice Kennedy concurred. The *Rapanos* decision thus recognizes and establishes limits on CWA jurisdiction. To determine which waters would satisfy the positions of those five justices who "concurred in the judgment" on CWA jurisdiction, both the plurality's test and Justice Kennedy's test must be considered. Only the waters that meet the plurality's test would be considered jurisdictional by the plurality, and only those waters that meet Justice Kennedy's test would be considered jurisdictional by Justice Kennedy. Thus, those waters that meet both tests would be considered jurisdictional by all five of those Justices (i.e., those members who concurred in the judgment in *Rapanos*).

The judgment of the Court announced by Justice Scalia was to "vacate the judgments" against John Rapanos and June Carabell and remand for further proceedings. *Id*. at 779. Because Justice Scalia announced the judgment of the Court, and his opinion was joined by three other Justices, his opinion is an appropriate starting point for interpreting the

[210] The expression of these concerns by the plurality and Justice Kennedy had no apparent effect on the Agencies in the Proposed Rule.

holding of the Court, as in Marks. Justice Kennedy was the only other Justice to concur in the judgment. Justice Kennedy agreed with the plurality opinion on the following points: the requirement that the word "navigable" in "navigable waters" must be given some importance and effect, *id*. at 759; Congress intended to regulate at least some waters that are not navigable in the traditional sense, *id*. at 767; the CWA does not reach all wetlands, or even "all 'non-isolated wetlands,'" *id*. at 799-80; the presence of a hydrologic connection to navigable-in-fact waters is not enough, standing alone, to support jurisdiction, *id*. at 784-85; and "mere adjacency to a tributary" is insufficient, *id*. at 786.

By contrast, Justice Kennedy disagreed with the plurality that CWA jurisdiction extends only to permanent standing waters or streams with continuous flow, at least for a period of "some months," and disagreed that CWA jurisdiction does not extend to wetlands lacking a continuous surface connection to other jurisdictional waters. *Id*. at 769. The plurality, for its part, did not agree with Justice Kennedy's "significant nexus" test. Accordingly, while there are many waters that would appear to meet both tests (e.g., a stream with continuous flow into a traditional navigable water, or a wetland with a continuous surface connection to that stream), a water that met only the plurality's permanent standing water or continuous flow/surface connection test or only Justice Kennedy's significant nexus test would not fall within the "narrowest grounds" of the positions of the Justices who concurred in the judgment. Only a water that met both the plurality's and Justice Kennedy's tests would be jurisdictional to the satisfaction of all five Justices. Such a water would thereby meet the "narrowest grounds" for interpreting CWA jurisdiction under *Rapanos*.[211]

Accordingly, to satisfy both the plurality's and Justice Kennedy's tests and thereby come within CWA jurisdiction, a water must, for example, meet each of the following prerequisites:

- a water that is a standing water must be relatively permanent;
- a water that is a stream must have a continuous flow;
- a water that is a wetland must have a continuous surface connection to an otherwise jurisdictional water; and
- a water must have a significant nexus to a traditional navigable water.

The Proposed Rule would extend CWA jurisdiction to a vast number of features that do not meet all (and in many cases, do not meet any) of these prerequisites. Accordingly, the

[211] Justice Kennedy's significant nexus test cannot alone be the test for CWA jurisdiction because it was not "joined" by the plurality. The supreme law of the land simply cannot be pronounced by a single concurring opinion not agreed with by the plurality of justices in rendering a holding. That is, the *Marks* standard is not the position taken by a single justice who concurred in the judgment on the narrowest grounds, but "that position taken by those Members" of the Court who concurred in the judgment on the narrowest grounds. 430 U.S. at 193-94. Logically, finding "that position" of "those Members" who concurred in the judgment on the "narrowest grounds" – in *Rapanos* a judgment establishing limits on the Agencies' CWA jurisdiction – entails determining which waters all of those Members would agree are jurisdictional. *Id*. The dissenting opinions do not count toward determining the holding of the Court because, of course, those opinions did not join in the "holding of the Court"; they dissented. *Id*.

Proposed Rule must be substantially revised to meet these prerequisites, and must be re-proposed for public comment.

Notably, based on concerns with the Agencies asserting jurisdiction without regulatory clarity, the Justices were unanimous in calling for rulemaking.[212] Yet the Proposed Rule is not faithful to *Rapanos* or other Supreme Court decisions. (p. 36-40)

Agency Response: The Courts of Appeals that have considered this issue have not adopted the position that jurisdiction exists only where both the plurality's and Justice Kennedy's standards are satisfied. Technical Support Document, 1C. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

Irrigation and Electrical Districts Association of Arizona (Doc. #15832)

10.218 We ask the agencies to explain which parts of the existing regulatory definition of "Waters of the United States" are rendered difficult to use by Supreme Court precedent. We make this request because we cannot find in this precedent any assault on the existing regulatory definition, not in *Riverside Bayview Homes*, 474 U.S 121 (1985), not in *SWANCC*, 531 U.S. 159 (2001), and most assuredly not in *Rapanos* and *Carabell*, 547 U.S. 715 (2006).

In each of these cases, the Court focused on how the agencies interpreted the definition concerning their jurisdiction, not perceived flaws in the definition itself. Where the Court reined in the agencies, it was for over broad interpretation of the definition.

Moreover, in two cases last year, the Justice Department opposed, and the Supreme Court rejected, expanded plaintiff views of Clean Water Act jurisdiction that, indirectly, attacked the current definition. *LACFCD v. NRDC*, 133 S.Ct. 710 (2013); *Decker v. NEDC*, 133 S.Ct. 1326 (2013). Some of us thought that these positions indicated satisfaction with the definition, until the instant Federal Register notice.

Since redefining Waters of the United States is not being compelled, failure to redefine the term now can have no meaningful adverse effect on the continued administration of the law by the agencies. The current definition still works. It is the attempt by the agencies to stretch the boundaries of the Act and the regulatory definition that have come under scrutiny, not the definition itself. (p. 1-2)

Agency Response: The agencies determined that the guidance documents issued after *SWANCC* and *Rapanos* are not effective in providing the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific

[212] The Justices unanimously agreed that a rulemaking might have avoided this result, and invited the agencies to engage in rulemaking going forward. See, e.g., *id*. at 726 (plurality opinion); *id*. at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority" through rulemaking, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."); *id*. at 782 (Kennedy, J., concurring); *id*. at 812 (Breyer, J., dissenting) (calling for the Agencies "to write new regulations, and speedily so").

jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. In this rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Preamble, II. The two cited decisions did not address the definition of "waters of the United States."

Basin Electric Power Cooperative (Doc. #16447)

10.219 The United States Supreme Court has twice struck down similar far-reaching definitions of "waters of the United States" to what the Agencies are advancing in this rulemaking. First in *SWANCC,*[213] then again in *Rapanos,*[214] the Court plainly determined that a rule that attempts to regulate "waters of the United States" as broadly as this rule attempts to regulate is a rule that exceeds the Agencies' statutory authority. The plurality in *Rapanos* limited the jurisdiction that the phrase "the waters of the United States confers on the Agencies to "include only relatively permanent, standing or flowing bodies of water,"[215] "as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'"[216] "All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel-especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans. '"[217]

The plurality in *Rapanos* made clear that the "significant nexus" test enunciated in *SWANCC* was limited to wetlands that abut an adjacent navigable waterway,[218] and suggested that Justice Kennedy's case-by-case test of whether a particular wetland in a particular case had a "significant nexus," even though it was not directly adjacent to a waterway, resulted in a vague and confusing case-by-case standard.[219] In any event, Justice Kennedy's test is limited to case-by- case factual exceptions; it does not allow the Agencies to reassert through rulemaking a broad interpretation of "waters of the United States" that "stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power."[220] In other words, Justice Kennedy's exception is a case-by-case exception. It does not open the door to a broad rulemaking of the kind that is being attempted here.

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

[213] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).
[214] *Rapanos v. U.S.*, 547 U.S 715 (2006).
[215] 547 U.S. at 732.
[216] 547 U.S. at 733.
[217] 547 U.S. at 733.
[218] 547 U.S. at 726.
[219] 547 U.S. at 738, FN9.
[220] 547 U.S. at 738.

ChooseCleanWater Coalition (Doc. #11773.1)

10.220 When passing the Clean Water Act in 1972, Congress made it clear that the scope of the Clean Water Act was to be far-reaching. The Act's ambitious goal—"to restore and maintain the chemical, physical and biological integrity of the Nation's water"[221]—required extensive federal authority over the "Nation's waters." The record of Congress' deliberation demonstrates that that Congress intended the Clean Water Act "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[222]" Congress recognized that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.[223]" Given Congress' clear intent that the Clean Water Act address pollution at its source and its recognition that waters are interconnected, the scope of the proposed rule is well within Congressional intent and is legal[224]. (p. 1)

Agency Response: The agencies agree that the rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.221 The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are entitled to deference in decisions about the scope of Clean Water Act authority based on their expert ecological judgment about the role that certain kinds of waters play in the aquatic system[225], unless a particular interpretation "invokes the outer limits of Congress' power[226]." Where, as here, the proposed rule is based on copious scientific evidence and the agencies' judgment about whether the science reveals a "significant nexus" between various categories of waters and downstream navigable or interstate waters, the approach is a reasonable and lawful interpretation of the Clean Water Act[227]. (p. 2)

Agency Response: The agencies agree that the rule is consistent with law and well supported by the administrative record. Preamble, III and IV, Technical Support Document, I-IX.

Southern Illinois Power Cooperative (Doc. #15486)

10.222 The proposed rule unlawfully expands CWA jurisdiction beyond the limits intended by Congress and recognized by the U.S. Supreme Court. The proposed rule ignores the Rapanos plurality opinion and misinterprets Justice Kennedy's significant nexus standard. (p.9)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

[221] 33 U.S.C §1251(a)
[222] Sen. Conf. Rep. No. 92-1236, 92nd Cong. 2d Sess., reprinted in 1972 U.S Code Cong. & Admin. News 3376 at 3822.
[223] S. Rep. No. 414 92nd Cong., 2d Sess., reprinted in 1972 U.S Code Cong. & Admin. News 3376 at 3822.
[224] *See Chevron U.S.A. v. NRDC,* 467 U.S. 837, 842-843 (1984) (holding that if Congress' intent is clear, the Court and the agency must give effect to Congress' unambiguously expressed intent).
[225] *United States v. Riverside Bayview Homes,* 474 U.S. 121, 132-35 (1985).
[226] *Solid Waste Agency of Northern Cook County* v. *Army CORPS of Engineers,* 531 U.S. 159, 172 (2001).
[227] *Rapanos v. United States,* 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).

Washington County Water Conservancy District (Doc. #15536)

10.223 the Supreme Court's interpretations of the term "waters of the United States" have consistently given this meaning to the term "navigable waters": waters that are or have been navigable in fact, or which could reasonably be made navigable. While allowing some deference to the Agencies in regulating wetlands that are adjacent to and "inseparably bound up with" navigable waters, the Supreme Court's interpretations have recognized that federal jurisdiction under the CWA is limited by the term "navigable waters" and by the Act's policy of preserving the states' primary authority over land and water resources. The Agencies' interpretations, by contrast, consistently read the term "navigable waters" out of the statute and ignore the effect of the Proposed Rule on the authority of states. (p. 5)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.224 THE AGENCIES' ANALYSIS OF SUPREME COURT PRECEDENT IS FLAWED.

In light of the language of the CWA and the Supreme Court's interpretations of the Act, the Agencies' Proposed Rule adopts a definition of "waters of the United States" that is overly-broad as a matter of law. The Agencies have stated that "the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations,"[228] but even the Agencies' own flawed Economic Analysis concludes that "the proposed rule increases overall jurisdiction under the CWA . . . over current field practices."[229] More importantly, this is not the relevant comparison in evaluating the legality of the Proposed Rule. The critical question is not how the Proposed Rule compares to existing regulations or historic agency practice, but how it compares to existing law, as interpreted by the Supreme Court. When compared to existing law, it is clear that the Proposed Rule adopts an expansive interpretation that exceeds the regulatory authority Congress granted to the Agencies under the CWA. (p. 8)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C.

10.225 **The Proposed Rule misinterprets and misapplies the concurring opinion in *Rapanos*.** In particular, the Proposed Rule gives undue weight to Justice Kennedy's concurring opinion in Rapanos and fails to give any substantive consideration to Justice Scalia's plurality opinion. As a result, the Proposed Rule adopts an interpretation of the CWA that conflicts with *SWANCC*. As noted above, the Court in *SWANCC* flatly rejected the Agencies' assertion of jurisdiction over "nonnavigable, isolated, intrastate waters" and held that CWA jurisdiction does not extend to non-wetland "ponds that are not adjacent to" traditional navigable waters.[230] Contrary to this clear statement in *SWANCC*, the Agencies have attempted to extend *Rapanos* beyond its holding to justify the

[228] Proposed Rule, 79 Fed. Reg. at 22,192.
[229] United States Environmental Protection Agency & U.S. Army Corps of Engineers, Economic Analysis of Proposed Revised Definition of Waters of the United States at 12 (Mar. 2014), available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.
[230] *SWANCC*, 531 U.S. at 168-71

regulation of waters that are expressly not jurisdictional under *SWANCC*. Indeed, the Agencies' Proposed Rule could be interpreted to allow regulation of the very same isolated pond in Illinois that the *SWANCC* court said was not jurisdictional.

As noted above, *Rapanos* addressed the narrow question of "whether the term 'navigable waters' in the [CWA] extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact," but may have some other connection to navigable waters.[231] The Proposed Rule purports to extend this holding to some wetlands with no connection to navigable waters, and to other, non-wetland water bodies such as intermittent streams and isolated ponds.[232] This aspect of the rule directly conflicts with *SWANCC*, and cannot be justified by Justice Kennedy's concurring opinion in *Rapanos*, particularly since Justice Kennedy joined the majority opinion in *SWANCC*.

Moreover, even within the confines of Justice Kennedy's concurring opinion in *Rapanos*, the Agencies have adopted an overly-broad reading of that concurring opinion. For example, Justice Kennedy did not state that the Army Corps could decide to treat all tributaries as automatically jurisdictional-by-rule, and his opinion does not support the Agencies' broad, categorical jurisdictional-by-rule approach. In fact, even in the more limited context of jurisdictional determinations for the types of wetlands at issue in *Rapanos*, Justice Kennedy expressed concerns about the breadth of such a categorical approach in the absence of "more specific" criteria such as the frequency, duration, and volume of flow.[233]

In the Proposed Rule, the Agencies admit that "the frequency, volume, and duration of flow are relevant considerations for determining if a water body has the physical characteristics suitable for navigation."[234] Despite this statement, however, and despite Justice Kennedy's suggestion that the Agencies should use such factors in evaluating jurisdiction over tributaries, the Agencies go on to state that they will not use these factors because, in their opinion, they are "not the best measure" of ecological effects.[235] This aspect of the Proposed Rule, which allows the Agencies' ecological judgments regarding the cumulative ecological effects of small streams to trump the word "navigable" in the Act, is fundamentally inconsistent with the CWA, as interpreted by the majority in *SWANCC*, and with Justice Kennedy's and Justice Scalia's opinions in *Rapanos*.(p. 8-10)

Agency Response: **The rule is consistent with the statute and case law. Technical Support Document, I.A., B., and C.**

[231] *Rapanos*, 547 U.S. at 759.
[232] Id.
[233] *Id*. At 782.
[234] Proposed Rule, 79 Fed. Reg. at 22,200
[235] Id. at 22,261 ("Because smaller streams, whether perennial, intermittent, or ephemeral, are much more common than larger streams, the volume of a stream's flow is not the best measure of its contribution to the chemical, physical, or biological integrity of downstream waters. . . . As discussed in more detail in Appendix A, small streams cumulatively exert a strong influence on downstream waters, partly by collectively providing a substantial amount of the river's water . . . but also by playing unique roles that large streams typically do not, including providing habitat for aquatic macroinvertebrates which help maintain the health of the downstream water." (internal citations omitted)).

Southern Law Center et al. (Doc. #13610)

10.226 This rulemaking is critical because it is imperative that the wetlands regulatory program be administered and enforced in a clear and definitive manner. The meaning of the words "navigable waters" and "waters of the United States" have been debated since Congress passed the Clean Water Act in 1972. Although the agencies have developed regulatory definitions for these terms in the past, we now have the benefit of a well-developed body of case law, as well a well-developed body of scientific knowledge to shape the definition. It is time that the agencies revise the current 1986 regulatory definition and put in place a definition that takes into account the legal and scientific developments that have transpired over the last three decades. If we are to have a long-term resolution to the waters of the United States issue, it needs to happen with this rulemaking. (p. 2)

Agency Response: The agencies agree that the rule will result in the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Preamble, II.

10.227 Congress intended the regulatory agencies to interpret the term "waters of the United States" broadly. The legislative history of the Act demonstrates that in passing the Act, Congress meant to protect all the nation's waters. And the U.S. Supreme Court has ruled on the scope of these protections; each time the Court has upheld a broad interpretation of the Act. The proposed rule honors these decisions as well as the original intent of Congress.

It was appropriate for the regulatory agencies to choose the Kennedy test over the Scalia test: There is no requirement that the agencies apply both the Kennedy and Scalia tests. The agencies were free to use their discretion to choose the test that would bring the most clarity to the program. Also, it is the Kennedy test that is more firmly grounded in science.

The Kennedy test only requires one of the criteria—chemical, physical, or biological—to establish a significant nexus: Some commenters have suggested that in order for a water to be jurisdictional, it must have a chemical, physical, and biological nexus with a downstream traditional navigable water (TNW). Although this is not true and would be inconsistent with the purpose of the Clean Water Act, the agencies must make a better case as to why the correct reading is "or" not "and." (p. 3)

Agency Response: The agencies agree that the rule is consistent with the statute and decisions of the Supreme Court. Technical Support Document, I.A., I.B. and I.C.

10.228 By passing the Clean Water Act in 1972[236], Congress made sweeping changes in how water would be regulated in this country. Previously, the states were in charge of keeping pollutants out of our waters. Because so many states were reluctant to impose controls on factories, sewage treatment plants, and other sources of pollutants, this experiment ended poorly. For example, leading up to the passage of the Clean Water Act the Cuyahoga

[236] In 1972 the "Clean Water Act" was still labeled the "Federal Waler Pollution Control Act Amendments of 1972." It was not until the Act was amended in 1977 that the Act was renamed the Clean Water Act.

River in Cleveland was so polluted that it caught fire multiple times. And Lake Erie, the fifth largest body of water in this country, had to be put on life support because it was so choked with pollutant-caused algal blooms that fish could not survive in its waters.

In defining the scope of the Act, Congress said that the Act would apply to all "navigable waters," which it defined as the "waters of the United States." Although the Act does not go further to explain these terms, the legislative history clearly does. For example, as the House Committee Report for the Act provides:

> One term the committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that the interpretation would be read narrowly. However, this is not the committee's intent. The committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes[237].

When EPA promulgated its regulations in 1973 to implement the Section 402 of the Act, it defined waters of the United States broadly as the following:

> (1) All navigable waters of the United States;
>
> (2) Tributaries of the navigable waters of the United States;
>
> (3) All interstate waters;
>
> (4) Intrastate lakes, rivers and streams which are utilized by interstate travelers for recreation and other purposes;
>
> (5) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce;
>
> (6) Intrastate lakes, rivers and streams which are utilized for industrial purposes by industries in interstate commerce.[238]

In this definition, EPA recited almost every connection possible between water and commerce. The Corps adopted a much more conservative approach and in its regulations stated that Corps jurisdiction under Section 404 of the Act would only extend as far as its Section 10 jurisdiction under the Rivers & Harbors Act of 1899. This narrow interpretation of the CWA was overturned in the courts soon thereafter.[239] Using a phased approach, the Corps regulations soon came in line with the EPA definition of waters of the United States.[240]

When the CWA was amended in 1977, the Section 404 program suffered an incredible amount of scrutiny within both houses of Congress, yet when the dust settled, Congress did not alter its definition for navigable waters, and thus, left intact the EPA and Corps definitions for that term as well. Instead of changing the jurisdictional scope of the

[237] Additional Views of Representative Edgar and Representative Myers, H.R. Rep. No. 95-139, at 54 (1977); 123 Cong. Rec. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (D-Mich.)); 123 Cong. Rec. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio)).
[238] 38 Fed. Reg. 13527, 13529 (May 22, 1973).
[239] *Natural Res. Defense Council v. Callaway,* 524 F.2d 79, 83-85 (2d Cir. 1975).
[240] *See also* 40 Fed. Reg. 31319, 31320 (July 25, 1975); 33 C.F.R. § 209.120(d)(2) and (e)(2) (1976).

Section 404 program, it carved out exemptions for certain activities involved in normal farming, ranching, silviculture, and mining.[241] (p. 5-6)

Agency Response: The rule is consistent with the statute. Technical Support Document, I.A.

10.229 The three U.S. Supreme Court decisions that interpret waters of the United States, also allow for a broad definition of that term. When *United States v. Riverside Bayview Homes, Inc*. was decided, many thought that the question about how broadly the CWA protections were to extend was settled for good—the CWA was meant to protect all the waters of the United States.[242] The case involved adjacent wetlands that were far removed from the shores of Lake St. Clair in Michigan, yet the Court determined that these wetlands were waters of the United States. In its unanimous decision, the Court held that the Corps was properly within its administrative discretion when it determined that wetlands adjacent to a "navigable waterway" are jurisdictional even if they are not regularly flooded by overflow from the traditional navigable waters. The Court concluded that "it was a permissible interpretation of the Act" to conclude that the term "waters of the United States" encompasses "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction.[243]"

Drawing from the legislative history of the Act, the Court stated that, "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for 'water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[244] Finally, the Court found it instructive that attempts during the 1977 amendments to broaden the definition of waters of the United States failed.[245] The Court unanimously concluded its decision by stating that it "was persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.[246]"

The EPA and the Corps interpreted the *Riverside Bayview* decision to give them the authority to regulate all waters across the country where there was a federal hook. The result was language in the 1986 joint EPA and Corps regulations that provided that the protections of the CWA reached any water that would be used for migratory bird habitat.[247]

This so-called migratory bird rule was challenged when the Solid Waste Agency of Northern Cook County (SWANCC) decided that it wanted to construct a solid waste landfill in an abandoned gravel mine outside of Chicago. The Corps initially declined to assert jurisdiction over the SWANCC site, but when the Corps discovered that migratory

[241] Pub. L. No. 95-217 (1977); 123 CONG. REC. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (DMich.)) at 939-40; 123 Cong. Rec. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio)).
[242] 474 U.S. 121, 106 S.ct. 455 (1985).
[243] *Id.* at 135.
[244] *Id.* at 132-33 (citing S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).
[245] *Id*. At 135.
[246] *Id* at 139.
[247] 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

birds frequented the numerous ponds at the site, the Corps decided to assert jurisdiction, and ultimately denied the permit because it posed a potential threat to drinking water supplies and destroyed unmitigatable habitat for migratory birds.[248] When *SWANCC* reached the Supreme Court, a divided 5-4 Court held that the "migratory bird rule" was not an allowable basis for asserting jurisdiction and that the ponds were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its term extends."[249]

In short, the Court said that the agencies had been too aggressive in its interpretation of waters of the United States. But the Court refused to draw any line short of the migratory bird rule. Thus, the *SWANCC* Court identified a problem with the regulatory program, but did little to fix it.

In 2003, the Bush Administration published a guidance document that retracted Corps and EPA jurisdiction under the CWA far beyond what the *SWANCC* Court directed. For example, this post-*SWANCC* guidance directed Corps and EPA staff not to assert jurisdiction over "isolated" waters without first obtaining permission from headquarters[250]. No similar instructions were issued to get permission before allowing unregulated pollution or destruction of these waters by determining that they were not subject to Clean Water Act jurisdiction. More importantly, in practice, the 2003 guidance led to the loss of resources. Whenever the agencies themselves determined that waters were "isolated," intrastate, and not traditionally navigable– even where the waters had uses other than as habitat by migratory birds–the waters were found to be non-jurisdictional. According to the EPA, about 20 million acres of wetlands were placed at risk of losing federal Clean Water Act protections under the 2003 policy.[251]

In *Rapanos* the Solicitor General argued to the U.S. Supreme Court that the CWA encompasses and protects the non-navigable tributaries of the traditional navigable waters and the wetlands adjacent to these tributaries. The *Rapanos* petitioners and others argued that the CWA does not protect non-navigable tributaries and only covers those wetlands directly adjacent to traditional navigable waters[252]. In its decision the Court split 4-1-4.[253]

The four-justice plurality opinion, which was written by Justice Scalia, concluded that:

> "[T]he phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." The phrase does not include channels through which water flows

[248] *Solid Waste Agency of N Cook Cnty. v. U.S. Army Co1ps of Eng 'rs,* 531 U.S. 159, 165 (200 I).
[249] *Id.* at 173.
[250] 68 Fed. Reg. 1991, 1997-98 (Jan. 15, 2003) ("field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CPR 328.3(a)(3)(i)-(iii)").
[251] *See* Eric Pianin, *Administration Establishes New Wetlands Guidelines,* The Washington Post, Jan. 11, 2003, at A05.
[252] Brief of Petitioners at 12-13, *Carabell v. U.S. Army Corps of Eng'rs,* (Dec. 2, 2005). (The petitioners in *Carabell* case advanced a more limited argument, claiming that it was impermissible for the Corps to regulate a wetland as "adjacent" lo a protected water body- and therefore subject to the Clean Water Act -if it lacked a hydrological connection with the water body.)
[253] *Rapanos v. United States,* 126 S.Ct. 2208 (2006).

intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[254]

The opinion also would require wetlands to have a "continuous surface connection" to jurisdictional waters to be protected.[255]

Justice Kennedy, who cast the lone middle vote, wrote in his opinion that for a water to be protected by the CWA it has to have a physical, biological, or chemical effect on a traditional navigable water in order to be protected, in other words, it must have a significant nexus with that downstream water.[256] In determining whether a particular water is jurisdictional, Kennedy stated that it was proper to look at the cumulative impact of a water on the nearest downstream traditional navigable water taking into account other similarly situated waters in the region.[257]

Since *Rapanos*, numerous courts have wrestled with the question of which opinion (or opinions) contains the controlling rule of law. For instance, in the First and Eighth Circuits, a water is protected under the Clean Water Act if it meets either the plurality standard or the "significant nexus" standard[258]. In the Eleventh Circuit, a water may only be covered consistent with the "significant nexus" standard. The Seventh and Ninth Circuits both have ruled that the "significant nexus" standard is a sufficient basis to uphold jurisdiction, but have not ruled out the use of the plurality standard in appropriate circumstances[259]. The Second, Fifth, and Sixth Circuits have reached decisions in which they left to a later case the resolution of whether one of the standards or both are valid jurisdictional triggers[260]. (p. 7-10)

Agency Response: The rule is consistent with caselaw. Technical Support Document, I.C.

National Wildlife Federation (Doc. #15020)

10.230 The *Rapanos* case involved wetlands connected by surface flow to tributaries that eventually flowed into traditionally navigable waters.[261] The case involved three sites

[254] *Id* at 2225 (plurality opinion).
[255] *Id* at 2226.
[256] *Id* at 2248.
[257] *Id*.
[258] *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007), *reh 'g denied,* 521 F.3d 1319 (11th Cir. 2008); *see also United States v. Freedman Farms, Inc.,* 2011 WL 1884000, *7 (E.D.N.C. 2011) (denying reconsideration of jury instruction based exclusively on Justice Kennedy's "significant nexus" standard).
[259] *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724-25 (7th Cir. 2006) (discussing both standards and concluding that Justice Kennedy's is narrower view except in "rare cases[s]" and concluding that Justice Kennedy's test "must govern the further stages of this litigation"); *N. Cal. Rive1watch v. City of Healdsburg,* 496 F.3d 993, 999- 1000 (9th Cir. 2007) (replacing prior opinion characterizing Justice Kennedy's test as "the controlling rule of law" with one that says it is "the controlling rule of law for our case"); *but cf. United States v. Moses,* 496 F.3d 984, 990 (9th Cir. 2007) (decision issued three days prior to revision of *Healdsburg* opinion cites the initial *Healdsburg* opinion and characterizes Justice Kennedy's test as "the controlling rule of law").
[260] *Cordiano v. Metacon Gun Club, Inc. ,* 575 F.3d 199, 215-16 (2d Cir. 2009); *United States v. Lucas,* 516 F.3d 316, 327 (5th Cir. 2008) (concluding that evidence is sufficient for jury to convict under plurality, "significant nexus," or dissent tests, but not indicating which standard, if any, controls); *United States. v. Cundiff,* 555 F.3d 200, 210 (6th Cir. 2009).
[261] *Rapanos,* 126 S. Ct. at 2238 (Kennedy, J. concurring).

eleven to twenty miles away from the nearest traditionally navigable water.[262] Each site involved different tributary types, from a wide perennially flowing natural river, to intermittently flowing man-made or man-altered conveyances.[263] The related *Carabell* case involved a wetland that did not share a documented surface hydrological connection with its neighboring tributary, a ditch that carried an indeterminate amount of water about a mile to the navigable Lake St. Clair.[264]

There was no majority opinion in *Rapanos*. While a majority voted to remand the cases back to the lower court for further review, there were divergent and contradictory rationales for what standard the lower court should apply. Justice Scalia, writing for the plurality, looked mainly to a 1954 dictionary to support his analysis.[265] His opinion stated the Act's coverage included "those relatively permanent, standing or continuously flowing bodies of water" and "only those wetlands with a continuous surface connection to [other regulated waters]."[266] Justice Scalia included a footnote stating he does not necessarily mean to "exclude seasonal rivers" or waters "that might dry up in extraordinary circumstances, such as drought."[267] A recent case has indicated that seasonal can be reasonably interpreted based on geographic location.[268] Importantly, Justice Scalia's test and rationale for narrowing Clean Water Act jurisdiction was rejected by a majority of the Court.

Justice Stevens, writing for a four-member dissent, deferred to the Corps' current categorical regulation of all tributaries and their adjacent wetlands.[269] He found:

[T]he Corps has concluded that [wetlands adjacent to other waters, including non-navigable tributaries] play important roles in maintaining the quality of their adjacent waters, and consequently in the waters downstream…Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase "waters of the United States," the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands [such as those at issue in *Rapanos* and *Carabell*].[270] Justice Kennedy, in a solo concurring opinion, largely agreed with Justice Stevens that broad protection under the Act is warranted.[271] He also rejected the plurality's jurisdictional test as being "without support in the language and purposes of the Act or in our cases interpreting it."[272] Yet, Justice Kennedy found that to support jurisdiction for wetlands adjacent to certain non-navigable tributaries, a showing needed to be made that such waters have a

[262] *Id*. at 2214 (plurality opinion).
[263] *Id*. at 2238 (Kennedy, J. concurring).
[264] *Id*. at 2239.
[265] *Id*. at 2220-21 (plurality opinion).
[266] *Id*. at 2225, 2226 (emphasis in original).
[267] *Id*. at 2221 n.5 (emphasis omitted).
[268] See *United States v. Vierstra*, 2011 WL 1064426, *4 (D. Id. 2011) (stating that "common sense and common usage forged in the Intermountain West and applied to the Government's evidence would support a finding that the Low Line Canal is 'relatively permanent'"), affirmed 2012 WL 3269211 (9th Cir. Aug. 13, 2012).
[269] *Rapanos*, 126 S. Ct. at 2252, 2265 (Stevens, J., dissenting).
[270] *Id*. at 2257 (citations omitted). Justice Stevens goes on to say that, "I think it clear that wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream." *Id*. at 2264.
[271] *Id*. at 2241 (Kennedy J., concurring).
[272] *Id*. at 2242.

"significant nexus" to traditionally navigable waters for jurisdiction to attach.[273] According to Justice Kennedy: [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[274] The dissent stated Justice Kennedy's test "will probably not do much to diminish the number of wetlands covered by the Act in the long run."[275] An examination of the test helps explain why the dissent reached this conclusion. First, it is important to note how utterly Justice Kennedy rejects the plurality's restrictive test, which is largely unconcerned with the water quality goals of the Act. Justice Kennedy accuses the plurality of being "unduly dismissive" of the interests put forth by the government.[276] Unlike the plurality, who see little value in protecting ephemeral waters, dry arroyos, and wet meadows (waters that the plurality characterizes in part as "puddles"),[277] Justice Kennedy understands that many of these waters warrant protection.[278] He notes at length that nowhere in the Act is there support for a jurisdictional distinction between waters with continuous flow and waters with intermittent flow.[279] Similarly, he notes that the Act, case law precedent, and ecology fail to support the plurality's insistence on a continuous surface connection between wetlands and nearby water bodies.[280] Justice Kennedy explains that wetlands perform important ecological functions, such as pollutant filtering and flood retention and "it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme."[281] Importantly, in recognition of the vital ecological functions wetlands perform, Justice Kennedy wrote that wetlands that either individually or collectively impact "the chemical, physical or biological integrity"[282] of other navigable waters have the requisite "significant nexus" to be regulated under the Clean Water Act.[283] The ecological functions identified by Justice Kennedy include flood retention, pollutant trapping, and filtration.[284] Justice Kennedy recognized wetlands often perform these important ecological functions even though they may be intermittent or ephemeral, or lack a surface connection to other waters.[285] Justice Kennedy's test allows for the aggregation of impacts of similarly situated wetlands, meaning individually less significant wetlands may be protected if they become significant when viewed collectively within a region. Subsequent case law has indicated

[273] *Id*. at 2249.
[274] *Id*. at 2248.
[275] *Id*. At 2264 (Stevens, J. dissenting)
[276] *Id*. at 2246 (Kennedy, J., concurring).
[277] *Id*. at 2221 (plurality opinion).
[278] *Id*. at 2244 (Kennedy, J., concurring).
[279] *Id*. at 2242-43.
[280] *Id*. at 2244
[281] *Id*. at 2245-46.
[282] 33 U.S.C. § 1251(a).
[283] *Rapanos*, 126 S. Ct. at 2248.
[284] *Id*. at 2248.
[285] *Id*. at 2242-46.

that this term can be interpreted broadly.[286] Justice Kennedy also indicated a significant nexus to navigable waters can be assumed for certain categories of wetlands. For instance, he stated that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecological interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone."[287] Therefore, wetlands adjacent to traditionally navigable waters (TNWs) are categorically covered under Justice Kennedy's analysis, and a case-by-case determination is not needed. [288] Likewise, Justice Kennedy suggested wetlands next to certain major tributaries may also be categorically covered by the CWA.[289] It is only in regards to wetlands adjacent to minor tributaries that Justice Kennedy refuses to allow categorical assertion of jurisdiction under the current regulations.[290] Justice Kennedy also accepts as "reasonable" the Corps current definition of adjacent, which includes wetlands that may be separated from other waters by dikes, berms, and other natural or manmade barriers.[291] Justice Kennedy does not assert categorical regulation of tributaries is no longer permissible, or a case-by-case determination of a "significant nexus" to traditionally navigable waters is required to regulate any tributary.[292] On the contrary, he suggests the current definition of tributary "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."[293] As to tributaries, Justice Kennedy only expresses concern about categorically extending jurisdiction to all wetlands that are adjacent to any waters that meet the regulatory definition of tributaries. Specifically, he writes: [T]he breadth of this standard – which seems to leave wide room for the regulation of drains, ditches, and streams

[286] See *Precon Development Corp. v United States Army Corps of Engineers*, 633 F.3d 278, 292 (4th Cir. 2011) ("[W]e recognize that Justice Kennedy's instruction – that 'similarly situated lands in the region' can be evaluated together – is a broad one, open for considerable interpretation and requiring some ecological expertise to administer").

[287] *Rapanos*, 126 S. Ct. at 2249. Justice Kennedy reiterates "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."

[288] This has been confirmed by multiple lower court decisions interpreting *Rapanos*. See *United States v. Cundiff*, 555 F.3d 200, 207 (6th Cir. 2009) (finding that under Justice Kennedy's opinion assertion of jurisdiction over wetlands adjacent to navigable-in-fact waters may be met 'by showing adjacency alone); *Northern California River Watch v. Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (finding same); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2007) (finding same).

[289] *Id*. at 2248 ("[I]t may well be the case that *Riverside Bayview's* reasoning – supporting jurisdiction without any inquiry beyond adjacency – could apply equally to wetlands adjacent to certain major tributaries.").

[290] *Id*. at 2249 ("Absent more specific regulations, . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.").

[291] *Id*. at 2245.

[292] Justice Kennedy's opinion limited his basis for remand to the lower court to the question of "whether the specific wetlands at issue possess a significant nexus with navigable waters." 126 S. Ct. 2252. This contrasts with the plurality's broader basis for remand to determine "whether the ditches and drains near wetlands are 'waters,'" and "whether the wetlands in question" are also jurisdictional. *Id*. at 2235. This contrast is further indication Justice Kennedy may not require a case-by-case significant nexus determination for tributaries. Indeed, as the Federal District Court for the District of Idaho recently noted, "It is an open question as to whether Justice Kennedy's concurrence applies in the tributary context." *United States v. Mike Vierstra*, 2011 WL 1064526, *5 (D. *Id*. 2011), affirmed 2012 WL 3269211 (9th Cir. Aug. 13, 2012).

[293] *Id*. at 2249. Justice Kennedy never calls into question the significance of major tributaries to traditionally navigable waters.

remote from any navigable-in-fact waters and carrying only minor water volumes towards it – precludes its adoption as the determinative measure of whether wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.[294] The dissent would support jurisdiction in every instance where Justice Kennedy and the plurality would.[295] (p. 14- 18)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

American Rivers (Doc. #15372)

10.231 The primary objective of the Clean Water Act ("CWA") is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[296] The CWA established a regulatory framework that prohibited point source discharges of pollutants into "navigable waters" without a permit. The intent was to limit the amount of pollutants entering waterways as well as monitor the kinds of pollutants being discharged. The Act asserts federal jurisdiction over "navigable waters," which are defined under the CWA as "waters of the United States, including the territorial seas."[297] This definition was a purposeful expansion beyond waters "navigable-in-fact"[298] to extend protection to a broad array of waters, waterways, and wetlands in the United States.

The drafters of the CWA on the Senate Committee on Public Works understood the connectivity of water systems. Their report states, "Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source."[299] The Committee understood that what was discharged upstream would flow downstream and they wanted to protect the whole watershed. Additionally, the Conference Report developed by the House and Senate Committees emphasizes the comprehensive jurisdiction of the CWA, stating that "the conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[300] Congress recognized the importance of providing comprehensive protection to U.S. waters and not constraining the CWA's scope to an overly narrow interpretation of navigability.

Congress intended a broad jurisdictional scope for the CWA, which was upheld by a federal court in 1975.[301] Following enactment of the CWA, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") developed regulations to define the term "waters of the United States." Whereas the EPA definition was in line

[294] *Id*.
[295] *Id*. at 2265 ("Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases – and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied – on remand each of the judgments should be reinstated if either of those tests is met.") (emphasis in original).
[296] 33 U.S.C. § 1251(a) (2013).
[297] 33 U.S.C. § 1362(7) (2013).
[298] Waterways are "navigable-in-fact" when, "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557 at 563 (1870).
[299] S. Rep. No. 92-414, at 77 (1971).
[300] H.R. Rep. No. 92-911, at 131 (1972) (Conf. Rep.).
[301] *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

with the goals of the CWA, the Corps' definition was significantly narrower in scope, covering only traditionally navigable waters. A federal court rejected the Corps' definition, stating that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Clean Water Act, the term is not limited to traditional tests of navigability."[302] This was further emphasized in *International Paper Co. v. Ouellette*, in which the Supreme Court determined that, "the Act applies to all point sources and virtually all bodies of water..."[303]

The current regulatory definition of "waters of the United States" includes traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.[304] It is critical to consider the historical context of jurisdiction under the CWA in evaluating proposals to update or revise the definition of "waters of the United States" in order to adhere to its intended purpose. (p. 3-4)

Agency Response: The rule is consistent with the statute. Technical Support Document, I.A.

10.232 In *Riverside Bayview Homes, Inc. v. United States*, the Court was determining the validity of the Corps' interpretation of the regulation defining "waters of the United States" and the scope of their jurisdiction under the CWA. The Court was specifically looking at whether "adjacent wetlands" are considered to be "waters of the United States." The Court held unanimously, "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."[305] The Justices found that adjacent wetlands have "significant effects on water quality and the aquatic ecosystem..."[306] Thus the jurisdictional scope of the CWA was confirmed to extend to adjacent wetlands in order to protect them and the jurisdictional water to which they are connected from degradation.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*"SWANCC"*) the Supreme Court held that the non-navigable, intrastate, isolated waters in dispute (abandoned sand and gravel pits that were filled with water and varied in size from one-tenth of an acre to several acres and in depth from several inches to several feet) could not be classified as a "water of the United States" based solely on the fact that they are a habitat for migratory birds.[307] In a 5-4 opinion, the Court held that use of the Migratory Bird Rule[308] exceeds the Corps' authority under Section 404 of the CWA.[309]

[302] *Id*.
[303] *International Paper Company v. Ouellette*, 479 U.S. 481, 492 (1987).
[304] 33 C.F.R. § 328.3 (2013).
[305] *U.S. v. Riverside Bayview Homes, Inc*. 474 U.S. 121, 135 (1985).
[306] *Id*. at n.9.
[307] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).
[308] The Corps 'attempted to modify the definition of "waters of the United States" in order to clarify the scope of their § 404 permit program. The Corps would have their jurisdiction extend to waters, "a) which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b) which are or would be used as habitat by other

The Court stated, "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this."[310] The Court recognized that if they were to uphold federal jurisdiction over a waterway based solely on it being a habitat for migratory birds then that would abrogate the term 'navigable' out of the CWA altogether.[311] Although the Court held the Corps exceeded its authority here, the holding was very narrow and, when applied to later cases, restricts the Corps' ability to apply jurisdiction over isolated waters using only the Migratory Bird Rule.[312] This can be regarded as allowing the Corps to assert jurisdiction over isolated wetlands, as long as their decision is not solely based on the migratory bird rule. (p. 4-5)

Agency Response: **The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.**

10.233 In 2006, the Supreme Court addressed the scope of CWA's coverage for wetlands that are not adjacent to traditionally navigable waterways when they consolidated the cases of *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers* (referred to together as "*Rapanos*"). The Justices issued three decisions with no majority opinion. The plurality opinion sets forth a two prong test to determine if a wetland is jurisdictional: "First, that the adjacent channel contains a 'water of the United States,' and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[313] Justice Scalia defines "water of the United States" for purposes of the test:

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams'[,]…oceans, rivers, [and] lakes.' See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[314]

Under Justice Scalia's definition, a waterway must flow perennially to be considered a "water of the United States" and a wetland must have a "continuous surface connection" to that perennial waterway to be jurisdictional. This considerably limits the types of waters that the Corps can determine are "waters of the United States," and thus constrains the overall scope of the CWA.

The concurring opinion by Justice Kennedy found that a water or wetland possesses a "significant nexus" and is thus jurisdictional if, the water "alone or in combination with

migratory birds which cross state lines…" Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 291, 41217 (Nov. 13, 1986).
[309] *SWANCC*, 531 U.S. at 159.
[310] *Id*. at 168.
[311] *Id*. at 172.
[312] Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 10, 1993 (Jan. 15, 2003).
[313] *Rapanos v. United States*, 547 U.S. 715, 742 (2006).
[314] *Id*. at 739.

similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of other covered waters understood as navigable."[315] The significant nexus test, when applied to the facts of the case, confirmed that a wetland which "can perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage" is in fact a "water of the United States."[316]

The dissent by Justice Stevens gives deference to the Corps and generally agrees with Justice Kennedy's opinion except for the significant nexus approach, which they were concerned would be too difficult to prove. The dissent argues that it is enough for wetlands to be adjacent to tributaries of navigable waterways for them to also be navigable waterways. The dissent illustrates that non-isolated wetlands can "obviously have cumulative effects on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the 'limited' connection to traditionally navigable waters that is all the statute requires."[317] Thus, no significant nexus test is needed.

Justice Roberts was part of the plurality opinion but he went out of his way to write a concurrence to specifically address rulemaking. He stated that the "agencies delegated rulemaking authority under a statue such as the Clean Water Act are afforded generous leeway by the court in interpreting the statute they are entrusted to administer."[318] He noted that the EPA and Corps made an effort to initiate a rulemaking after *SWANCC* but that it was never finalized.[319] He observed that if the Agencies had completed the rulemaking they "would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority."[320] Justice Roberts stressed the deference the Court can give to a rule that defines the scope of the CWA promulgated by the Agencies and suggested that if the Agencies had made such a rule than they may not have been defeated in Court. Justice Breyer in his dissent also articulated that once the Agencies write regulations defining the scope of "navigable waters" then, "the courts must give those regulations appropriate deference."[321] We agree with Justice Roberts and Justice Breyer and we appreciate EPA and the Corps' efforts in promulgating a rule now.

The *Rapanos* decision resulted in three conflicting, or at least contradictory, Supreme Court opinions that offer muddled guidance to lower courts and the Agencies as how to interpret the term "waters of the United States." The Circuit Courts have varied widely in their interpretation and use of the plurality and concurring opinions, and administrative guidance following these decisions has resulted in increased uncertainty and declining enforcement.[322] (p. 5-7)

[315] *Id*. at 780.
[316] *Id*. at 779-780; see also 33 C.F.R. § 320.4(b)(2) (2013).
[317] *Rapanos*, 547 U.S. at 808.
[318] *Id*. at 758.
[319] *Id*.
[320] *Id*.
[321] *Id*. at 811. Deference is appropriate unless the Agency interpretation is unreasonable. See, *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc*., 467 U.S. 837 (1984).
[322] Memorandum from Majority Staff, Comm. on Oversight and Gov't Reform, and Majority Staff, Comm. on

Agency Response: **The rule is consistent with caselaw. Technical Support Document, I.C.**

10.234 The absence of a majority opinion in *Rapanos* has resulted in significant variation in how the lower courts have interpreted the split decision. The First, Third and Eighth Circuits maintain that water is protected under the law if it meets either the plurality standard or the "significant nexus" test.[323] The Eleventh and Seventh Circuits maintain that a water may be jurisdictional only if it meets the "significant nexus" standard.[324] The Fourth Circuit and Ninth Circuit have applied the 'significant nexus' standard, but have not ruled out the use of the plurality standard.[325] The Second, Fifth, and Sixth Circuits have not conclusively ruled on which standard to use because their particular cases have met both standards.[326] In seven of those Circuit Court cases the United States Supreme Court was asked for certiorari, but it was not granted.[327]

Courts are seeking guidance as to the meaning of "waters of the United States." This clarification is essential so that jurisdictional determinations can be made in a consistent manner throughout the United States. Whether or not a stream or wetland is jurisdictional under the CWA should not depend upon the federal circuit court district where it is located. (p. 7)

Agency Response: **The rule is consistent with caselaw. Technical Support Document, I.C.**

10.235 Following both the *SWANCC* and *Rapanos* decisions, EPA and the Corps released guidance documents to provide directives for field staff interpreting the Supreme Court decisions and implementing jurisdictional determinations and agency actions under the CWA. Following *SWANCC*, EPA and the Corps published an Advance Notice of Proposed Rulemaking ("ANPRM") and released a guidance memo to field staff specifically focusing on jurisdiction for so-called "isolated," non-navigable, intrastate waters that were the focus of the *SWANCC* decision. The guidance memo released in 2003 became effective immediately and required field staff to receive the permission of agency headquarters before asserting jurisdiction over "isolated" waters.[328] In practice, when Agencies determined that waters were "isolated," even if the water had other

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Transportation and Infrastructure to Rep. Henry Waxman, Chairman, House Comm. on Oversight and Gov't Relations, and Rep. James Oberstar, Chairman, House Comm. on Transportation and Infrastructure, Decline of the Clean Water Act Enforcement Program (Dec.16, 2008).

[323] *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 182 (3rd Cir. 2011).

[324] *United States v. Robinson*, 505 F.3d 1208, 1219 (11th Cir. 2007); *United States v. Gerke Excavating, Inc*., 464 F.3d 723, 724 (7th Cir. 2006).

[325] *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000-1001 (9th Cir. 2007); *United States v. Moses*, 496 F.3d 985, 990 (9th Cir. 2007), *Precon Development Corp. v. United States Army Corps of Engineers*, 633 F.3d 278, 283 (4th Cir. 2011).

[326] *U.S. v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008).

[327] Robert Meltz and Claudia Copeland, Cong. Research Serv., RL33263, The Wetlands Coverage of the Clean Water Act (CWA): *Rapanos* and Beyond 7 (April 22, 2014).

[328] Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1997-98 (Jan. 15, 2003). The document states, "field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 C.F.R. 328.3(a)(i)-(iii)."

functions beyond its use by migratory birds, the waters were deemed nonjurisdictional.[329] The effect of this guidance was a significant loss of protections for waters that had previously been protected under the original and intended reach of the CWA. American Rivers and a significant majority of others in the water and advocacy community were adamantly opposed to the ANPRM. Fortunately, the Bush Administration never finalized that rulemaking effort.[330]

Following the *Rapanos* decision, several guidance documents were released by the Corps and EPA. The 2008 guidance, issued jointly by EPA and the Corps, imposed significant limitations to CWA protections beyond the scope of the *Rapanos* and *SWANCC* decisions. The Agencies chose to construe the Supreme Court decisions to restrict the coverage of the CWA instead of using the authority the Court permitted them to maintain protective jurisdiction. The guidance required that less than "relatively permanent" streams receive a case-by-case significant nexus test to determine jurisdiction.[331] Additionally, wetlands adjacent to non-navigable tributaries that are not "relatively permanent" and wetlands adjacent to but that do not "directly abut a relatively permanent non-navigable tributary" require a case-specific significant nexus analysis.[332] The 2008 guidance considerably undermined protections for small streams and wetlands by imposing the significant nexus hurdle to more waterways than necessary.

In April 2011, EPA and the Corps proposed a new guidance. This guidance was focused on protecting smaller waterways in order to keep upstream pollutants from traveling downstream.[333] American Rivers supported the Agencies' efforts to clarify the scope of the CWA after *Rapanos*, and offered some minor suggestions that would improve the 2011 Guidance. We advocated for an improved definition of "tributary" that did not rely on the presence of an ordinary high water mark; we asserted that ditches should be regulated as tributaries if they acted like tributaries by contributing flow to other bodies

[329] See U.S. Gov't Accountability Office, GAO-05-870, Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction 6 (Sep. 2004), available at http://www.gao.gov/assets/250/247705.pdf. The document states, "In the five districts we reviewed, Corps officials said they generally do not consider seeking jurisdiction over isolated, intrastate, nonnavigable waters on the sole basis of 33 CFR 328 (a)(3) because (1) headquarters has not provided detailed guidance on when it is appropriate to use this provision; (2) they believe that headquarters does not want them to use this provision; (3) they were concerned about the amount of time that might be required for a decision from headquarters; or (4) few isolated, intrastate, nonnavigable waters were in their districts whose use, degradation, or destruction could affect interstate commerce."

[330] Press Release, EPA, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), available at http://yosemite.epa.gov/opa/admpress.nsf/0/540f28acf38d7f9b85256dfe00714ab0?opendocument. The press release states, "After soliciting public comment to determine if further regulatory clarification was needed, EPA and the Corps have decided to preserve the federal government's authority to protect our wetlands. The Agencies will continue to monitor implementation of this important program to ensure its effectiveness."

[331] Memorandum from Benjamin H. Grumbles, Assistant Adm'r for Water, E.P.A. and John Paul Woodley, Jr. Assistnat Sec'y of the Army, Department of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* 7 (Dec. 2, 2008), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.

[332] *Id*. at 8.

[333] U.S. EPA and Army Corps of Engineers, Draft Guidance on Identifying Waters Protected by the Clean Water Act (April 27, 2011), available at http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf.

of water protected by the CWA; we requested that the Agencies make adjacent wetlands categorically covered by law; and we asked that "other waters" be looked at in terms of their aggregate effect on the watershed. Unfortunately, the 2011 Guidance was never implemented and the 2008 Guidance is currently the controlling document. While we appreciated the Agencies' effort to clarify jurisdiction through the guidance documents, we proposed that a rulemaking would be better due to the deference it would be given in court. We commend the Agencies for moving forward with a proposed rulemaking.

The *Rapanos* and *SWANCC* decisions, along with the resulting administrative guidance documents, have created an atmosphere of uncertainty among EPA and the Corps when enforcing the CWA and making jurisdictional determinations. An EPA memorandum reported that in a period of less than two years, approximately 500 enforcement cases were adversely affected due to unclear jurisdictional requirements following the Supreme Court decisions.[334] The memo breaks down the missed opportunities to 304 instances where enforcement of CWA violations were not pursued because of jurisdictional uncertainty, 147 instances where the enforcement priority of a case was lowered because of jurisdictional concerns, and 61 cases where a lack of CWA jurisdiction was asserted as an affirmative defense in an enforcement proceeding.[335] It is clear that uncertainty surrounding "waters of the United States" jurisdictional determinations is suppressing enforcement of the CWA.

The EPA memorandum also states that the biggest burden to enforcement, post-*Rapanos*, is the presumption that intermittent and ephemeral tributaries to traditionally navigable waters and headwater wetlands are non-jurisdictional.[336] That presumption can only be overcome by a "significant nexus" analysis, which takes a considerable amount of resources.[337] For example, in order to make a jurisdictional determination, a large sum of money must be spent to model flow and conduct field investigations.[338] This added expense is impeding the Agencies' ability to enforce CWA requirements and protect vulnerable streams and wetlands.

In 2009, the EPA Inspector General reported that *Rapanos* created considerable uncertainty for the Corps' permitting program and EPA's compliance and enforcement actions.[339] Jurisdictional issues, analytical and data needs, and vague key terms such as "traditional navigable waters" and "adjacency" hindered their work.[340] The report also discovered that many EPA regional offices are struggling with the fact that *Rapanos* has raised the bar on establishing CWA jurisdiction and, as a result, more resources and time

[334] Memorandum from Granta Nakayama, EPA Assistant Adm'r for Enforcement and Compliance Assurance to Benjamin Grumbles, EPA Assistant Adm'r for Water, OECA's Comments on the June 6, 2007 Memo, Clean Water Act Jurisdiction Flowing the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* 2 (March 4, 2008), available at http://www.eenews.net/assets/2012/04/18/document_gw_01.pdf.
[335] *Id*.
[336] *Id*.
[337] *Id*.
[338] *Id*.
[339] U.S. EPA, Office of Inspector General, NO.09-N-0149, Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation (April 30, 2009), available at http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf.
[340] *Id*. at 1.

are required to put together a strong case for the Department of Justice ("DOJ").[341] Even if the EPA regional office can find jurisdiction without a significant nexus determination, the DOJ often requests one anyway because, in light of *Rapanos*, they feel they need it to support their case.[342] As regional offices expend limited resources to test the presence of a "significant nexus," enforcement declines and puts our rivers, wetlands, streams, and lakes, and the communities that rely upon them, at risk.

Many of the problems cited above will be addressed through a definition of "waters of the United States" that restores Congress' original intent. The Economic Analysis of Proposed Revised Definition of Waters of the United States asserts that government programs are going to benefit from the avoided cost of case specific jurisdiction evaluations.[343] The permitting process will be improved with more consistency, predictability, and timeliness.[344] The proposed rule will also aid in comprehensive enforcement which will lead to better compliance due to better certainty in what is a "water of the United States," and what is not. While the estimated cost of implementing the proposed rule is $162 to $278 million dollars, EPA calculates that this will be far outweighed by $338 to $514 million in likely benefits.[345] These numbers, while taking into account the economic benefits such as government savings on enforcement and savings from reduced uncertainty, do not fully capture the importance of the provision of clean water. We believe that the overall impact that the rule will have on our environment is something that is invaluable. (p. 8-11)

Agency Response: The agencies agree that the rule will result in the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. Preamble, II. The agencies agree that the benefits of the rule exceed the costs. Preamble, V and Economic Assessment in the docket.

Sierra Club (Doc. #15446)

10.236 With regard to the science, we believe it is unassailable. The term "connectivity" in the scientific report clearly comports with Justice Kennedy's "significant nexus" requirement in *Rapanos*. Because there was no majority opinion in *Rapanos*, Justice Kennedy's concurring opinion was the controlling opinion. See, *Graham v. Florida*, 560 U.S. 48, 59-60, 130 S.Ct 2011, 2021-22 (2010); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 9990 (1977). (p. 1-2)

Agency Response: The agencies agree that the rule is consistent with caselaw. Technical Support Document, I.C.

[341] *Id*. at 2.
[342] *Id*. at 6.
[343] U.S. Environmental Protection Agency and Army Corps of Engineers, Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014), available at http://www2.epa.gov/sites/production/files//2014-03/documents/wus_proposed_rule_economic_analysis.pdf.
[344] *Id*. at 10.
[345] *Id*. at 44, exhibit 28.

Southeastern Legal Foundation, Inc. (Doc. #16592)

10.237 Under the CW A, federal jurisdiction extends to "navigable waters," defined in the statute as "waters of the United States, including the territorial seas."[346] Certain categories of WOTUS, including waters which are navigable-in-fact, the territorial seas, and interstate waters and interstate wetlands (collectively referred to as "Traditional Waters"), are unquestionably jurisdictional. The limits beyond Traditional Waters, however, of what is and is not a WOTUS, have been at issue for decades. Three Supreme Court cases over the last thirty years have addressed this issue head-on. In addition, Congress has been presented numerous opportunities to weigh in on the definition of WOTUS by expanding federal jurisdiction, but in all instances has declined to do so. While there may be debate about the legal line separating jurisdictional from non-jurisdictional waters, Supreme Court precedent makes it crystal clear that, wherever that line may lie, it is well shy of the jurisdiction-expanding boundary drawn by the Agencies' Proposed Rule.

To understand the legal background against which the Proposed Rule was drafted, it is critical to focus on the Supreme Court precedent addressing WOTUS. The first case to address WOTUS was *United States v. Riverside Bayview Homes, Inc*.[347] In *Riverside*, the Court was asked to determine whether a wetland that "was adjacent to [Traditional Waters]" was a WOTUS.[348]

Finding that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which water ends and land begins," the Court held that WOTUS included wetlands "inseparably bound up with" and "actually abut[ting] [Traditional Waters]."[349]

Although the Riverside decision dealt with the understandable difficulty of line drawing in a gradual change from water to land, the Agencies seized upon the decision to launch an expansion of their authority. As part of this new effort, the Corps introduced the "Migratory Bird Rule" in 1986 to "clarify" the reach of its jurisdiction.[350] Under the Migratory Bird Rule, the Corps could extend jurisdiction to any intra-state waters "[w]hich are or would be used as habitat" by migratory birds. The Supreme Court addressed both isolated wetlands and the Migratory Bird Rule *in Solid Waste Agency v. United States Army Corps of Engineers*, the second Supreme Court case to assist in defining the boundaries of WOTUS.[351] In *SWANCC*, the Court held "nonnavigable, isolated, intrastate waters" were not jurisdictional based solely on the presence of migratory birds.[352] The Court based this decision on the plain text of the Clean Water Act, holding that whatever Congress might have intended it could not possibly include isolated pothole ponds as "navigable" waters.[353] Although not basing its holding on the point, the Court also stated that any other interpretation would raise serious constitutional

[346] CWA at 502(7).
[347] 474 U.S. 121 (1985) (*Riverside*).
[348] *Id*. At 131.
[349] *Id*. At 135, 137.
[350] 51 Fed. Reg. 41, 217.
[351] 531 U.S. 159 (2001) (SWANCC).
[352] *Id*. At 171.
[353] *Id*. At 174.

questions.[354] Notably, the *SWANCC* Court held that Riverside did not establish "that the jurisdiction of the Corps extends to ponds that are not adjacent to open waters."[355] In addition, for the first time, as discussed in more detail below, the *SWANCC* Court introduced the term "significant nexus" into the WOTUS parlance. When referencing its decision in Riverside, the *SWANCC* Court stated "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in [Riverside]."[356]

With their authority smartly cuffed, one might think the Agencies would relent on further assertions of expansive power. Not so. The third Supreme Court case to discuss the definition of WOTUS, *Rapanos v. United States Army Corps of Engineers*, is the main reason for the Proposed Rule.[357] Like the *SWANCC* Court before it, the *Rapanos* court also invalidated the Corps' assertion of jurisdiction over wetlands. *Rapanos* involved the consolidation of two separate cases based on similar fact patterns and a similar issue: whether wetlands situated a great distance from Traditional Waters that drain through several features before eventually reaching Traditional Waters are jurisdictional. In a 4-1-4 plurality opinion, five justices (the four justices joining the plurality opinion issued by Justice Scalia and Justice Kennedy in his concurrence) held that the Corps' hydrologic connection theory of jurisdiction was impermissible. Looking back on its decision in *Rapanos*, the Supreme Court subsequently stated "we considered whether a wetland not adjacent to [Traditional Waters] fell within the scope of the [CWA]. Our answer was no, ... "[358] The *Rapanos* plurality held that WOTUS "cannot bear the expansive meaning that the Corps would give it."[359] In addition,"[w]etlands with only an intermittent, physically remote hydrologic connection to [WOTUS] .... lack the necessary connection" to be considered jurisdictional.[360] Similarly, Justice Kennedy's concurrence found that "[t]he Corps' theory of jurisdiction in these consolidated cases - adjacency to tributaries however remote and insubstantial - raises concerns that go beyond the holding of *Riverside* ... , and so the Corps' assertion of jurisdiction cannot rest on that case."[361] And, directly relevant to the Proposed Rule, "[m]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydro logic linkage to establish the required nexus with [Traditional Water]."[362] The Court vacated the Sixth Circuit's ruling upholding the Corps' jurisdiction over the wetlands.

[354] *Id*. at 162, 174. "There are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here."
[355] *Id*. at 168. While the term "open waters" is not defined, there is reason to believe that open waters is co-existent with Traditional Waters. See, e.g., *Kaiser Aetna v. US*, 444 U.S. 164, 190 (1979) (the Maunaloa Bay, a Traditional Water, is an "open water"); *Kotch v. Board of River Pilot Comm 'rs*, 330 U.S. 552, 558 (1947) (pilots move ships from "open waters" to local waters).
[356] *SWANCC*, 531 U.S. at 167.
[357] 547 U.S. 715 (2006).
[358] *Sackett v. Environmental Protection Agency*, 123 S. Ct. 1367, 1370 (2012).
[359] *Rapanos*, 547 U.S. at 732.
[360] *Id*. at 742.
[361] *Id*.at 780.
[362] *Id*. at 784-85.

Despite reaching a majority to strike down the Corps' hydrologic connection theory, the Court could not reach a majority regarding the proper test for CWA jurisdiction. The plurality held that the "only plausible interpretation" of WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water. .. that are described in ordinary parlance as streams, oceans, rivers and lakes."[363] Specific to wetlands, the plurality held that "only those wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between 'waters' and wetlands" are covered by the CWA.[364]

Justice Kennedy's test took a different approach. Seizing on the term "significant nexus" as first used in *SWANCC* to explain the relationship between wetlands physically abutting Traditional Waters in *Riverside,* Justice Kennedy held that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and [Traditional Waters]."[365]

As discussed in more detail below, the Proposed Rule fails under both branches of *Rapanos*. First, the Proposed Rule not only ignores the standard articulated by the plurality, it includes a scope of jurisdiction that the plurality described as "beyond parody."[366] Second, the Proposed Rule misapplies Justice Kennedy's concurring opinion and his "significant nexus" test even while professing to rely on it. What the Proposed Rule does, once again, is to take a legal standard constructed to limit and restrain the government's authority, turned it on its head, and taken the standard as license for even greater jurisdiction.

SLF submits that in light of the legal framework applicable to CWA jurisdiction, and the repeated rebuke of the Agencies by the Court, there is no apparent way to rehabilitate the Proposed Rule and the only sensible course of action is to withdraw it in its entirety and start over. Out of an abundance of caution, however, SLF also submits the following comments on the deficiencies with the Proposed Rule. (p. 3-8)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

Competitive Enterprise Institute (Doc. #15127)

10.238 The Proposed Rule exceeds the Agencies' statutory authority under the Clean Water Act. The proposed rule continues "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute." *Rapanos*, 547 U.S. at 722 (plurality opinion). The proposed rule adopts a view

[363] *Id*. at 739. (internal quotations omitted).
[364] *Id*. at 740 (emphasis in original).
[365] *Id*. at 811.
[366] By calling an "ephemeral stream" a WOTUS, "the Corps has stretched the term [WOTUS] beyond parody." *Id.* at 734. "The plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Id*. Yet, the Proposed Rule provides that "ephemeral tributaries, including dry-land systems in the arid and semi-arid west" can be jurisdictional. Fed. Reg. at 22,202. See also "The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water..." Fed. Reg. at 22,201.

of the Agencies' jurisdiction that is, as the plurality opinion in *Rapanos* described, basically unbounded:

> The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States." *Id*.

Accordingly, the proposed rule exceeds the limits of the Agencies' statutory jurisdiction for the reasons stated in the plurality opinion. "'[T]he waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id*. at 732–33 (footnote and citation omitted). Yet the proposed rule sweeps up so called "tributaries" that are, at most, the sites of ephemeral and intermittent flows. Likewise, it sweeps up sites that lack even ephemeral or intermittent flows merely because they are within the "region" of actual bodies of water. The Agencies, however, lack the statutory authority to assert jurisdiction over "transitory puddles or ephemeral flows of water," much less land that lacks even those water features. *Id*. at 733. Accordingly, the proposed rule is *ultra vires*.

As the plurality opinion explains, this broad assertion of jurisdiction also directly conflicts with the CWA's definition of "point source." See *id*. at 735–36. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act also defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." §1362(12)(A). Thus, "point sources" and "navigable waters" must comprise, under ordinary principles of statutory interpretation, separate and distinct categories. Yet the proposed rule depends on a reading of "navigable waters" that encompasses all or nearly all point sources. Because that reading is precluded by the statutory text's separation of "navigable waters" and "point sources," the proposed rule is *ultra vires.*

Were there any doubt regarding these statutory questions, it is resolved by the CWA's statement that it is "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and

enhancement) of land and water resources . . . .” § 1251(b). The Agencies’ broad reading of “waters of the United States” to assert control over the development and use of land in entire watershed “regions” is flatly inconsistent with the Act’s stated policy and therefore must be rejected. That, in turn, renders the proposed rule *ultra vires*. (p. 8-9)

The Proposed Rule violates even the broadest reading of *Rapanos*. *Rapanos* has no single controlling opinion. Rather, the majority was split between a four-Justice plurality authored by Justice Scalia and a special concurrence (i.e., concurring in the judgment only) by Justice Kennedy.

Both the four-Justice plurality and Justice Kennedy’s concurrence agree that the terms “navigable waters” and “waters of the United States” in the CWA encompass more than waters that are either navigable in fact or potentially navigable. *Rapanos* at 730–31, 767. They diverge, however, when it comes to determining which non-navigable waters fall under the definition of “the waters of the United States.” As described above, the plurality opinion correctly states a practically administrable test based on the physical characteristics of the bodies of water in question.

By contrast, Justice Kennedy’s concurrence introduces a “significant nexus” test for CWA jurisdiction. This test, he writes, should to be used to determine which non-navigablein- fact waters fall under the definition of “waters of the United States.” Noting that “Congress enacted the law to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,’” Justice Kennedy concludes that Congress gave the Agencies authority over both the nation’s waters and those areas that are critical to the integrity of the nation’s waters. *Id*. at 779 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a)). He insists that the Agencies demonstrate that any non-navigable waters they seek to regulate have a significant hydrologic connection, or “significant nexus,” to the nation’s navigable waters.

Obvious though it may be, it bears emphasizing: the “significant nexus” test Justice Kennedy proposes requires that the nexus be, well, significant. To regulate waters beyond those immediately adjacent to the nation’s waters, the Agencies must demonstrate a hydrologic nexus that is more than “speculative or insubstantial.” *Id*. at 780 (Kennedy, J., concurring). “Given the potential overbreadth of the [Agencies’] regulations, this showing is necessary to avoid unreasonable applications of the statute.” *Id*. at 782 (Kennedy, J., concurring). As a consequence, Justice Kennedy’s test would preclude the Agencies from “regulat[ing] drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *Id*. at 780–81 (Kennedy, J., concurring).

The EPA has taken the official position that both the four-Justice plurality and Justice Kennedy’s concurrence form the controlling legal test in *Rapanos*. Envtl. Prot. Agency, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*, at 3 (Dec. 2, 2008), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (last visited Nov. 12, 2014). In other words, in the agency’s view, “regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.” *Id*.

The proposed rule, however, scrupulously avoids stating which opinion (or opinions) the Agencies believe to be controlling. At the least, the Agencies appear to have adopted the position that the entirety of Justice Kennedy's concurrence may be relied upon because it received the support of "a majority of justices in *Rapanos*." 79 Fed. Reg. at 22,260. But the "*Marks* Rule," provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). There is no basis to describe the entirety of Justice Kennedy's concurrence as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id*. Instead, under proper application of Marks, "the concurring opinion of Justice Kennedy, and the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court." Hearing Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Environment and Public Works, 109th Cong. 4 (2006) (written 10 statement of Jonathan H. Adler), available at http://epw.senate.gov/109th/Adler_Testimony.pdf. This means, in general, that mere "adjacency to a nonnavigable tributary by itself will not be enough to establish jurisdiction." *Id*. at 5. It also means that "tributaries" cannot be interpreted to "allow[] for the assertion of jurisdiction with little regard for the actual connections between a given ditch, swale, gully, or channel with actual navigable waters." *Id*. The proposed rule violates these principles, particularly in its expansion of per se jurisdiction.

In relying on the entirety of Justice Kennedy's opinion, the Agencies appear to count the "votes" and give weight to the reasoning of the Court's dissenting members. But justices who decline to join the Court's holding regarding the resolution of an issue in a case do not shape that holding—a dissent or concurrence (as opposed to a special concurrence), after all, carries no precedential weight. Instead, as *Marks* holds, it is only the positions of "those Members who concurred in the judgments" that are relevant. 430 U.S. at 193 (emphasis added). Accordingly, *Rapanos* must be interpreted only on the basis of the plurality opinion and Justice Kennedy's special concurrence, not on the basis of a prediction about the way that the dissenting justices may vote in some hypothetical future case. In other words, the Agencies may not assume that they may justify their actions under either opinion; instead, they must accept, at the least, that the kinds of assertions of jurisdiction rejected in *Rapanos* are off limits to them. And to be on legal terra firma, they should justify their assertion of authority under both the plurality's approach and Justice Kennedy's.

This dispute is far from academic because central features of the proposed rule could only be supported under Justice Kennedy's concurrence. For example, the proposed definition of "tributaries" is undoubtedly irreconcilable with the plurality opinion, for the plurality made clear that "tributaries" are not themselves "waters of the United States." *Rapanos*, 547 U.S. at 743–45 (arguing that tributaries can be "point sources" conveying pollution at the place where they enter "waters of the United States," but not "waters of the United States" themselves). Justice Kennedy's concurrence, on the other hand, finds that some "tributaries" can potentially be "waters of the United States," even though earlier definitions of "tributaries" fail the "significant nexus" test. *Id*. at 781–82 (Kennedy, J., concurring).

Yet other features of the proposed rule could only, or more easily, be justified under the plurality's approach. One example is an aspect of the proposed definition of "adjacent." Because the plurality opinion does not require a "significant nexus" showing, only surface connection, it may allow regulation of "wetlands (however remote) possessing a surfacewater connection with a continuously flowing stream (however small)." *Id*. at 776 (Kennedy, J., concurring). The plurality opinion may therefore support the "confined surface hydrologic connection" part of the new "neighboring" definition, while Justice Kennedy's approach would seem to require specific showings that the "per se" nature of the proposed rule does not.

In sum, only by cobbling together the aspects of each *Rapanos* opinion that they favor can the Agencies find even arguable legal support for all aspects of their proposal. But agencies do not get to pick and choose from among competing and irreconcilable legal approaches. Because the proposed rule cannot be supported under one or the other interpretative approach in *Rapanos*—much less the common ground between the two—it is *ultra vires*.

Even if a court were to adopt the Agencies' implicit position that the four-Justice plurality and Justice Kennedy's concurrence together form the controlling *Rapanos* test—that is, that an assertion of jurisdiction that satisfies either standard is permissible—the proposed 12 rule would still fail. The proposed rule, with its expansive definitions of tributaries and adjacency, and its regional "other waters" analysis, covers numerous bodies of water and swaths of land that cannot be justified under either the four-Justice plurality opinion or Justice Kennedy's concurrence. As such, the proposal exceeds the Agencies' statutory authority under the Clean Water Act.

The proposed rule encompasses areas possessing neither "relatively permanent, standing or flowing bodies of water" with a "continuous surface connection" to navigable waters, nor a "significant nexus" to "waters that are or were navigable in fact or that could reasonably be made so." *Rapanos*, 547 U.S. at 732, 757, 759. For example, a per se rule recognizing tributaries as "waters of the United States" is not permitted under the plurality opinion, because the plurality requires a showing that the tributary actually conveys pollution at the point it reaches the navigable waters. *Id*. at 743 (plurality opinion). And the per se rule would also not be permitted by Justice Kennedy's concurrence, because it captures "streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id*. at 781 (Kennedy, J., concurring).

The proposed definitions of "adjacency" and "other waters" also violate even the most generous reading of *Rapanos*. "Adjacency" with its "riparian area" and "floodplain" categories, and "other waters" with its regional analysis, each encompass land and waters not at all bordering proper "waters of the United States," much less possessing a "continuous surface connection." *Id*. at 757. They thus cannot be justified under the plurality opinion. And they also violate Justice Kennedy's concurrence. Given that the concurrence expressed grave doubts about previous efforts by the Agencies, using the narrower definition of "adjacency," to regulate "wetlands adjacent to tributaries . . . little more related to navigable- in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC," it is inconceivable that the concurrence can be reconciled with a definition of adjacency that includes all waters in "riparian areas." *Id*. at 781–82 (Kennedy, J., concurring).

Nor does Justice Kennedy's concurrence support the proposed rule's "in the region" analysis. It does not directly answer that question because it was "neither raised by these facts nor addressed by any agency regulation." *Id*. at 782 (Kennedy, J., concurring). But Justice Kennedy does suggest that this approach is impermissible. Justice Kennedy would require the Corps to establish that wetlands adjacent to nonnavigable tributaries "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780 (Kennedy, J., concurring). By contrast, the proposed rule allows the agencies to presume that this is the case, without making any specific determination. Accordingly, this approach cannot be supported by Justice Kennedy's reasoning.

In sum, even if the Agencies are correct that they may rely on either of the two opinions that comprise the *Rapanos* majority, their proposed rule is still *ultra vires* because central aspects of it fail to satisfy either standard. (p. 10-15)

Agency Response: **The rule is consistent with the statute, case law, and the Constitution. Technical Support Document, I.A., B., and C. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.**

10.239 In the background of the Court's decisions in *Rapanos* and *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), is the question of the extent of Congress's regulatory authority under the Commerce Clause. In both cases, the Court interpreted the CWA so as to avoid reaching this constitutional question. But the broad reach of the proposed rule—which purports to assert federal regulatory authority over development adjacent to "tributaries" that are dry and on lands that are merely in the "region" of actual waters—not only exceeds the Agencies' statutory authority but also relies on an interpretation of the Act that exceeds Congress's Commerce Clause authority.

In *SWANCC*, the government sought to defend the Corps' "Migratory Bird Rule," which asserted CWA jurisdiction over intrastate waters that provide habitat for migratory birds, on the basis that "the protection of migratory birds is a 'national interest of very nearly the first magnitude'" due to the amount of money spent on bird-related recreation and therefore well within "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." 531 U.S. at 173. The Court, however, had its doubts: "For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear . . . ." *Id*. As it explained, "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *Id*. at 174. Whether or not it was within Congress's power to so impinge on the States' traditional authority, the Court assumed that Congress would have made some "clear statement" "expressing a desire to readjust the federal- state balance in this manner" before undertaking an action so fraught

with constitutional doubt. *Id*. Accordingly, it "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation." *Id*.

Likewise, the plurality in *Rapanos* recognized that "[r]egulation of land use, as through the issuance of the development permits . . ., is a quintessential state and local power" and that "[t]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land." 547 U.S. at 738. It too applied the avoidance canon, reasoning that it would "ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id*. To do otherwise would force the Court to confront "difficult questions about the ultimate scope of [Congress's commerce] power." *Id*.

Presumably a federal court could and would apply the same avoidance canon and clear statement rule in rejecting the interpretation set forth in the proposed rule. But that does not mean, of course, that the Agencies' interpretation can be supported under the Constitution— to the contrary, the application of the avoidance canon in both *SWANCC* and *Rapanos* suggests substantial doubt on that score, which is confirmed by application of basic Commerce Clause principles.

In particular, the Supreme Court has "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). The assertion of federal authority to regulate basic land-use requirements in entire regions of 15 the nation—and perhaps the entire region, if the Agencies' approach is carried out to its logical end—"would erode those limits, permitting Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'" *NFIB v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) (quoting The Federalist No. 48, at 309 (J. Madison)). For that reason alone, the Agencies' interpretation must be rejected.

More specifically, the Agencies' interpretation cannot be supported as a regulation of activities "substantially related" to interstate commerce. The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power": Congress may regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce," and "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (citations omitted). The regulation of land and water resources that does not involve navigable waterways, if it is within Congress's authority at all, would have to fit within the third category.

But the Court's decisions in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), prohibit the federal government from regulating noneconomic intrastate activities that have only an attenuated connection to interstate commerce. As in *Lopez*, the statute at issue here "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. As relevant, the CWA prohibits discharges into "the waters of the United States" without a permit issued by the federal government. This prohibition, as with the firearm-possession statute in *Lopez* and the civil remedy for the victims of gender-motivated violence in *Morrison*, does not directly regulate commercial activity. While a property owner may certainly hire a contractor to apply fill to a portion of his

property, the prohibition does not address that commercial transaction and applies equally to the property owner doing the work himself—or, for that matter, to a toddler with a bucket and shovel tossing dirt into a puddle. The CWA also lacks an express "jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." *Id*. Thus, the prohibition itself is not a regulation of economic activity. "[T]hus far in our Nation's history [the Supreme Court's] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. On that basis, a court would be constrained to reject the Agencies' interpretation of the CWA as exceeding Congress's Commerce Clause power.

Legislative history likewise provides no support for the argument that Congress considered "the effects upon interstate commerce" of the CWA's prohibitions. See *Lopez*, 514 U.S. at 562–63. Indeed, the Supreme Court considered and rejected in SWANCC the argument "that Congress intended to exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3.

In sum, the Agencies' interpretation must be rejected because it "would effectually obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557 (internal quotation marks omitted). (p. 15-18)

The proposed rule is a thinly veiled attempt by the Agencies to undermine democratically enacted state and local laws and policies. If finalized, the rule will replace the judgments of those most knowledgeable of local needs—who also happen to be those most directly burdened by clean water regulations—with the wishes and desires of federal bureaucrats. Such a usurpation of states' rights violates the CWA's scheme of cooperative federalism and thus the CWA itself.

The Agencies claim that the proposed rule "[h]elps states protect their waters." United States Environmental Protection Agency, Waters of the United States, available at http://www2.epa.gov/uswaters. (last visited Nov. 12, 2014). But by "states," the Agencies mean their state-level bureaucratic counterparts. And the "help" the Agencies think States need is help circumventing democratically enacted statutory limitations on the state bureaucrats' discretion. Indeed, one need look no further than the title of the source the Agencies cite to see their true intentions: State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act (Environmental Law Institute, May 2013), available at http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf (last visited Nov. 12, 2014) ("State Constraints").

Examining the "state-imposed limitations" that the Agencies find so troubling is revealing. These limitations, as the State Constraints report chronicles, come in two forms: "no more stringent than" laws and private property-rights laws. "No more stringent than" laws are "laws or policies that limit the authority of state agencies to protect waters more stringently than would otherwise be required under the federal Clean Water Act." *State Constraints*, at 11. Evidently twenty-eight States have determined that federal clean water regulations as they exist without the Agencies' attempt at jurisdictional expansion are sufficient— or, indeed, more than sufficient—to protect their waters, and have adopted "no more stringent than" laws. *Id*.

Laws protecting rights to private property, the existence of which the Agencies also seem to regret, are "legal protections, often in the form of 'private property rights acts,' for the benefit of property owners whose rights are affected by state government action—often including local government action." *Id*. at 20. The principal form such laws take is "assessment provisions," which "require state government officials to assess their actions for potential constitutional takings implications, or for other impacts on private property rights." *Id*. at 24. The other predominant form of laws protecting rights to private property is "compensation/ prohibition" provisions, which "require[] state agencies to pay certain private property owners who successfully claim that government regulation has resulted in a devaluation of their property." *Id*. at 21. All told, twenty-two States have adopted property-based limitations on the authority of regulatory agencies, often through voter ballot initiatives.

The Agencies, deeming bureaucratic discretion superior to the express will of the democratic populous, are proposing this rule to supplant such state and local laws. As shown below, that runs contrary to the policies that Congress sought to further in enacting the CWA.

The opening section of the CWA in which Congress specifies the statute's goals and purposes clearly adopts a scheme that respects the rights of States. "It is the policy of the Congress," the CWA declares, "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…" 33 U.S.C. § 1251(b). Congress then goes on to order that "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution…" 33 U.S.C. § 1251(g). Yet despite these explicit articulations of congressional purpose, the Agencies have chosen to adopt an approach that is decidedly un-cooperative.

Rather than impose top-down regulation, the Agencies should respect the water management policies adopted by those who have the "primary responsibilities and rights" to make such determinations. (p. 18-20)

Agency Response: **The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C. The Supreme Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. Technical Support Document, IV.**

10.240 Expanding the Agencies' jurisdiction over our country's waters has grave consequences for individuals' liberty and right to property. As the Supreme Court has observed, the Agencies exercise their authority to grant permits under the CWA with "the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'" *Rapanos*, 547 U.S. at 721 (plurality opinion) (quoting 33 C.F.R. § 320.4(a)). Successfully navigating the bureaucratic process to receive such a permit can be expensive and time consuming—"[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Id*. All the while, one risks coming out empty handed, unable to satisfy the economic judgments or aesthetic tastes of the Agencies' officials. Even a brief

survey of recent CWA cases demonstrates that widening the scope of the Agencies' jurisdiction imperils individual liberty and rights to property.

The Agencies are quite clear that they consider rights to property an obstacle to their regulatory pretensions. The State Constraints report commissioned by the Agencies and cited to justify the proposed rule describes rights to property as "set[ting] up a series of hurdles" to regulation. State Constraints, at 30. More troubling still, the report warns that property-based limitations can create "additional political scrutiny [of agency discretion] that could call into dispute the agency's scientific judgments." *Id*. Such obstacles and public oversight, the report concludes, create a "gap" that the federal government needs to fill. *Id*. at 5.

So what problems, exactly, do the Agencies have with rights to property? For one, laws that prevent individuals qua individuals from bearing rightfully public burdens "limit some forms of new environmental regulation, as state agencies cannot afford to pay owners as a condition of having their regulations enforced." *State Constraints*, at 20–21. Other laws protecting rights to property, such as assessment requirements, "create additional processes for an agency to follow when a proposed regulation is likely to affect private property rights." *Id*. at 21. Still others "enhance property owners' ability to contest state regulation affecting their property." *Id*. In short, it would seem that the Agencies' grievances with rights to property boil down to the fact that those rights are a check on the Agencies' unfettered authority.

But rights to property are essential to—indeed, coextensive with—liberty and freedom precisely because they provide the check on governments that the Agencies so lament. It was in recognition of the important role property has in preserving our freedoms that the Founders to saw fit to ratify the Fifth Amendment, providing that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Agencies' proposed rule is antithetical to this fundamental, natural right, and must accordingly be rejected.

CWA compliance imposes a massive burden on property owners, and interacting with the Agencies in the exercise of their CWA can be a costly and dangerous undertaking. After all, they have as an enforcement mechanism the threat of "a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." 33 U.S.C. § 1319(c)(2)(B). But just how burdensome the Agencies' enforcement regime is does not come into focus until one considers concrete examples. Lois Alt, the owner of Eight Is Enough Farm in Old Fields, West Virginia, has been engaged in a lengthy legal battle with the EPA. Ms. Alt owns "eight poultry confinement houses equipped with ventilation fans, a litter storage shed, a compost shed and feed storage bins." However, she violated the CWA when "[p]recipitation [fell] on Ms. Alt's farmyard, where it contacted the particles, dust and feathers from the confinement houses, creating runoff that carried such particles, dust and feathers across a neighboring grassy pasture and into Mudlick Run, a water of the United States." *Alt v. EPA*, 979 F. Supp. 2d 701, 704 (N.D. W. Va. 2013). Because Ms. Alt did not have a permit for such discharges, the "EPA said that it could bring a civil action against Ms. Alt for this violation, in which case Ms. Alt 'will be subject to civil penalties of up to $37,500 per day of violation'" and further that "a criminal action could be initiated." *Id*. at 705.

Or one could discuss the case of David Hamilton in Worland, Wyoming, who wanted to grow crops on part of his property. To free up space, he diverted a "meandering" creek on his property into "a new, straightened channel," also on his property, without an EPA 21 permit. *United States v. Hamilton*, 952 F. Supp. 2d 1271, 1272 (D. Wyo. 2013). Diverting the creek, it turned out, constituted discharging a pollutant from a point source under the CWA, so the EPA ordered Hamilton to "remove the fill material from Slick Creek and restore it to its previous condition" at his own expense. *Id*.

Application of CWA procedures recently prompted a unanimous rebuke from the Supreme Court in the *Sackett* case. For filling in part of their residential lot near a lake with rock and sand in preparation for building a home, the Sackett family found themselves in the undesirable position of facing potentially $75,000-a-day in EPA fines for violating the CWA. *Sackett*, 132 S. Ct. at 1372. When the Sacketts asked for a hearing to challenge the EPA's finding that their land is covered by the term "waters of the United States"—land, it should be noted, that was separated from the nearby lake by several other lots "containing permanent structures"—the EPA refused their request. *Id*. at 1370-71. It was only by taking their case to the Supreme Court that the Sacketts were ultimately able to vindicate their right simply to challenge the EPA determination in court.

Broad CWA jurisdiction can also pose a trap for the unwary. For example, James Wilson, a developer in Maryland, worked in partnership with the United States Department of Housing and Urban Development to build a development that included 10,000 housing units, parks, and schools. *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997). On three of the parcels in the 4,000 acre development, Mr. Wilson had ditches dug so he could build on them. Even though Mr. Wilson worked with the federal government, and the Army Corps authored a memorandum stating that it is "not clear" the land was a "water of the United States," he was eventually convicted on four felony counts for knowingly violating the CWA. *Id*. at 255. His conviction was overturned on appeal.

As these cases and countless others illustrate, the Agencies often exercise their regulatory muscles arbitrarily and to the detriment of individual liberty. Because the Agencies have such severe penalties at their disposal, and inadequate judicial checks on their discretion, the Agencies' jurisdiction should be limited, not expanded. The Agencies' proposal not only moves policy in the wrong direction, it also fails to adequately consider the impact of expanded CWA jurisdiction on rights to property and fails to consider the burden that its approach would impose on property owners. (p. 20-14)

Agency Response: **This rule does not constitute a taking of private property in violation of the Fifth Amendment. Technical Support Document, I.C. The rule does not shift the burden of proof to the regulated community; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.**

Citizen's Advisory Commission on Federal Areas, State of Alaska(Doc. #16414)

10.241 The proposed rule relies on Justice Kennedy's "significant nexus" test as the prevailing legal consensus on jurisdiction under CW A §404. However, there is no consensus on

whether Justice Kennedy's concurrence in *Rapanos v. United States*, where his test is outlined,[367] represents a working rule. When a plurality opinion issues, the holding is generally confined to whatever position is taken by the majority of justices "on the narrowest grounds."[368] However, as Chief Justice Roberts implies in his concurrence,[369] application of the narrowest grounds doctrine is challenging with the breakdown of opinions issued in *Rapanos*. For instance, where federal jurisdiction is found using the *Rapanos* plurality's test, all nine justices could agree. Conversely, where the significant nexus test determines an area is nonjurisdictional, it is possible only one justice would agree,[370] since the dissent argued in favor of whichever test sustained jurisdiction.[371] In any event, a comprehensive application of *Rapanos* has to be about more than polling justices, or endowing a single justice's opinion with the full force of law. While markedly split on a jurisdictional test, the justices appears to agree on some key points:

- The qualifier "navigable" matters, even though the CW A gives the federal government jurisdiction over waters that are not navigable in the traditional sense but which have a connection to waters which are.
- The CWA grants jurisdiction over wetlands which are immediately adjacent to traditional navigable waters with no discernible boundary between them.
- The current standard for tributaries (having an ordinary high water mark and leading to traditional navigable waters or other tributaries) does not automatically grant jurisdiction over the wetlands adjacent to them.
- Hydrological connection is not dispositive; quantity and regularity of flow matter.
- CW A jurisdiction exists even for water bodies that experience a dry season, unless the wet season is speculative.
- Limitations on the extent of jurisdiction are necessary to avoid serious constitutional and/or federalism difficulties.

These consensus points provide significantly more defensible guideposts than indiscriminate adoption of Justice Kennedy's *Rapanos* concurrence. More than that, however, the proposed rule's interpretation of its significant nexus test is inconsistent with the precedent it purports to clarify in its refined definition of WOTUS, including *Rapanos* but, in particular, the prior decisions in *United States v. Riverside Bayview Homes, Inc.*,[372] and *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[373] (*SWANCC*) which established the test. These Court's holdings in those cases were not overruled in Rapanos, and the proposed rule's interpretation of the significant nexus test must be just as (or even more) consistent with them.

[367] 126 S. Ct. at2241.
[368] *Marks v. United States*, 430 U.S. 188, 193 (1977).
[369] *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).
[370] *Cf* 79 Fed. Reg. at 22, 192 (arguing the four dissenting justices would affirm blanket application of the significant nexus test).
[371] *Rapanos*, 126 S. Ct. at 2265 and n.14 (Stevens, J., dissenting). See also *United States v. Gerke Excavating, Inc*., 464 F.3d 723, 724- 25 (2006) (per curiam) (describing instances where the plurality's test, but not the significant nexus test, would be satisfied).
[372] 474 U.S. 121 (1985).
[373] 531 U.S. 159(2001).

As the *Rapanos* plurality notes, the idea of a "significant nexus" from *Riverside Bayview* was based on the circumstances of that case; more specifically, a wetland immediately adjacent to a navigable waterway, with no way to discern where the water in the wetland ends and the water in the navigable waterway begins, can be considered jurisdictional. The Court's significant nexus in *Riverside Bayview* was the wetland's obvious (not remotely hydrological) connection to the navigable-in-fact waters immediately adjacent to it.[374] The Court's significant nexus in *SWANCC* was also informed by an obvious adjacency to open water.[375] Justice Kennedy dismisses a "surface" connection as a baseline requirement, but he does not preclude its singular relevance in those cases. He simply adopts a more expansive (but still limited) "significant" connection with navigable waters. (p. 3-4)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A. and C, II.

10.242 The proposed rule, particularly the concept of jurisdiction-by-rule (per se jurisdiction), goes well beyond the significant nexus test described in *Rapanos* and established in prior case law. Justice Kennedy tied his significant nexus test in *Rapanos* to both *SWANCC* and *Riverside Bayview*[376], noting its flexibility to find jurisdiction beyond permanent waters with a surface connection to covered waters. This flexibility could account for specific instances where jurisdiction over a particular water body could be consistent with the intent of the CWA - specific instances he wanted the ACOE to be free to identify, as needed. Though it is never explicitly limited as such, the only possible approach consistent with Justice Kennedy's guidance would heavily favor, if not exclusively provide for, case-by-case determinations.

Only two observations by Justice Kennedy could arguably support a per se jurisdiction concept:

- "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."[377]
- "[A]n intermittent flow can constitute a stream ... while it is flowing. [citations omitted] It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams."[378]

The first example merely restates the holding *in Riverside Bayview* and adjacency findings would thus be limited to the circumstances presented in that case (immediately adjacent with no discernible boundary). The agencies cannot simply define "adjacent" to include things outside the scope of the CWA in order to use this statement as justification for per se jurisdiction. The second example restates an assumption in *Riverside Bayview* that Congress intended to include some non-navigable waters. In Justice Kennedy's view, the ACOE could find intermittent streams jurisdictional under this assumption; since they would be streams when flowing, it could be problematic to treat them differently

[374] See 474 U.S. at 134.
[375] See 531 U.S. at 168.
[376] *Id*. at 2240-41.
[377] *Id*. at 2249.
[378] *Id*. at 2243.

dependent on the presence or absence of water. And though he did not provide an explicit flow rate or temporal threshold for such a finding, the lack of such a threshold would be inconsistent with the law and his concurrence as a whole.[379]

Every other example Justice Kennedy provides of waters potentially covered by the CWA is qualified in some way to note possibility, not wholesale inevitability, and most contemplate some attached process of discerning whether a specific water body is jurisdictional. For example:

- "Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on 'waters,' that may not always be true."
- "The question is what circumstances pem1it a bog, swamp, or other nonnavigable wetland to constitute a 'navigable water' under the Act-as §1344(g)(l), if nothing else, indicates is sometimes possible."
- "As Riverside Bayview recognizes, the Corps' adjacency standard is reasonable in some of its applications."
- "It seems plausible that new or loose fill ... could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps' experts can better assess than can the plurality."
- "In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways."
- "[The existing standard for tributaries] may well provide a reasonable measure ofwhether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."
- "Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region."
- "Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty."
- "The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure."
- "[M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. A more specific inquiry, based on the significant nexus standard, is therefore necessary." [citations omitted]

[379] The proposed rule's esoteric reliance on a bed, bank and Ordinary High Water Mark fails to create a meaningful distinction.

The per se jurisdiction concept takes generic categories of water bodies where the text or intent of the CWA may support coverage and, instead, automatically grants coverage in all instances. Justice Kennedy's generic language, broad assumptions and apparent contemplation of further inquiry by the agencies demonstrably belies a blanket approach. Moreover, the approach dramatically shortchanges the diversity of wetlands and waters that exist nationwide, is a massive expansion of the existing regulations (regardless of the preamble's statement to the contrary) and undercuts any notions of federalism enshrined in the original legislation and subsequent case law. This is not a legal, or even palatable, exchange for the proposed rule's claim of added clarity and convenience, two things which can just as easily be provided by saying every pathway for and molecule of H20 in the United States is under federal jurisdiction.

In establishing his significant nexus test, Justice Kennedy bolstered any expansion on precedent with support, either explicit or implicit, from the CWA and congressional intent. He also demonstrated a concern for "unreasonable applications of the statute" in requiring the ACOE to "establish a significant nexus on a case-by-case basis" unless "more specific regulations" were developed.[380] The proposed rule does not include the specificity Justice Kennedy was after - in fact, it still contains "the potential overbreadth"[381] which concerned Justice Kennedy enough to require case-by-case determinations for adjacent wetlands.

Lastly, it bears mentioning that the *Rapanos* Court was only considering the definition of WOTUS found in the current regulations. The discussion is thereby limited to the terms outlined there - e.g., captioning undefined terms like "tributaries" and "adjacent wetlands." Nothing in the opinion, or other precedent, supports or lends credibility to the proposed rule's new and expanded definitions of "tributaries" and "adjacent wetlands." These new definitions appear to capitalize on the Court's limited discussion of these terms to see where expansion is possible consistent with those discussions, while ignoring the context under which they were developed. (p. 3-6)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A. and C.

Red River Valley Association (Doc. #16432)

10.243 Under CWA section 404(a), any person engaging in activities that result in the "discharge of dredged or fill material into the navigable waters" must obtain a permit from the Corps. The term "navigable waters" is defined broadly by statute to mean all "waters of the United States, including the territorial seas." In turn, the Corps has further defined this term by regulation to include: (1) waters currently used or used in the past for interstate of foreign commerce, including waters subject to the ebb and flow of the tide (i.e., traditional navigable waters); (2) interstate waters and wetlands; and (3) "other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce .... "

[380] *Id*. at 2249.
[381] *Id*.

This definition also includes "tributaries" of these waters, impoundments of these waters, and "wetlands adjacent to [these] waters."

The agencies' stated intent for issuing the Proposed Rule is to implement the U.S. Supreme Court's decisions in two noteworthy cases that address the scope of waters protected by the CWA: *Solid Waste Agency of Northem Cook County v. U.S. Army Corps of Eng'rs (SWANCC)* and *Rapanos v. United States (Rapanos)*. In *SWANCC*, the agencies attempted to use the Migratory Bird Rule to assert jurisdiction over a non-navigable, isolated, intrastate pond based on its use as a habitat for migratory birds. The Court ruled that jurisdiction does not extend to ponds that are not adjacent to open water where the only connection to navigable waters was the presence of migratory birds. The *SWANCC* court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could properly govern wetlands and other waters that were not themselves navigable. However, as the Court observed, "it is one thing to give a word limited effect and quite another to give it no effect whatever." In other words, water that is totally isolated from navigable waters is beyond the regulatory authority provided by Congress under the CWA.

In the *Rapanos* case, the Supreme Court addressed the question of whether CWA jurisdiction extends to wetlands not "adjacent" to navigable water. The Court's decision was essentially split three ways: a four member plurality opinion issued by Justice Scalia, a concurrence by Justice Kennedy, and a four-member dissent written by Justice Stevens. The Scalia plurality opinion found that "navigable waters" must be "relatively permanent, standing or continuously flowing bodies of water," which does not include intermittent streams and tributaries that empty into navigable waters. The Kennedy concurrence established a "significant nexus" test. Under this test, for a water or wetland to constitute "navigable waters," it must possess a "significant nexus" to waters that are or were navigable in fact (i.e., traditional navigable waters) or that reasonably could be so made. The Stevens dissent would have deferred to the Corps' exercise of regulatory jurisdiction.

The meaning and intent of *Rapanos* has been the subject of extensive debate, but one aspect of the case is clear: it limits the agencies' jurisdiction. Under Supreme Court precedent, Justice Kennedy's concurring opinion should be viewed as the controlling test in future cases. We urge the agencies to rely exclusively on the Kennedy concurrence, in keeping with the law as articulated by the Eleventh Circuit. The Proposed Rule exceeds the scope of jurisdiction under the Kennedy concurrence.

Under the agencies' interpretation, virtually any nexus beyond "speculative" or "insubstantial" would result in a finding of jurisdiction under the agencies' guidance. Even areas that lack a hydrologic connection to traditional navigable waters can be deemed jurisdictional under the Proposed Rule's expansive test. (p. 1-2)

Agency Response: **The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C. The agencies' significant nexus determinations are consistent with the statute, the caselaw, and the science. Preamble, III and Technical Support Document, II and VI.**

Center for Biological Diversity, Center for Food Safety and Turtle Island Restoration network (Doc. #15233)

10.244 As to other proposed exclusions, we note that Appendix B to your rule, "Legal Analysis," provides no discussion of groundwater, gullies, rills, non-wetland swales, and other water bodies and features that you propose to newly exempt from the definition of WOTUS. That likely is for good reason, as a plain reading of the overall intent of the Clean Water Act cannot support your newly proposed establishment of these exemptions. (p. 10)

Agency Response: See Exclusions compendium.

10.245 While the proposed rule does some good things to affirm long-time federal authority to protect some types of waters, the proposed rule as written takes certain issues raised by various justices in *SWANCC* and *Rapanos* and elevates them to a scientific and legal status that is unwarranted. Neither case calls for EPA to vacate scientific principles to satisfy political concerns. EPA should stand on the sound science that has been created by its own people, sister agencies, and the virtually unanimous independent scientific community, to provide the strongest protections available under the Clean Water Act to the limits of the commerce clause. Anything less will continue to degrade our Nation's already imperiled water quality. See GAO-14-80, "Changes Needed if Key EPA Program is to Help Fulfill the Nation's Water Quality Goals" (Dec. 2013). (p. 11)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C.

The Washington Legal Foundation (Doc. #5503)

10.246 WLF is concerned that the agencies' proposed definition of "waters of the United States" is not consistent with the leading Supreme Court cases interpreting the permissible outer limits of federal jurisdiction under the CWA. The purported goals of EPA's proposal are to provide clarity and predictability to the public, with a rule that is clear, understandable, and consistent with the law. A careful reading of the proposed Rule, however, suggests that its practical effect will likely be to accomplish something Congress chose not to do—effectively circumvent the Supreme Court's imposition of meaningful limits on how far the Corps and EPA can go in asserting jurisdiction under the CWA. (p. 3)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C.

National Federation of Independent Business (Doc. #8319)

10.247 Though we fully recognize the importance of the CWA's goals of eliminating pollutant discharges into the waters of the United States, we have serious objections to the Proposed Regulation because it will expand CWA jurisdiction beyond the constitutional limits recognized in *Rapanos v. United States,* 574 U.S 715 (2006). Under the Proposed Regulation the Agencies will assert newly expanded jurisdiction over properties all across the country. We expect the actual impact of the Proposed Regulation will greatly exceed the Agencies' prediction of a mere 3% increase in jurisdictional wetlands; though we do not have a metric for offering a precise measurement of the proposed jurisdictional expansion, there is no way that its sweeping categorical rules will be so limited in effect. (p. 2)

Agency Response: **The rule is narrower than the existing regulation and is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C. See the Economic Analysis for an explanation of the scope of the analysis.**

10.248 As Justice Alito noted in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), the "reach of the Clean Water Act is notoriously unclear." This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. See *United States v. Riversde Homes, Inc*. 474 U.S 121 (1985); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S 159 (2001); *Rapanos*, 547 U.S 715. But, the exact reach of the CWA remains a murky question—so much so that some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland. *See* Jonathon Adler, *Wetlands, Property Rights, and the Due Process Deficit, Cato Supreme Court Review,* 141 (2012).

While it is commendable that the Agencies apparently seek to resolve some of the confusion over the jurisdictional reach of the CWA in the Proposed Regulation, our view is that only Congress can fix this problem. The Proposed Regulation would resolve the vast majority of jurisdictional disputes by applying categorical rules, which will result in expansive assertions of jurisdiction. But *Rapanos* makes clear that categorical assertions of jurisdiction must be rejected. It is simply beyond the authority of the Agencies to expand CWA jurisdiction through the rulemaking process in a manner that conflicts with the jurisdictional tests set forth in *Rapanos* and her progeny. (p. 2)

Agency Response: The rule is narrower than the existing rule and is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B, and C.

10.249 The Agencies are not writing on a blank-slate here. The Supreme Court has made clear that there are constitutional limits on the jurisdictional reach of the CWA. The Agencies have been repudiated for overreaching in the past, and will be again if the Proposed Regulation is understood as reaching beyond the constitutional limitations recognized in *Rapanos*. While there are still grounds for disputing how far CWA jurisdiction reaches on a case-by-case basis, *Rapanos* set the outer-limits. And the Agencies cannot exceed those limits any more than Congress could. Accordingly, the only question is whether the Proposed Regulation goes beyond what *Rapanos* would allow. For the reasons set forth below, we maintain the Proposed Regulation is inconsistent with *Rapanos* and should therefore be amended or abandoned entirely. (p. 3)

Agency Response: **The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C.**

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

10.250 The proposed rule provides much needed clarity regarding the scope of federal jurisdiction over waters of the United States in the wake of U.S. Supreme Court decisions including *SWANCC v. U.S. Army Corps of Engineers*, and *Rapanos v. United States*. These two decisions altered the previous understanding of Clean Water Act jurisdiction, but did not provide a clear and comprehensive definition to replace the existing rule and guidance on the waters protected under the Clean Water Act. The plurality decision in

Rapanos in particular has resulted in uncertainty regarding the correct scope of federal regulation, especially for wetlands. Many states operate under state rather than federal law. This has resulted in delays where both state and federal review are required, and engendered a lack of trust in the ability of state and federal agencies to appropriately apply water regulations. (p. 2)

Agency Response: The agencies agree that the Supreme Court's decisions have resulted in uncertainty and that the rule provides much needed clarity.

South Park Coalition (Doc. #0160)

10.251 Thank you for your attention to this matter. The character of the nation's aquatic resources, its wetlands and associated flora and fauna are best protected in the commons by the total inclusion of necessary and inherent rule and scientifically-based designation enumeration of all related and collateral natural factors. To omit "migratory birds" from the definition of "waters of the "United States" would be a serious oversight - see especially *State of Missouri v. Holland* 252 U.S 416 (1920) – Supreme Court of the United States:

> "…Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself."
>
> "…Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U.s 118, 39 Sup. Ct. 403." (p. 5)

Agency Response: In light of the Supreme Court's decision in *SWANCC,* the agencies do not define "waters of the United States" based on migratory birds. Technical Support Document, I.C.

Texas Conservative Coalition (Doc. #14528)

10.252 As discussed by the Supreme Court in *Rapanos v. United States*, the EPA's authority to regulate "the waters of the United States" extends only to relatively permanent, standing, or continuously flowing bodies of water such as streams, oceans, rivers, and lakes. Its authority under the Act does not extend to channels where water flows intermittently or ephemerally, such as drainage channels for rainwater runoff. (p. 2)

Agency Response: **The rule is consistent with the statute and the caselaw, an. Technical Support Document, I.A., and C.**

Friends of the Rappahannock (Doc. #15864)

10.253 When passing the Clean Water Act in 1972, Congress made it clear that the scope of the Clean Water Act was to be far-reaching. The Act's ambitious goal— "to restore and maintain the chemical, physical and biological integrity of the Nation's water"[382], required extensive federal authority over the "Nation's waters." The record of Congress' deliberation demonstrates that that Congress intended the Clean Water Act "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." [383] Congress recognized that 'water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." [384] Given Congress' clear intent that the Clean Water Act address pollution at its source and its recognition that waters are interconnected, the scope of the proposed rule is well within Congressional intent and is legal.[385] The EPA and the Army Corps are entitled to deference in decisions about the scope of

Clean Water Act authority based on their expert ecological judgment about the role that certain types and categories of waters play in the health and function of aquatic systems,[386] unless a particular interpretation "invokes the outer limits of Congress' power."[387] Where, as here, the proposed rule is based on copious scientific evidence and the agencies' judgment about whether the science reveals a "significant nexus" between various categories of waters and downstream navigable or interstate waters, the approach is a reasonable and lawful interpretation of the Clean Water Act. [388] (p. 2)

Agency Response: **The agencies agree the rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C.**

Common Sense Nebraska (Doc. #14607)

10.254 EPA issuance of the proposed rule is in excess of statutory jurisdiction, authority, or limitations because it unlawfully expands the scope of federal agency jurisdiction under the CWA.

Under the APA a Court shall set aside agency action which is "not in accordance with the law" or "in excess of statutory jurisdiction, authority or limitations." See 5 U.S.C. §706(2)(A),(C). "[T]he judiciary, not the agency is the final authority on issue of statutory construction," and will "reject any administrative constructions contrary to this clear congressional intent." *Massachusetts v. Dep't of Transp*., 93 F.3d 890,893 (D.C.

[382] 33 U.S.C. § 1251(a).
[383] Sen. Conf. Rep. No. 92-1236, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3376 at 3822.
[384] S. Rep. No. 414 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News at 3752-53.
[385] See. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-843 (1984) (holding that if Congress' intent is clear, the Court and the agency must give effect to Congress' unambiguously expressed intent).
[386] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-35 (,1985).
[387] *Solid Waste Agency of Northern Cook County v, Army Corp s of Engineers*, 531 U.S. 159, 172 (2001).
[388] *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).

Cir. 1996) (internal quotation marks and citations omitted). a. The proposed rule supersedes a 2003 Legal Memorandum and a 2008 Joint Guidance Memorandum which were limited to CWA § 404 determinations thereby wrongfully expanding the scope of federal agency jurisdiction under the CWA. The proposed rule represents the EPA and the U.S. Army Corps of Engineers (Corps) interpretation of the current jurisdictional reach of the CWA. The proposed rule will supersede a 2003 Joint Memorandum which provided clarifying guidance on the Supreme Court's *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers (SWANCC)* and a 2008 Joint Guidance memo issued after another Supreme Court case of *Rapanos v. United States* (*Rapanos*), (collectively "Existing Guidance"). Both of those cases involved wetlands issues with the Corps under §404. As noted earlier, the proposed rule addresses the definition of "waters of the United States" for all CWA purposes. And yet, the model for the regulatory approach here is the Existing Guidance which was limited on its face to §404 determinations. With backing of the Connectivity Report, the proposed rule would significantly expand the scope of categorical federal agency jurisdiction under the CWA. The proposal makes an aggressive interpretation of Justice Kennedy's "significant nexus" test for determining CWA jurisdiction under *Rapanos*. Justice Kennedy intended that in order to meet the significant nexus test, there needed to be some significance or importance to the individual water body's impact on navigable waters. It is not in keeping with that case-by-case need to determine the importance of the specific facts of potential impact to think that an entire area could be categorically lumped into jurisdiction. Land use features such as ditches, waterways, and dry creek beds which rarely carry water will now categorically be under federal jurisdiction. Isolated wetlands and other waters outside of these areas may still be subject to CWA jurisdiction after a Corps determination of significant nexus. The EPA states that the purpose and intent of this proposed rule is to provide clarity and certainty to the current analysis and decision-making under §404. In reality though, the proposed rule will dramatically and wrongfully expand the scope of federal jurisdiction beyond the understanding of the current, Existing Guidance. EPA should withdraw the proposed rule, fix the current bureaucratic nightmare of §404 permitting and reintroduce a rule that is in line with Supreme Court case law and appropriately limited on its face to §404 determinations. (p. 6)

Agency Response: **While the Supreme Court's decisions arose in the context of Section 404, the Supreme Court did not hold that there is a scope of "waters of the United States" unique to Section 404. The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C.**

10.255 The proposed rule unlawfully expands the scope of federal agency jurisdiction under the CWA through the use of broad and ambiguous terminology; by improper application of the "significant nexus" test for determining CWA jurisdiction according to *Rapanos v. United States*, 547 U.S. 715 (2006); by usurping the cooperative federalism tenants laid out in the CWA; and through the illegal regulation of groundwater. Unlawful expansion of federal agency jurisdiction under CWA through the use of broad and ambiguous terminology.

As discussed in detail in Section I., there are countless terms and phrases within the proposed rule that are not adequately defined or defined at all. What this provides to EPA is practically limitless authority to assert jurisdiction over thousands, if not millions, of

new water features and land uses creating only more confusion for all Nebraskans. Two additional overly broad terms include “tributary” and “adjacent.”

One stated purpose of the proposed rule is to reduce the use of the Corps' Wetlands Delineation Manual of 1987 and its supplements. The Manual is the tool the agencies use to determine whether water bodies are subject to CWA jurisdiction on a case-by-case basis. Case-by-case determinations using the Manual are frequently difficult, time consuming, and bureaucratic. The more difficult determinations are those waters described as "other waters" in the EPA and Corps' regulations. The proposed rule attempts to solve this difficulty by determining, for the first time, that the following will always be jurisdictional:

- All "tributaries", including any water (wetlands, lakes, and ponds) that contribute flow, either directly or through another water, to downstream traditional navigable waters, interstate waters, or territorial waters.
- All waters "adjacent" to such tributaries. "Adjacent" is broadly defined to include all waters located within the "riparian area" or "floodplain" of otherwise jurisdictional waters, including waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.

The proposed rule does codify existing policies and categorically exempt areas from federal CWA jurisdiction in a specific listing of the policies and areas. However, the net effect of the proposed rule is that smaller and more remote upstream bodies of water will fall with certainty within federal CWA jurisdiction.

Nebraska is comprised of over 77,000 square miles of area with over 92 percent of that area used for agricultural purposes. From west to east, the State moves from low precipitation high plains to higher precipitation grasslands in the east. There are an infinite number of scenarios that call for good judgment in determining whether or not a particular water body is or should be subject to federal CWA jurisdiction. This rule would impose a blanket jurisdictional determination over thousands of acres of private property. The effect would be to impose unnecessary property restrictions and uncertainty as to what that actually means to landowners.

Much of the cause for unlawful expansion of jurisdiction is due to the broad scope of definitions contained in the proposed rule. The definition of "tributary" is too broad and needs some element of permanent or consistent flow. As proposed, the definition is a land feature which has two banks, a bed and a high water mark. The land feature does not lose its tributary status if there are man-made breaks (bridges, culverts, etc.) so long as the bed and bank can be identified upstream and downstream of the break. And, a tributary can be natural, man-altered, or manmade and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).

In direct contradiction to this definition the proposed rule also states, a tributary need not even have two banks, a bed and a high water mark if the water feature contributes flow directly or through another water to a traditionally navigable water. (Proposed rule at 22241). The definition also goes on to include isolated water features that might somehow be connected through groundwater to a traditionally navigable water. Lastly, EPA has entirely excluded any consideration of flow or impact to traditionally navigable

waters, by including in the definition of tributaries intermittent and ephemeral streams. (Proposed rule at 22206). Clearly the plain sense reading of the definition of tributary is virtually limitless in its jurisdictional application.

There are many examples in Nebraska of waterways that have a bed and bank and a high water mark but only run during precipitation events. And, unless there is a significant amount of precipitation, many of those examples are waters that flow only a short distance before evaporating or seeping into the ground. Many rarely, if ever, have flow that actually reaches a flowing stream even though a topographic map may indicate that it does. This is especially true in the more arid western part of the state. Also, there are thousands of miles of "ditches" in Nebraska constructed either as part of public and private roadways or are on the land for various reasons to help direct water flow during storms or wet periods. To include these features as being subject to federal jurisdiction is unnecessary and will have little or no positive impact on water quality.

The Supreme Court has clearly articulated there is a limit to CWA jurisdictional authority. This limit is the commerce clause, the term navigable and a finding of "significance" in impact to traditionally navigable waters. See *SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001). In *SWANCC* the Court pointed out the authority of the "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute." *Id*. at 172.

"[It] is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id*.

Furthermore, when making determinations of what waters are jurisdictional for purposes of the CWA outside the scope of traditionally navigable waters the Supreme Court has always indicated that not just any tenuous connection will suffice. "It is the significant nexus…that informed our reading of the CWA." *SWANCC v. Army Corps of Engineers*, 531 U.S. 159, 167 (2001). This ""significant nexus" [or degree of impact of a connection] to waters that are or were navigable in fact or that could reasonably be so made" is required. *Rapanos v. Army Corps of Engineers*, 547 U.S. 715, 759 (2006).

Not only would "tributaries" be categorically subject to federal CWA jurisdiction but also any "adjoining" waters will be included. Adjoining waters include "neighboring" waters to tributaries. Neighboring waters are those that are located within a "riparian area" or "floodplains" or waters with a surface or shallow subsurface connection. In Nebraska, there are many areas that are flat and the state has many miles of rivers and streams creating expansive flood prone areas. Therefore, many of Nebraska's rivers and streams have extensive riparian and floodplain areas. Looking at the plain meaning of these definitions, Nebraskans have deep concerns that many areas of the state will be categorically defined as jurisdictional waters. If enacted as proposed, the interpretation of these definitions will be immensely important. These definitions should be narrowed to require that there is water flow present in a tributary for a significant amount of time to trigger jurisdiction. Or, provide some test that allows for the field personnel to exclude tributaries that only rarely contribute to the water quality of the identified traditionally

navigable water. Nebraska can provide many examples of tributaries that, even at their glory, do not contribute to water quality impacts of any navigable water.

Again, this interpretation of "adjacent" runs afoul of the CWA and Supreme Court rulings which does not allow EPA to assert jurisdiction over every open water in a floodplain and riparian area if they are isolated and do not have a significant connection to traditionally navigable waters. Justice Kennedy in his concurring opinion in Rapanos stated "…the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statutes does not extend so far." *Rapanos v. Army Corps of Engineers*, 547 U.S. 715, 778 (2006). (p. 6-8)

Agency Response: **The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., and C. The agencies' significant nexus determinations are reasonable and based on the science, the law, and the agencies' experience and technical expertise. Preamble III and IV, Technical Support Document, II and VI.**

10.256 Unlawful expansion of federal agency jurisdiction under CWA by improper application of the "significant nexus" test for determining CWA jurisdiction according to *Rapanos v. United States*, 547 U.S. 715 (2006).

In *Rapanos*, the Supreme Court analyzed when "adjacent wetlands" may be jurisdictional under the CWA. See Rapanos v. United States, 547 U.S. 715 (2006). Justice Kennedy in his concurring opinion articulated at times agencies could "identify categories of tributaries that due to their volume of flow, their proximity to navigable waters, or other relevant considerations are significant enough that wetlands adjacent to them are likely, in the majority of cases to perform important functions for an aquatic system incorporating navigable waters." *Id*. at 781. The entire analysis of "adjacency" in Supreme Court case law goes no further than wetlands adjacent to these major tributaries. However, EPA has illegally expanded their jurisdictional authority with the proposed rule by reading "wetlands" completely out of the "adjacency" and "significant nexus" analysis and is now claiming to assert not only "adjacent wetlands" automatically jurisdictional but that all "adjacent waters" are. (Proposed rule at 22269).

The literal interpretation of the proposed rule would be that a tributary (which is merely a discernible bed, bank and high water mark) and all of the adjoining riparian areas and floodplains would be under CWA jurisdiction. Read this way, which is the most direct reading, much of Nebraska would be categorically under federal jurisdiction with much of the rest left wondering if its "other waters" would pass the significant nexus test. This is because the proposed rule creates an additional determinant of jurisdiction. The term, "other water" refers to waters that cannot be considered "adjacent" to downstream jurisdictional waters and that are not tributaries of such waters. "Other waters" are found outside the riparian area and the floodplain, since waters within those areas are considered to be adjacent. As such, wetlands that are other waters typically would have "unidirectional flow". Fed Reg at 22246. Those isolated wetlands or land features would be viewed individually or collectively in a watershed to determine if they have "significant nexus" to traditional navigable waters. So, there would still be a Corps field determination of these features of the land to determine CWA jurisdiction. The Federal

Register discussion of the "significant nexus" test relies almost exclusively on science in its evaluation.

The Supreme Court significant nexus test went beyond pure science and also would ask, "so what?" In other words, science alone may show a connection but common sense should prevail when there is no likely impact on water quality. The recent §404(f)(l)(A) normal farming activity exemption interpretive rule did not help clear up uncertainty and, in fact, leads to more questions. "Normal farming" as an exemption to the CWA has always been interpreted broadly and the interpretive rule narrows this historical treatment and applies a prescriptive method of "normal farming" as defined by certain NRCS Standards. This prescriptive, intrusive approach to narrowing the CWA exemption is aligned with the attempt to categorically classify certain areas as jurisdictional. The cumulative effect is dictation by the agencies of land practices which exceeds authority granted to the agencies by Congress in the CWA.

The cumulative impact of the changed process and determinations under §404 will be to expand the federal CWA jurisdiction. Land use features such as ditches, waterways, and dry creek beds which rarely carry water will now categorically be under federal jurisdiction. Isolated wetlands and other waters outside of these areas may still be subject to CWA jurisdiction after a Corps determination of significant nexus. The EPA states that the purpose and intent of this proposed rule is to provide clarity and certainty to the current analysis and decision-making under §404. In my opinion, there will continue to be uncertainty in the §404 jurisdictional determination process caused by the new definitions.

Instead of the proposed rule, EPA and the Corps should either fix the current bureaucratic nightmare of §404 permitting or propose a rule that truly narrows down water bodies that should be protected by the CWA. In either case, the current proposal should be withdrawn. (p.9)

Agency Response: **The rule is narrower in scope than the existing regulation and is consistent with the statute and the caselaw. Technical Support Document, I. A, B. and C. The agencies have made reasonable significant nexus determinations. Preamble, III and IV; Technical Support Document, II, IV, V and VI. The agencies have withdrawn the Section 404(f) interpretive rule.**

10.257 An equally important area of impact on Nebraska is a concern that the attempt to fix the §404 problem creates many more problems under other sections of the CWA. If enacted as proposed, the definition of "waters of the United States" would affect the scope of all provisions of the CWA that use the term. This would include the §402 National Pollutant Discharge Elimination System (NPDES) permit program; the §303 water quality standards and total maximum daily load programs; the §401 state water quality certification process; and the §311 oil spill program. As noted earlier, the Existing Guidance (the model for this rule) was limited on its face to §404 determinations and had no practical impact on the other sections listed above. By essentially overlaying the Existing Guidance (as modified by the proposed rule) on these other sections, EPA will create significant cost and confusion, increase unnecessary bureaucracy, infringe on state programs, and expose agricultural producers to new liability.

There is currently a difference in use and application of the definition in the CWA of "waters of the United States" as it is utilized in various sections of the Act. The reason for this is easily explained. Other than the §404 program and the §311 oil spill program, the CWA is essentially administered by the states with delegated programs. All but a handful of states have CWA programs delegated to them. In Nebraska, the Nebraska Department of Environmental Quality (NDEQ) has been delegated all CWA programs other than §404 and §311 since the mid-1970s. In order to have an approved program, EPA must determine that the state's laws are consistent with the CWA. That would include an evaluation of the state equivalent definition of water bodies covered. In Nebraska, the definition of "waters of the state" is found in Neb.Rev.Stat. §81-1502(21) which was reviewed and approved by EPA. The wording of that definition is not identical to the wording of the definition of "waters of the United States" in the CWA. In fact, the wording is quite different. Wisely, Congress allowed states to craft their programs to be the most fitting to the state so long as the provisions were at least as stringent as the federal counterpart. The concept was one of "cooperative federalism" in which the federal government sets the broad goals and individual states reach the goals in a manner most appropriate for its citizens and based on its physical characteristics. As a result, the NDEQ has administered the §401, §402 and §303 programs using its unique "waters of the state" definition for nearly forty years. The NDEQ has applied that definition to literally thousands of permitting decisions without ever once referring to the Existing Guidance. During those forty years, the NDEQ's decisions have been overseen by the EPA and have been in accordance with the CWA. For agriculture in Nebraska, there is an understanding of what a "water of the state" is and is not based on four decades of interpretation by NDEQ. The EPA in administering §311 does not utilize the Existing Guidance document itself but advises producers to decide if a spill could "reasonably be expected" to reach water (EPA SPCC Fact Sheet: Information for Farmers, January 2014). However, the imposition of the proposed rule would create uncertainty, expansion of jurisdiction, and exposure to new liability for Nebraska producers. In addition, the federal encroachment of what is now a state delegated program runs counter to the concept of "cooperative federalism" which is a tenet of federal environmental programs. Currently, the §402 program most impacts Nebraska agriculture in permit requirements for certain livestock operations and pesticide applications on or near water. For livestock producers, the NDEQ first started regulating discharges to "waters of the state" in 1974. Thousands, if not tens of thousands, of livestock producers have been visited by the NDEQ since that time. The NDEQ's program is to observe an operation to determine if waste or runoff has the potential to impact waters of the state. If there is a potential to impact water quality then the producer must either change the operation to avoid the potential impact or control the waste and runoff such that it will not impact water quality.

Many producers, especially small producers, have been able to modify their operation or construct mitigating landscape features (water diverting berms or waterways, for example) to avoid impacting waters of the state. Likewise, producers have been constructing livestock waste control facilities under state permits. These are state construction standards for engineered facilities to handle all waste and it is common to use land application of waste as part of the operation. All decisions in these programs have relied on the state definition of regulated water bodies for forty years. In addition, many producers have gone through the NPDES permitting process and are currently

operating under a General Permit or an Individual Permit. This regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception. All determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, the Nebraska regulatory scheme suddenly leaves the producer wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water. This will cause confusion, increase costs and will expose producers to new liability to enforcement from the federal or state government or to citizen suits under the CWA. This federalization of a current state program also infringes states' rights and runs counter to the concept of "cooperative federalism". In Nebraska, farmers and ranchers have rarely been subject to NPDES permits other than the livestock program (and the recent pesticide permits which will be discussed later). The expansion of the definition to categorically include tributaries and waters adjoining tributaries takes in many new types of waters and land features. It is an additional concern that the Interpretive Rule treatment of "normal farming" activities does not apply to sections other than §404. That creates a question mark and added confusion over what differences there would be between §404 and the rest of the Act as it relates to the farming exemptions. Many of the questions that have long ago been answered or understood will now be at issue again. For example, if a farmer or rancher incidentally deposits fertilizer into a ditch or water way we know that most likely we are not dealing with a "point source discharge to waters of the United States" (the test for a permit under §402) because the area has not been deemed jurisdictional and this incidental activity would be exempt under the current application of the Act. With the proposed change, this same incident could occur in a categorically determined jurisdictional area and not be considered "normal farming" activity under NRCS Standards. Does that mean that a §402 permit is required? This increased confusion and uncertainty is not necessary. Again, the Nebraska definition of waters of the state is in place and has been implemented for forty years in a rational fashion. There is no problem that needs to be fixed in Nebraska. The recent need to establish a process to obtain coverage for pesticide applications "on or near" water creates another point of potential turmoil if the proposed rule is adopted. *The National Cotton Council of America v. EPA* decision caused much confusion on how states would issue permits for application of pesticides on or near water bodies. The NDEQ developed and issued a General Permit with cooperation from Region VII. The General Permit is appropriate for Nebraska's varying conditions. It may not, however, cover all of the expansion of categorical federal jurisdiction and "other waters" as contemplated in the proposed rule. Nebraska agricultural producers are directly impacted by this issue and any change is unnecessary because the State has adequately addressed any concern here. In summary, an expansion of CWA jurisdiction and an overlay of §404 decision-making process to §402 does not make sense. The State of Nebraska has developed a surface water discharge permitting system that is now built on forty years of implementation. EPA should not try to fix what is not broken. The proposed rule will expose producers to

liability and uncertainty by drastically changing the NPDES program with an expanded federal definition. (p. 10-11)

Agency Response: **As the agencies stated in the preamble to the proposed rule, the term "navigable waters" is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process. While there is only one CWA definition of "waters of the United States," there may be other statutory factors that define the reach of a particular CWA program or provision.**

The final rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. Preamble, IV, Technical Support Document, I.C., and General Compendium The rule is narrower in scope than the existing regulation and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I. A, B. and C. The agencies have withdrawn the Section 404(f) interpretive rule. The *National Cotton Council* decision is outside the scope of the rule.

10.258 The NDEQ has also administered the §401 and §303 programs since delegation in the 1970s. The impact on §401 will be an increase in the number of certifications that the State will need to issue because there will be more federal actions to trigger certification needs. This may add more bureaucracy, time, and red tape to the existing process. This will increase resource needs of state government and will potentially raise the NDEQ's budget. The §303 program will be impacted by the increased number of water bodies subject to water quality standards. The NDEQ has been monitoring and assessing water bodies for forty years based on its interpretation of the state definition of waters of the state. EPA has approved the state program and, thus, has approved the definition. The addition of more water bodies will add to the state burden without additional resources which will lead to the need for more state resources. In addition, the water bodies that are subject to state assessment will also need to be evaluated to determine if they meet an assigned beneficial use. If the beneficial use is not being met, the water body may be impaired and need to be listed on the §303(d) list of impaired water bodies. That would trigger the requirement that a total maximum daily load (TMDL) be prepared which lays out "reasonable assurances" to bring the water body out of impaired status. Additional TMDLs will put added burdens on producers. If EPA's expanded jurisdictional reach is realized under the propose rule, TMDLs may be written that include reasonable assurances that incorporate regulatory controls over newly defined CWA waters. Under the "other waters" definition, there could be entire watersheds that are subject to TMDLs with mandatory requirements to bring the isolated wetlands within it back into attainment with water quality standards. Nebraska agriculture should be concerned that this is an unwarranted reach of regulatory authority beyond the intent of the CWA or the holdings of the Supreme Court. The federal encroachment into the §303 process is another illustration of the erosion of cooperative federalism. The NDEQ has developed a successful model of a voluntary process whereby priority watersheds can be protected

using state, local, and federal resources to leverage private investment. There have been very successful efforts in Nebraska and around the country that are collaborative watershed projects using state, local, federal, and private (agricultural producers and land owner) resources. If these same efforts had been under a mandatory regulatory program, the results would have been much less successful. In fact, an unintended consequence of this proposed rule would be to create a disincentive for producers to install conservation measures at their operations. Why install conservation terraces if there is a question as to how that land feature will be viewed under the new rule? Why would a producer voluntarily try new conservation practices if they would raise the jurisdictional issue and potentially require a permit? Another significant concern of Nebraska agriculture should be the effect of the proposed rule on the §311 oil spill program. Due to the expanded jurisdiction to include tributaries and water adjoining tributaries and other waters, there will be more instances of the need to prepare a Spill Prevention, Control, and Countermeasures Plan (SPCC) plan. Currently, the EPA Fact Sheet advises producers to determine if a spill would "reasonably" reach water to decide if the operation needs a plan. With the blanket categories of jurisdictional waters that would be subject to CWA jurisdiction, that rule of thumb would surely change Many producers would have to assume that they would need a SPCC plan since the jurisdictional question would be so far reaching and unpredictable. This change will place an additional burden on producers and create an additional liability exposure without additional benefits to water quality. (p.10-12)

Agency Response: **The agencies considered impacts on implementing programs. Preamble, V and economic analysis in the administrative record.**

10.259 Unlawful expansion of federal agency jurisdiction through the illegal regulation of groundwater under the CWA. As discussed, the statutory definition of "waters of the United States" does not include groundwater and EPA itself recognizes that "groundwater, including groundwater drained through subsurface drainage systems" are not "waters of the United States." (proposed rule at 22273-22274). We continue to also be concerned about the potential for groundwater sources to be treated] as "waters of the United States". EPA has commented that this isn't so and the proposed rule itself contains an exclusion for groundwater. However, the definition of "adjacent" and "neighboring" would include "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to jurisdictional water. There are many areas in Nebraska where there is a hydrologic connection of surface and ground water. In fact, there are entire river basins where this phenomenon exists. Are all riparian and floodplain areas with a hydrologic connection of ground and surface water now going to be subject to CWA jurisdiction? What are the limits of this language? The impact of this interpretation is critical for Nebraska. If the answers to the questions above are in the affirmative, then a whole new layer of types of water and types of CWA permits needed come into play. The proposed rule needs to be more explicit as to what subsurface connections are covered, if any. The CWA was not meant to cover groundwater and it should be excluded from jurisdictional coverage. (p.12-13)

Agency Response: **The rule explicitly excludes groundwater from the definition of "waters of the United States." The rule does not include a provision defining adjacency and neighboring based on shallow subsurface. Preamble IV. While the**

agencies acknowledge that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." Preamble IV. The rule is consistent with the statute. Technical Support Document, I. A.

Missouri and Associated Rivers Coalition (Doc. #15528)

10.260 Congress enacted the CWA as a means to exercise its traditional commerce power over navigation, and it is clear Congress intended to create a partnership between the Federal agencies and states to jointly protect the nation's water resources. The proposed rule reaches well beyond what Congress intended and expands the scope of the CWA to isolated, non-navigable waters. Additionally, it is contrary to the Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*). The *SWANCC* Court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could apply to wetlands and other waters that were not themselves navigable. But the Court went on to make clear that "limited effect" is not the same as "no effect whatever." The proposed rule seeks to strip the term navigable of having any meaningful effect. In *Rapanos v. United States* the Supreme Court identified limits to Federal authority under the CWA. Although the meaning and intent of *Rapanos* have been the subject of extensive debate, one aspect of the case is certain: it limits Federal jurisdiction. The Agencies are now ignoring those limits as well as Supreme Court precedent. The multiple opinions in the *Rapanos* case and the tests put forth by the Justices provide a rather complex framework for determining the scope of CWA jurisdiction. Even so, the decision-making process arising from that framework is defensible. Over time and through continued application the determinations made thereunder are becoming increasingly consistent and repeatable. Having already strayed far from the initial intent of Congress, the Agencies are now disregarding the clear outcome of Rapanos by having put forth a proposed rule that would essentially remove the remaining limits to establishing Federal jurisdiction under the authority of the CWA. The claim by the Agencies that the proposed rule will only slightly (approximately 3%) expand jurisdiction is not based on an actual field application, but rather an internal review of existing records and the information contained therein. It is to be expected that data in existing records would be what was relevant under the existing rule, rather than that required for a determination under the proposed rule. Efforts to analyze application of the proposed rule have found that it will significantly expand jurisdiction, and in some areas the amount of jurisdictional waters (river miles and number of ponds) may more than double. This Federal overreach by the Agencies will usurp any meaningful authoritative role for the states and put in place an approach that can be used to exercise Federal control over any and all waters, including those that have been traditionally identified and regulated as "Waters of the State." (p. 4)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B., and C

Regulatory Environmental Group for Missouri (Doc. #16337.1)

10.261 The Proposed Rule relies too heavily on Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) and then impermissibly expands Justice Kennedy's more cautious approach to determining what constitutes a Waters of the United States.

Two tests for jurisdiction arose from the *Rapanos* decision. The first test comes from the plurality opinion authored by Justice Scalia which essentially holds that jurisdiction applies only to relatively permanent waters. The second test is drawn from the sole opinion of Justice Kennedy who wrote that jurisdiction stems from finding a "significant nexus" of waters having an ecological connection. The Proposed Rule overrides the Plurality test and expands the Kennedy test to the ultimate extent by equating any connectivity to significant ecological function, thereby proposing an unfettered and expansive view of federal authority. Such a parsing of Justice Kennedy's analysis of "significant nexus" ignores his own caveat that a mere hydrologic connection does not bestow ecological significance to certain waters. In short, Kennedy's test requires a caseby- case determination. Significant nexus is more than a speculative or insubstantial effect on the chemical, physical or biological integrity of a navigable or interstate water or territorial sea. As Justice Scalia points out in *Rapanos*, the significant nexus test is susceptible to the interpretation that anything that affects "waters of the U.S." is in fact "waters of the U.S." at 755. In so doing, the Proposed Rule in untethered from any rational tie to the language of the CWA and the constitutional underpinnings thereof.

The CWA is premised on the federal government's authority to regulate commerce on "navigable waters." The Supreme Court in prior cases has noted the expansion of the traditional term "navigable waters" but also has long insisted that the term must carry some of its original substance and cannot be read out of the CWA. Accordingly, the Court wrote:

> "… it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (*SWANCC*), 531 U.S. 159, 172 (2001).

In short, the Proposed Rule ignores the plain language of the CWA, prior decisions of the Supreme Court, and cherry picks language from Justice Kennedy's concurring opinion in *Rapanos* to support the expansion of federal authority.

The EPA should therefore withdraw the proposed rule and substantially revise it to correctly follow the Clean Water Act and the Supreme Court's *Rapanos* decision.

The Federal Agencies erroneously assumed that Justice Kennedy' concurring opinion governs the Supreme Court's interpretation of the Clean Water Act's jurisdictional limits and method to determine jurisdiction classification of a water. No opinion in *Rapanos* commanded a majority. Justice Kennedy agreed with four Justices to remand the case back to the lower court, but wrote a separate opinion. The Proposed Rule treats Justice Kennedy's separate opinion as authority, when in fact, three appellate circuit courts have

held that both the Kennedy opinion and the Plurality opinion of Justice Scalia have precedential value. In a 1977 decision, the Supreme Court set out a standard to determine the precedential value where no opinion commanded a majority of justices. According to the Court:

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the *narrowest grounds*." *Marks v. United States*, 330 U.S. 188, 192 (1977) (emphasis added).

What constitutes the "narrowest ground" is not always easy to determine, but three appellate courts have held that Justice Kennedy's concurrence is not the narrowest ground and therefore should not be treated as the only opinion that carries precedential value in *Rapanos*. (p. 2-4)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C. All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA.

Michigan United Conservation Clubs (Doc. #16395)

10.262 When passing the Clean Water Act in 1972, Congress made it clear that the scope of the Clean Water Act was to be far-reaching. The Act's ambitious goal—"to restore and maintain the chemical, physical and biological integrity of the Nation's water"[1]—required extensive federal authority over the "Nation's waters." The record of Congress' deliberation demonstrates that that Congress intended the Clean Water Act "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[2] Congress recognized that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[3] Given Congress' clear intent that the Clean Water Act address pollution at its source and its recognition that waters are interconnected, the scope of the proposed rule is well within Congressional intent and is legal.[4](p. 2)

Agency Response: The agencies agree that the rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

West Virginia Rivers Coalition (Doc. #17028)

10.263 The Proposed Rule is supported by legislative history. When passing the Clean Water Act in 1972, Congress made it clear that the scope of the Clean Water Act was to be far-reaching. The Act's ambitious goal—"to restore and maintain the chemical, physical and biological integrity of the Nation's water"[389] —required extensive federal authority over the "Nation's waters." The record of Congress' deliberation demonstrates that that

[389] 33 U.S.C. § 1251(a).

Congress intended the Clean Water Act "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[390] Congress recognized that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[391] Given Congress' clear intent that the Clean Water Act address pollution at its source and its recognition that waters are interconnected, the scope of the proposed rule is well within Congressional intent and is lega1.[392]

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are entitled to deference in decisions about the scope of Clean Water Act authority based on their expert ecological judgment about the role that certain kinds of waters play in the aquatic system,[393] unless a particular interpretation "invokes the outer limits of Congress' power."[394] Where, as here, the proposed rule is based on copious scientific evidence and the agencies' judgment about whether the science reveals a "significant nexus" between various categories of waters and downstream navigable or interstate waters, the approach is a reasonable and lawful interpretation of the Clean Water Act.[395]

Agency Response: The agencies agree that the rule is consistent with the statute, the caselaw, and the Constitution and that the agencies' significant nexus determinations are reasonable and based on the science, the law, and the agencies' experience and technical expertise. Preamble III and IV, Technical Support Document, I A, I.C. II and VI.

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

10.264 The proposed rulemaking and expanded definition and therefore regulation of Waters of the United States is a great distance from the statutory basis spelled out before the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC).* This proposed rulemaking seemingly relies on Justice Kennedy's significant nexus test in *Rapanos v. United States* to expand statutory jurisdiction in this matter. Given *SWANCC,* we believe if the agency is going to interpret the meaning of significant nexus, it should be done narrowly and not broadly as is proposed. Finally, other associations in our region have commented in this matter and without reiteration, we fully support the points enumerated in their October 15, 2014 submission on behalf of the North Houston Association, The Woodlands' Development Company and West Houston Association. (p. 2)

Agency Response: The rule is consistent with the statute and Supreme Court decisions. Technical Support Document, I.A., B., and C.

[390] Sen. Conf. Rep. No. 92-1236, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3376 at 3822.
[391] S. Rep. No. 414 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News at 3752-53.
[392] *See Chevron USA. v. NRDC*, 467 U.S. 837, 842-843 (1984) (holding that if Congress' intent is clear, the Court and the agency must give effect to Congress' unambiguously expressed intent).
[393] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-35 (1985).
[394] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 172 (2001).*
[395] *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).

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

10.265 The agencies present the proposed definition primarily as a means to determine over which waters the agencies have jurisdictions under the CWA. The ambiguity of the current understanding of "waters of the United States" under the CWA has led to a costly case-by-case system of jurisdictional determination. At times, these determinations have led to protracted litigation in cases such as *Rapanos v. United States*[396] and *Solid Waste Agency of North Cook County (SWANCC) v. US Army Corps of Engineers*.[397] In these cases, the Supreme Court found that the agencies had expanded their jurisdiction beyond the original intent of the CWA.[398]

The proposed definitions appear to be an attempt by the agencies to reestablish jurisdiction over areas lost in the *Rapanos* and *SWANCC* cases through definitional reinterpretation. The result would extend the agencies' reach beyond any rational application of the term "navigable waters" or "waters of the United States," which is why the courts reduced their jurisdiction in the first place.

The Regulatory Impact Analysis (RIA) prepared by the agencies claims that the proposed rule would only increase *de facto* jurisdiction by three percent over the *status quo* nationwide.[399] The RIA, however, provides neither the methodology nor the reasoning behind this conclusion. We encourage the agencies to release their methodology for public scrutiny prior to any final decisions.

Environmental lawyer Joseph Koncelik notes that the definition of tributary in particular is so broad that "it is difficult to come up with a stream or wetland that would likely not fit in the definition…"[400] Furthermore, he notes that the rule includes a "catch-all provision" that allows the agencies to assert jurisdiction on a case-by-case basis to regulate streams and wetlands that might not meet the already expansive definition.[401]

This expands the agencies' jurisdiction to an array of formations that share little in common with "navigable waters." In combination with the uncertain meaning of "significant nexus" and the new definitions of "flood plain" and "riparian area," the rule empowers the agencies to establish jurisdiction over virtually any water formation nationwide, saving for the clear exemptions delineated in the proposed rule. This functionally restores the agencies' jurisdiction over waters judged outside the scope of the CWA by the *SWANCC* and *Rapanos* cases. (p. 3-4)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute, caselaw and the Constitution. Technical Support

[396] *Rapanos v. United States*, 547 U.S. 715 (2006).
[397] *Solid Waste Agency of Northern Cook City v. Army Corps of Engineers*, 531 U.S. 159 (2001) (99-1178), 191 F.3d 845, reversed.
[398] *SWANCC*, 531 U.S. 159.
[399] US Environmental Protection Agency and US Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, March 2014.
[400] Jon Koncelik, "EPA and Corps Release Proposed Rule Defining 'Waters of the U.S.,'" *Ohio Environmental Law Blog* (blog), April 1, 2014, http:// www.ohioenvironment allawblog.com/ tags/navigable-waters ..
[401] *Ibid.*

Document, I.A., B., and C. Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II. The final rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. Preamble, IV, Technical Support Document, I.C., and General Compendium.

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

10.266 Finally, the proposed rule does not address the question of its application to waters "that were previously found to be non-jurisdictional, but that are re-evaluated and found to be jurisdictional," raising the issues of retroactivity and grandfathering.[402] Even taking the Agencies conservative assessment in their Economic Analysis accompanying the proposed rule that roughly an additional 3 percent of waters would be subject to jurisdiction, including 17 percent of "other waters" due to all tributaries and adjacent wetlands being deemed jurisdictional[403]" it is a matter which needs further comment.

The Agencies do not address the issues of retroactivity or "grandfathering," relative to waters previously nonjurisdictional but are reevaluated, and found to be jurisdictional under the proposed rule. The proposed rule makes many changes as to what is or is not jurisdictional under the CWA and would allow certain tributaries, adjacent waters or wetlands and "other waters" to be deemed jurisdictional on a case-specific basis going forward post promulgation. Even the Agencies' very conservative assessment that only an additional 3 percent of waters would be found jurisdictional, including 17 percent of "other waters" indicates that the issue of retroactivity is a serious one.

According to the blue-ribbon legal committee providing advice to the state environmental commissioners, the Agencies have several options as to grandfathering "in order of the most restrictive to the least restrictive in exempting matters from the new regulations."[404] The options listed by the committee are cumulative, e.g., the third exemption includes the first and second. This is a pure policy call, but the most equitable approach would be to propose all seven options and seek public comment before any rule is finalized. The Agencies should then select the most reasonable option based on public comment with a view toward protecting regulated entities and citizens who previously relied on the absence of CWA jurisdiction to their detriment.

The seven options suggested by the blue-ribbon legal team are as follows:

a) "Only past fill activity is exempt from the new regulations.

[402] ACOEL, at p. 46.
[403] U.S Environmental Protection Agency and U.S. Army Corps of Engineers. Economic Analysis of Proposed Revised Definitions of the Waters of the United States, March 2014, p. 12. (For a critique of this analysis, see David Suudig, Ph.D., Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States ('I'he Brattle Group), May 15, 2014, prepared for 'l'he Waters Advocacy Coalition.)
[404] ACOEL, at p. 51-52.

b) All development associated with an authorized action is exempt from the new regulations for the term of the authorization but compliance is required for permit extensions and reauthorizations.

c) All development associated with authorized action is exempt from the new regulations for the term of the authorization and for permit extensions and reauthorizations.

d) All development associated with an application filed as of a particular date (for example April 21, 2014 the date of the proposed rule) is exempt from the new regulations.

e) All development associated with an approved JD [Jurisdictional Determination] is exempt from the new regulations for the period contained in the approval.

f) All development associated with a Preliminary JD is exempt from the new regulations, if applying these new rules to a particular project would result in substantial hardship to a permit applicant.

g) All development associated with a mitigation bank is exempt from the new regulations for the period of the banking agreement unless otherwise mutually agreed to by the banker and the Corps."[405]

The new terms and definitions introduced by the Agencies in the subject rulemaking are abstract, open-ended and contingent, at least to some extent, on variable field conditions and subjective staff observations and judgment absent more quantitative or geographic criteria or definition, say, of significant nexus. So it is necessary to protect those regulated entities and citizens who have acted in reliance on the previous stance of the Agencies toward jurisdiction. "Grandfathering," in the circumstances, is equitable, fair and economically efficient.

The Agencies should address the retroactivity problem by including a "grandfather" provision in the proposed rule after proposing seven options offered by the blue-ribbon legal team advising state environmental commissioners and receiving public comment on them. (p. 9-10)

Agency Response: **Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The preamble makes clear that the agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations made after the effective date will be made consistent with this rule. The rule is narrower in scope than the existing rule. Technical Support Document, I.B. The rule is not vague and meets Constitutional due process requirements. Technical Support Document, I.C. The final rule and the preamble provide definitions and clarifications of the key terms that demarcate the boundaries of CWA jurisdiction and provide for increased clarity, certainty and consistent implementation. Preamble, IV, Technical Support Document, I.C., and General Compendium**

[405] *Id*.

10.267 The Agencies have misconstrued the law by de-coupling the *SWANCC* decision from Justice Kennedy's opinion in *Rapanos*. The Agencies should defer promulgation of the rule and seek public comment on the relationship of *SWANCC* to *Rapanos* and revise both the rule and Appendix B accordingly. (p. 17)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

American Legislative Exchange Council (Doc. #19468)

10.268 [T]he proposed rule appears to conflict with two Supreme Court rulings that both checked the federal government's overly broad interpretation of the CWA. In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (2001), the court held that isolated waters and wetlands not adjacent to navigable waters were not subject to regulation under Section 404 of the CWA. In the court's decision, Chief Justice William Rehnquist wrote: "[t]he term 'navigable' has…the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." In Rapanos v. United States (2006), the court made clear that wetlands under federal jurisdiction must have some connection or nexus to "traditional navigable waters." (p. 2)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

10.269 WHEREAS, the proposed rule provides almost unlimited CWA federal jurisdiction, impairs state authority and therefore contravenes congressional intent and is not consistent with three distinct rulings by the Supreme Court regarding the limits of federal jurisdiction; (p. 4)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

United States House of Representatives, Committee on Science, Space, and Technology (Doc. #16386)

10.270 What is your legal justification for aggregating the impacts of isolated waters or wetlands? Please provide a detailed legal rationale and any supporting examples or precedent. (p. 7)

Agency Response: Consistent with Justice Kennedy's opinion, the rule based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

10.271 Is the EPA's use of non-public scientific data consistent with the agency's Scientific Integrity Policy? Please provide a detailed legal rationale and any supporting examples or precedent. (p. 8)

Agency Response: See Science Compendium. The EPA's use of non-public scientific data is consistent with the agency's Scientific Integrity Policy. Non-public data can take a variety of forms, e.g., data claimed as confidential business

information, Personally Identifiable Information, or data owned by third parties who provide analyses to the EPA but deny the EPA access to the underlying data. The Scientific Integrity Policy promotes a culture of transparency. At the same time, it acknowledges the Privacy Act and other laws, regulations and policies that might limit some data disclosure. See Science Integrity Policy at 2. In particular, the Science Integrity Policy recognizes that the EPA often uses data and information generated by third parties to inform its decisions. See Science Integrity Policy at 2, n.2. The Policy neither forecloses their use nor compels their disclosure. Instead, the Policy focuses on the data's quality, noting that, under the agency's Information Quality Guidelines, the EPA must review and document the quality and soundness of this type of data prior to use. See Science Integrity Policy at 2, n.2.

In the interests of transparency, the Policy also calls upon the EPA to use non-proprietary data and models "when feasible." See Science Integrity Policy at 4. But even this encouragement recognizes feasibility as a limiting factor. Simply put, sometimes the EPA needs to use proprietary data and models to support its policy decisions, even though this information cannot be disclosed to the public. Nothing in the Scientific Integrity Policy prevents the EPA from doing so.

Similarly, as part of its stakeholder outreach or collection of public comments, the EPA often obtains analyses relevant to its decision-making from trade associations, non-governmental organizations or other interested members of the public. But sometimes the stakeholders do not supply the underlying data. The EPA evaluates the quality of these analyses as it would any other information and makes both the analyses and its views available to the public.

The EPA honors the Scientific Integrity Policy in its decision-making.

10.272 What Constitutional limits to federal authority under the CWA does the EPA recognize? Please provide a detailed legal rationale and any supporting examples or precedent. (p. 9)

Agency Response: The rule is consistent with the Constitution. Technical Support Document, I.C.

10.273 The Agency appears to abandon the Commerce Clause based limitation to jurisdiction and attempt to create a new science-based limitation. Please provide a detailed legal rationale and any supporting examples or precedent. (p. 12)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Senate Committee on Environment and Public Works, et al. (Doc. #16564)

10.274 The proposed "Waters of the United States" rule is an end-run around Supreme Court decisions which have confirmed the constitutional and statutory limits to Clean Water Act jurisdiction. When Congress passed the Clean Water Act in 1972, it predicated federal jurisdiction on the presence of "navigable waters."[406] Congress further defined "navigable waters" to mean "the waters of the United States, including territorial seas,"

[406] In general, the Clean Water Act prohibits the unauthorized discharge of pollutants, and defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

expressly referencing the former term in the statute's various regulatory programs.[407] In so doing, Congress evidenced its desire that navigability would serve as a foundational concept for Clean Water Act jurisdiction.

The Clean Water Act's legislative history illustrates Congress's intent to ground federal jurisdiction in navigability. Although "waters of the United States" provided a "new and broader definition" for the term "navigable waters," the purpose of this new definition was to align the statute with the understanding that "there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government."[408] Under the new definition of "navigable waters" as "waters of the United States," navigability would remain critical to jurisdictional inquiries, but interstate concerns less so:

"[I]t is enough that the waterway serves a link in the chain of commerce among the States as it flows in the various channels of transportation- highways, railroads, air traffic, radio and postal communications, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway."[409]

Thus, Congress "was clear that the [Clean Water Act] was anchored by the concept of navigability."[410]

The Supreme Court has confirmed that the term "navigable waters" constrains EPA's and the Corps' authority to regulate discharges into "waters of the United States." In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC),* the Court held that isolated, nonnavigable ponds were beyond the agencies' statutory authority under the Clean Water Act.[411] And in *Rapanos v. United States*, a majority of the Court rejected the Corps' attempt to designate wetlands located near drainage ditches as "waters of the United States.',[412] These cases underscored that "[t]he term 'navigable' has at least the import of showing ... what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[413]

The proposed "waters of the United States" rule defies the Supreme Court's recognition of the statutory limits Congress placed upon the agencies. In fact, the proposed rule would reach the very waterbodies in *SWANCC* and *Rapanos* over which EPA and the Corps bad unlawfully asserted Clean Water Act jurisdiction.

For example, in *SWANCC*, the Corps had asserted jurisdiction over small ponds at an abandoned gravel pit. But as the Supreme Court explained, nothing in the Clean Water

[407] See 33 U.S.C. § 1362(7).
[408] 118 Cong.Rec. 33756-57 (1972) (statement of Rep. Dingell).
[409] *Id.* (quoting *Utah v. United States*, 403 U.S. 9, 11 (1971)) (other internal citation omitted).
[410] The Clean Water Act Following the Recent Supreme Court Decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell*: Hearing Before the S. Comm. on Environment and Public Works, 110th Cong. 44 (2007) (statement of George J. Mannina, Jr.).
[411] *Solid Waste Agency of Northern Cook County v. USACE* (*SWANCC*), 531 U.S. 159 (2001).
[412] *Rapanos v. United States*, 547 U.S. 715 (2006).
[413] *SWANCC*, 531 U.S. at 172.

Act's text or the statute's legislative history suggested that the term "waters of the United States" included nonnavigable, isolated waterbodies like the ponds.[414] The Court observed further that in order to uphold the Corps' interpretation, "we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this."[415] Accordingly, the Court held that the Corps exceeded its statutory authority in claiming that the isolated, nonnavigable ponds were jurisdictional.[416]

Remarkably, and notwithstanding *SWANCC*, the proposed "waters of the United States" rule purports to provide ample authority for EPA and the Corps to assert Clean Water Act jurisdiction over the isolated, nonnavigable waters at issue in the Court's decision. The proposed rule indicates that "waters with a shallow subsurface hydrologic connection" to another jurisdictional water are "adjacent" waters and thus "waters of the United States" per se.[417] The *SWANCC* ponds and project site were connected to groundwater and located in an area with a documented groundwater connection to the Fox River.[418] Therefore, applying the proposed rule's broad definition for "adjacent" waters, the *SWANCC* ponds and project site would automatically qualify as "waters of the United States" under the proposed rule.

The proposed rule would also authorize EPA and the Corps to designate the ponds and project site as "waters of the United States" under the proposal's "other waters" provision. Under this provision, a waterbody may be considered a jurisdictional "other water" if "those waters alone, or in combination with other similarly situated waters ... located in the same region, have a significant nexus" to a TNW, interstate water, or territorial sea.[419] Because the proposed rule would authorize isolated, nonnavigable waterbodies to be "combin[ed] with other similarly situated waters in [a] region" in order to satisfy the proposal's "significant nexus" standard, it would be practically impossible for the *SWANCC* ponds and project site to escape the prospect of EPA or the Corps once again classifying them as "waters of the United States."[420]

EPA and the Corps attempt to limit *SWANCC* to its discussion of the Migratory Bird Rule, appearing to recognize that the proposed rule would result in "waters of the United States" jurisdiction for the *SWANCC* ponds and project site. In the executive summary to the proposed rule, the agencies opine that *SWANCC* "held that the use of ' isolated' nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal authority under the [Clean Water Act]."[421] Similarly, in recent correspondence with members of the Senate Environment and Public Works Committee, EPA claims that the proposed rule "is consistent with [*SWANCC*] and precludes

[414] See *id*. at 167-169 & 168 n.3.
[415] *Id*. at 168.
[416] *Id*. at 174.
[417] Proposed Rule, 79 Fed. Reg. at 22263.
[418] See Solving the Problem of Polluted Transportation Infrastructure Stormwater Runoff: Hearing Before the Subcomm. of Water and Wildlife of the S. Comm. on Environment & Public Works, 113 Cong._ (2014) (response of J. G. Andre Monette to question for the record, on file with Senator David Vitter).
[419] Proposed Rule, 79 Fed. Reg. at 22263.
[420] *Id*.
[421] *Id*. at 22 191.

establishing (Clean Water Act] protections for waters based solely on the presence of migratory birds."[422]

These statements suggest that EPA and the Corps believe the Migratory Bird Rule was the only flaw in *SWANCC*, and that other arguments, theories, or information could have saved the day for the government. Yet a fair reading of the Court's decision belies the agencies' myopic viewpoint. The Court in *SWANCC* repeatedly emphasized that its concern was not with the Migratory Bird Rule as such, but the fact that application of the rule resulted in a "waters of the United States" designation over property that was categorically beyond the agency's statutory authority.[423] The Court held that the Corps lacked authority over isolated, nonnavigable ponds because it "read the statute as written."[424] The fact that the asserted jurisdiction had resulted from application of the Migratory Bird Rule was incidental and irrelevant to the Court's decision.

The proposed rule's coverage of the remote wetlands at issue in *Rapanos* is no less disconcerting. In that case, the wetlands were near ditches and man-made drains, which in turn were located 11 to 20 miles from the nearest TNW. The Corps nonetheless claimed that the wetlands were "waters of the United States," and the Sixth Circuit agreed based on its conclusion that Clean Water Act jurisdiction could be "satisfied by the presence of a hydrologic connection" between a remote wetland and TNW.[425]

The Supreme Court rejected this broad theory of Clean Water Act jurisdiction. Writing for the plurality, Justice Scalia determined that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right so that there is no demarcation between 'waters' and wetlands, are 'adjacent to ' such waters and covered by the [Clean Water Act]."[426] In contrast, wetlands "with only an intermittent, physically remote hydro logic connection to 'waters of the United States'" were not jurisdictional under the plurality approach.[427]

Justice Kennedy likewise dismissed an interpretation of "waters of the United States" that would "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."[428] In his concurring opinion, Justice Kennedy concluded that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establishing its jurisdiction."[429] But, Justice Kennedy continued, if a wetland is not adjacent to a TNW, "the Corps must establish a significant nexus on a case-by-case basis

[422] Letter from Kenneth J. Kopocis, Deputy Assistant Administrator, U.S. Environmental Protection Agency to Hon. David Vitter (Oct. 29, 2014).
[423] See *SWANCC*, 531 U.S. at 168 ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this."), 174 ("[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here.").
[424] *Id*. at 174.
[425] *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004).
[426] *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion).
[427] *Id*.
[428] *Rapanos v. United States*, 547 U.S. at 778 (Kennedy, J., concurring).
[429] *Id*. at 782.

when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[430] The Justice remarked further that wetlands "possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" [431]

Taken together, Justice Scalia's and Justice Kennedy's opinion squarely preclude EPA and the Corps from asserting categorical Clean Water Act jurisdiction over wetlands based on a mere hydrologic connection to a TNW. Yet the proposed "waters of the U.S." rule adopts precisely this approach: under the proposed rule, a "tributary" is jurisdictional per se, and includes wetlands "if they contribute flow, either directly or through another water" to a TNW, interstate water, or territorial seas.[432] In *Rapanos*, there was no dispute that the wetlands contributed flow to a TNW, meaning that the wetlands at issue in that case would automatically become "waters of the U.S." under the proposed rule.[433]

Notably, although the proposed "waters of the U. S." rule relies heavily on Justice Kennedy's opinion in particular, EPA and the Corps have distorted his approach. For instance, Justice Kennedy suggested that the agencies "may choose to identify categories of tributaries that, due to their volume of flow[,] their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely ... to perform important functions for an aquatic systems incorporating navigable waters."[434] In no way, however, does this suggestion imply that EPA and the Corps could identify wetlands themselves as tributaries, as they have done in the proposed rule.[435] Moreover, the tributary definition proposed by the agencies would sanction the federal regulation of "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," despite Justice Kennedy's warning against such a standard.[436]

The proposed "waters of the United States" rule also indicates that its "significant nexus" standard may be satisfied if a water alone or in combination with similarly situated waters "significantly affects the chemical, physical, or biological integrity" of a TNW, interstate water, or territorial sea.[437] Yet Justice Kennedy's opinion makes clear that there must be a significant effect to the chemical, physical, and biological integrity of a downstream water in order for the significant nexus standard to be satisfied.[438] The current proposal is far afield from even Justice Kennedy's tailored analysis.

EPA and the Corps to proposal to assert "waters of the United States" jurisdiction over the types of waterbodies at issue in *SWANCC* and *Rapanos* is as astonishing as it is

[430] *Id*.
[431] *Id*. at 780.
[432] Proposed Rule, 79 Fed. Reg. at 22262-22263.
[433] See *United States v. Rapanos*, 376 F.3d at 642-643.
[434] *Rapanos v. United States*, 547 U.S. at 780· 781 (Kennedy, J., concurring).
[435] See Proposed Rule, 79 Fed. Reg. at 22263.
[436] *Rapanos*, 547 U.S. at 781.
[437] Proposed Rule, 79 Fed. Reg. at 22263.
[438] See *Rapanos*, 547 U.S. at 780.

alarming. Worse yet, it demonstrates that the agencies have not learned from the Supreme Court's direction that statutory limits contained in the Clean Water Act must be honored. EPA and the Corps should withdraw the proposed rule as recognition of the infringement upon federalism and liberty the rule would impose. (p. 9-13)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Michael Bamford, Director, The Property Which Water Occupies (Doc. #8610)

10.275 The Purpose of these Rules is that these broad interpretations of CWA by the EPA and ACOE resulted in the Supreme Court finding that these Federal agencies have exceeded the limits of jurisdictional authority. In place of defining jurisdictional limitations premised upon fulfilling the purpose of the CWA, the Rules again attempt to base jurisdiction on an ad hoc analysis from previous court rulings which held the agencies have discretion in interpretation of the CWA to include protecting upstream waters before reaching navigable waters. Judicial dicta on each site-specific issue does not replace the need for the EPA to present the legal basis for claiming ubiquitous jurisdiction over all the space water occupies, even space privately owned. Exempting activities like street drainage (which are difficult to resolve) or more popular activities (like recreational watercraft toilet flushing) indicates the Rules themselves set arbitrary and capricious standard as to when the CWA should be invoked. Exempting activities that would otherwise be a CWA violation highlights the subjective nature of invoking CWA jurisdiction. The Rules fail to define limits which avoid exceeding authority while still meeting the statutory obligation. Only by basing jurisdiction on protecting the integrity of public/navigable waters, would the Rules avoid running afoul of the laws established to prevent interference with property rights and basic liberties. The presence of water alone establishes no basis for controlling use of property. (p. 11-12)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.1. TNWs, Interstate Waters, Territorial Seas, Impoundments

Agency Summary Response:

The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The agencies disagree that the interpretation and guidance in the preamble to the proposed rule and in this section represents an expansion of the concept of traditional navigable waters. The interpretation and guidance is not an expansion from that given by the agencies in 2008. Further, while the 2008 attachment, the preamble to the proposed rule, and this section reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.

Specific Comments

National Association of State Departments of Agriculture (Doc. #15389)

10.276 NASDA concludes the proposed rule ignores the holding of the plurality opinion and inappropriately relies exclusively on Justice Kennedy's opinion, selectively, and incorrectly, extrapolating provisions from *Rapanos* to support the proposed rule. We maintain that the Court held that a hydrologic connection alone is not enough to establish federal jurisdiction and the CWA does not extend jurisdiction to features distant from navigable waters and carrying only minor volumes of flow. The agencies inappropriately draw broad conclusions from Justice Kennedy's concurring opinion in the proposed rule. The agencies' proposal would improperly extend CWA jurisdiction far beyond agency authority and beyond the limits interpreted by the Supreme Court in *SWANCC* and *Rapanos*. The agencies must acknowledge that Congress and the Supreme Court clearly intend the CWA to have limits, and that states as co-regulators have environmental standards customized to the unique issues related to water quality regulation within their borders. The underlying question of WOTUS jurisdiction and the proposed rule is not so much a matter of science but of legal authority.[439] "Navigable," while not limited simply to navigable-in-fact waters, limits federal jurisdiction from including all or nearly all water bodies. In the *SWANCC* decision, the Court stated that "the word 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[440] (p. 4)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

Waters Advocacy Coalition (Doc. #17921.1)

10.277 The Proposed Rule's interpretation of waters that are considered (a)(1) through (a)(3) waters is inconsistent with *Rapanos* and prior case law. Whether a water is a TNW, interstate water, or territorial sea ((a)(1) through (a)(3) water) is of fundamental importance because the proposed rule deems waters jurisdictional based on their relationships to these waters. The proposed rule's broadening of the scope of waters that can be considered (a)(1) through (a)(3) waters has a domino effect, thereby broadening the scope of waters that are jurisdictional based on their relationship to (a)(1) through (a)(3) waters. (p. 99)

Agency Response: The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. Technical Support Document, III.

Washington County Water Conservancy District (Doc. #15536)

10.278 SWANCC specifically held that CWA jurisdiction does not extend to "non-naviagble, isolated, intrastate waers."In 2000, in the *Solid Waste Agency of Cook County v. Army Corps of Engineers* (*SWANCC*) case, the Supreme Court considered whether the CWA extended to an isolated pond located in anabandoned sand and gravel pit in northern

[439] Western States Water Council, letter to Gina McCarthy, EPA Administrator, November 5, 2013.
[440] 531 U.S. 159, 172 (2001).

Illinois.[441] A majority of the Court, including Justice Kennedy, explicitly rejected the Agencies' assertion of jurisdiction over "nonnavigable, isolated, intrastate waters" like the pond at issue in *SWANCC*.[442] The Court observed that the Army Corps' 1974 regulations limited "navigable waters" to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce," and found "no persuasive evidence that the [Army] Corps mistook Congress' intent" when promulgating these regulations in 1974.[443]

While the Court in *SWANCC* specifically concluded that the Army Corps' "Migratory Bird Rule" was not supported by the CWA, its holding rejected any interpretation of the CWA that included jurisdiction over areas such as "nonnavigable, isolated, intrastate waters." [444] In particular, the Court expressly held that CWA jurisdiction does not extend to non-wetland ponds that are not adjacent to traditional navigable waters.[445] The Court's broad statements regarding such isolated waters provided the central rationale for the result in *SWANCC*, and therefore cannot be treated by the Agencies as mere dicta.[446] Instead, the *SWANCC* Court's statements regarding isolated waters are part of its holding. As discussed below, the Agencies' Proposed Rule relies on a misinterpretation of SWANCC that fails to recognize the Court's broad holding regarding isolated waters.[447] (p. 5-6)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C.**

10.1.1. Traditional Navigable Waters (TNWs)

Agency Summary Response

The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The agencies disagree that the interpretation and guidance in the preamble to the proposed rule and in this section represents an expansion of the concept of traditional navigable waters. The interpretation and guidance is not an expansion from that given by the agencies in 2008. Further, while the 2008 attachment, the preamble to the proposed rule, and the Technical Support Document reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.

[441] *SWANCC*, 531 U.S. at 162
[442] *Id*. at 168
[443] *Id*.
[444] *Id*.
[445] *Id*.
[446] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").
[447] Proposed Rule, 79 Fed. Reg. at 22,191 (describing *SWANCC's* holding as follows: "the use of 'isolated' nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority").

Specific Comments

District 5, Siskiyou County, Yreka, CA (Doc. #3099)

10.279 It is clear from the legal history that the United States derives its regulatory power from the Commerce Clause – specifically the power to prescribe the national rule by which navigation is to be conducted among the states. Over the years, this Constitutional power expanded, being interpreted to recognize the federal role of regulation over navigation on rivers that were "navigable in fact" or could be rendered navigable as a regular public highway for commercial transport, capable of accessing destinations in another state. Federal power then grew to recognize the regulation of discharges, such as sediment, that could obstruct navigation capacity on a navigable stream. To expand regulation into non-navigable streams deviates from any conceivable foundation in Constitutional authority or jurisdiction, violates the 10th Amendment, and moves into the area of pure Administrative will and dictate.

In the legal history, it is helpful to recognize that precedent evolved in three different areas - for three different purposes:

- For the purpose of determining early jurisdiction where "admiralty" or "maritime" law had application;
- For the purpose of determining "sovereign lands" of common law States at the time of admission to statehood, where private land and littoral rights were subordinated to the common public trust; or "private rivers" of the States where private land and littoral rights were "vested" under patent, not subject to public trust and required just compensation for "takings"; and
- For the purpose of determining federal jurisdiction under the Commerce Clause upon which various Acts of Congress have been based (Such as the "Rivers and Harbors Appropriation Act," the "Federal Water Power Act," the "Clean Water Act" and the "Safe Drinking Water Act."). (p. 1)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B., and C. The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. Technical Support Document, III.

10.280 Article III, Section 2, Clause 1 of the Constitution of the United States declares that "The judicial power shall extend... to all cases of admiralty and maritime jurisdiction..."

In England the word "maritime" referred to cases arising upon the high seas, while "admiralty" referred to those arising upon the "arms" of the sea, defined as "Royal Rivers" or navigable waters affected by the ebb and flow of the tides. "Admiralty" and "maritime" jurisdiction traditionally comprises two types of cases: (1) those involving acts, (prize cases, torts, injuries, and crimes,) and (2) those generally involving shipping contracts and transactions. In the first category, jurisdiction is determined by the locality of the act, while in the second category, subject matter is the primary determinative factor.

In the Judiciary Act of 1789, 1 Stat.77, ch. 20, s. 11, Congress essentially defined "navigable waters of the United States" as those which were navigable from the sea by ships with the capacity to carry 10 or more tons:

In the Act, the federal district courts were given exclusive original cognizance] "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it;..."

Through early cases, [*DeLovio v. Boit*, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *The Seneca*, 21 Fed. Cas. 1801 (No. 12670) C.C.E.D.Pa. 1829) (Justice Washington,)] the court broadened its interpretation of admiralty and maritime jurisdiction from that of the English law, to that of maritime law based in the Law of Nations, respected by maritime courts of all nations and adopted by most of Europe. By 1848, the Court had stated in *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S (6 How.) 334, 86:

"...whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed."[See *Waring v. Clarke*, 46 U.S (5 How.) 441 (1847)] (p. 1-2)

Agency Response: **The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. While the 2008 attachment, the preamble to the proposed rule, and the Technical Support Document reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.**

10.281 In other early cases**,** the superior federal power of Congress to license vessels and promulgate rules regarding their operation on navigable waters of the United States was established upon the basis of the "Commerce Clause" of the Constitution of the United States:

Article I, Section 8, Clause 3 of the Constitution of the United States declares [Congress shall have the power] "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In *Gibbons v. Ogden*, 22 U.S 1 (1824), it was established that the word "commerce" included "navigation." The power to "regulate," in the Commerce Clause, was the power "to prescribe the rule by which commerce [navigation] is to be governed." Chief Justice Marshall gives examples of such "rules" as: the granting of license, ("permission, or authority") to conduct a particular maritime trade - such as "coasting" or fishing, subject to certain duties, (prescribed by maritime law or those pertaining to the safety and comfort of passengers.)

Justice Bradley, in *The Lottawanna*, 88 U.S (21 Wall), stated that the maritime law referenced by the Constitution was intended "to [be] a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Although the question of "admiralty" jurisdiction itself was later determined to rest upon the "admiralty grant" of Article III, Section 2, Clause 1 of the Constitution of the United States, combined with the so-called "second prong" of the "necessary and proper clause," early determinations rested jurisdictional authority upon the Commerce Clause. (p. 2-3)

Agency Response: **The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. While the 2008 attachment, the preamble to the proposed rule, and the Technical Support Document reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.**

10.282 Federal powers under the Commerce Clause were initially determined to apply only to the "navigable waters of the United States," which were differentiated from navigable waters that were solely internal to the States.

Chief Justice Marshall, in *Gibbons v. Ogden*, 22 U.S 1 (1824), first stated:

> "...in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

"This principle is, if possible, still more clear, when applied to commerce 'among the several States.' They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce 'among' them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third?..."

This was rephrased as a foundational definition by Justice Field in *The Daniel Ball*, 77 U.S 557 (1870):

> "...they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power."

Justice Shiras reviewing prior cases defining "navigable waters of the United States" in *Levoy v. U S*, 177 U.S 621 (1900) concluded:

> "...It is a safe inference from these and other cases to the same effect which might be cited, that the term, 'navigable waters of the United States,' has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;' and with reference to which the observation was made by Chief Justice Marshall, shall, that 'it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.' *Gibbons v. Ogden*, 9 Wheat. 194, 6 L. ed. 69.

"While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of 'navigable waters of the United States,' or to define what traffic shall constitute 'commerce among the states,' so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the state of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce."

"The trial judge instructed the jury as follows:

> 'What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another state. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another state from the state in which you start on that journey that is a navigable water of the United States. It is so called in contradistinction to waters which arise and come to an end within the boundaries of the state. . . . But, if from the water in one state you can travel by water continuously to another state, and

> the water is a navigable water, then it is a navigable stream of the United States. . . . If it was navigable, and connected with waters that permitted a journey to another state, then it is a navigable water of the United States...'

"If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

"Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levees to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arise out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes."

In *Escanaba & Lake Michigan Transp. Co, v. City of Chicago,* 107 U.S 678 (1883), Justice Field stated:

> "The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the states or with foreign countries. Such is the case with the Chicago river and its branches..."

Justice Lurton in *U.S. v. Chandler-Dunbar Water Power Co*., 229 U.S 53 (1913) quoting *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. ed. 96, 99:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders [admiralty law]..."

In *Economy Light & Power Co. v. U.S*, 256 U.S 113 (1921), Justice Pitney stated:

> "We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions ... Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the states...."

In the 1940 case of *United States v. Appalachian Electric Power Co.*, 31 U.S 377, the Court, guided by a definition of "navigable waters" in the Federal Water Power Act which included waters that in an "improved condition" would be "suitable for use," turned from the "natural" condition standard to include rivers that had the potential to be artificially made navigable as navigable for the purpose of federal control under the Commerce Clause**.** Stated Justice Reed:

> "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered**.** 'Natural or ordinary conditions' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken**.** Congress has recognized this in section 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use**.** The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so..." (p. 3-6)

<u>Agency Response:</u> The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. While the 2008 attachment, the preamble to the proposed rule, and the Technical Support Document reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.

10.283 Although the law of 1789 essentially defined "navigable waters," (where admiralty law was to be made applicable,) as those "waters which are navigable from the sea by vessels of ten or more tons burthen," much confusion arose over the actual navigable capacity of many inland American waterways. In *The Steamboat Thomas Jefferson*, 23 U.S (10 Wheat.) 428, (1825), Justice Story adopted the traditional restrictive English rule,

confining admiralty jurisdiction to the high seas and upon rivers influenced by the ebb and flow of the tide.

However, in 5 Stat. 726 (1845) Congress formally extended admiralty jurisdiction over the Great Lakes and connecting waters. In 1851, Chief Justice Taney in *The Genessee Chief v. Fitzhugh*, 53 U.S (12 How.) 443, officially overturned the tidal ebb and flow requirement laid down in The Thomas Jefferson. Taney's ruling established the basis for subsequent judicial extension of admiralty jurisdiction to be applicable to all waters determined to be "navigable in fact."

The foundational standard was given by Justice Field in *The Daniel Ball*, stated:

> "...The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water..."

Justice Shiras reviewing prior cases defining "navigable waters of the United States" in *Levoy v. U S*, 177 U.S 621 (1900) cited another foundational case of *The Montello*, 20 Wall. 441, *sub nom. United States v. The Montello*, 22 L. Ed. 394::

> 'The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.'

Justice Brewer in *U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.s 690 (1899) clarified that navigational use of only a minor commercial value to trade and agriculture would not qualify a river to be designated as "navigable in fact":

> "...Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the territory of New Mexico. The mere fact that logs, poles, and rafts are floated down a stream

> occasionally and in times of high water does not make it a navigable river. It was said in *The Montello*, 20 Wall. 430, 439, 'that those rivers must be regarded as public navigable rivers in law which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' And again: 'It is not, however, as Chief Justice Shaw said (*Rowe v. Bridge Corp*., 21 Pick. 344), "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

Justice Shiras reviewing prior cases defining 'navigable waters of the United States' in *Levoy v. U.S*, cited the decision in *Egan v. Hart*, 165 U.S 188, 41 L. ed. 680, 17 Sup. Ct Rep. 300, to the effect that shallow seasonal water bodies without channels were categorized non-navigable, even though they could be artificially modified to become navigable:

"The [Louisiana] trial judge, as to the contention that Bayou Pierre was a navigable stream, said:

> From Grande Ecore, where it (Bayou Pierre) enters Red river, to a point some miles below its junction with Tonre's Bayou,-a stream flowing out of the river,-Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question it has never been navigated, and is unnavigable. Between these two points it is nothing but a highwater outlet, going dry every summer at many places, choked with rafts, and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water.'

"And accordingly it was found by the trial court that Bayou Pierre was not a navigable water of the United States. Its judgment was affirmed by the supreme court of Louisiana, and the case was brought to this court and the judgment of the court below affirmed. *Egan v. Hart*, 165 U.S. 188, 41L.ed.680, 17 Sup. Ct. Rep. 300.

Justice Pitney in *U.S v. Cress*, 243 U.S. 316 (1917), clarified the term "ordinary condition," by a determination that to be considered a "public navigable river," the river must be "navigable in fact" in its natural state:

> "In Kentucky, and in other states that have rejected the common-law test of tidal flow and adopted the test of navigability in fact...numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial

> means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right....We have found no case to the contrary...."

"This court has followed the same line of distinction. That the test of navigability in fact should be applied to streams in their natural condition was in effect held in *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999...The point was set forth more clearly in *The Montello*, 20 Wall. 430, 22 L. ed. 391, where the question was whether Fox river, in the state of Wisconsin, was a navigable water of the United States within the meaning of the acts of Congress. There were rapids and falls in the river, but the obstructions caused by them had been removed by artificial means so as to furnish uninterrupted water communication for steam vessels of considerable capacity. It was argued that although the river might now be considered a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore was not a navigable water of the United States within the purview of *The Daniel Ball* decision. The court, accepting navigability in the natural state of the river as the proper test, proceeded to show that, even before the improvements resulting in an unbroken navigation were undertaken, a large and successful interstate commerce had been carried on through this river by means of Durham boats, which were vessels from 70 to 100 feet in length, with 12 feet beam, and drawing, when loaded, from 2 to 2 1/2 feet of water. The court, by Mr. Justice Davis, declared that it would be a narrow rule to hold that, in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. 'The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway....'

Justice Van Devanter in the *State of Oklahoma v. State of Texas*, 258 U.S 574 (1922), clarified that "exceptional" use for navigation confined to "irregular and short periods of temporary high water" did not meet the requirements for designation as "navigable":

> "While the evidence relating to the part of the river in the eastern half of the state is not so conclusive against navigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; in other words, that it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability..."

In *United States v. State of Utah*, 283 U.S 64 (1931) Justice Hughes provides a comprehensive summary of the basic meaning of "navigable in fact" as defined by the Court:

> "...The test of navigability has frequently been stated by this Court. In *The Daniel Ball*, 10 Wall. 557, 563, the Court said: 'Those rivers must be regarded as public

> navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' In *The Montello*, 20 Wall. 430, 441, 442, it was pointed out that 'the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation,' and that 'it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.' The principles thus laid down have recently been restated in *United States v. Holt State Bank*, 270 U.S 49, 56, 47, S. Ct. 197, 199, where the Court said:

'The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats-nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.' **...**

"The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the Court said, in *Packer v. Bird*: 137 U.S. 661, 667, 11 S. Ct. 210, 211, 'It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them.' In *Economy Light & Power Company v. United States*, 256 U.S. 113, 122, 123 S., 41 S. Ct. 409, 412, the Court quoted with approval the statement in *The Montello*, supra, that 'the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.' (p. 6-10)

Agency Response: **The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. While the 2008 attachment, the preamble to the proposed rule, and the Technical Support Document reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.**

Offices of the Attorney Generals of Oklahoma, West Virginia and Nebraska (Doc. #7988)

10.284 The Proposed Rule involves the central issue of defining the Agencies' jurisdictional reach under the CWA: what constitutes "navigable waters," or "waters of the United States." "For a century prior to the CWA, [the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S at 723 (plurality opinion) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). Accordingly, after Congress enacted the CWA, the Corps "initially adopted this traditional judicial definition for the Act's term 'navigable waters.'" *Id*. (citing 39 Fed. Reg. 12119, codified at 33 CFR §209.120(d)(1). After a district court ruled this definition was too narrow, the Corps went to the opposite extreme, issuing regulations that sought to define "waters of the United States" as extending to the limits of Congress' authority under the Commerce Clause. *Id*. at 724 (citing 40 Fed. Reg. 31,324-31,325 (1975); 42 Fed. Reg. 37,144 & n.2 (1977)).

While the Supreme Court in 1985 upheld a portion of those regulations to include wetlands that "actually abut[ted] on" traditional navigable waters, *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 135 (1985), the Court has since issued two significant opinions rejecting the Agencies' overbroad assertions of CWA authority:

In *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, 531 U. S. 159 (2001) *(SWANCC),* the Supreme Court examined the Corps' asserted jurisdiction over any waters "[w]hich are or would be used as habitat" by migratory birds. The Court held that this exceeded the Corps' CWA authority because the CWA did not reach "nonnavigable, isolated, intrastate waters" such as seasonal ponds. *Id*. at 171. The Court explained that its holding was supported by the doctrine that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result," *Id*. at 172. adding that this concern is particularly important here because an overbroad interpretation of the CWA would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power," *Id*. At 173. The Court explained that extending the Corps' CWA jurisdiction to isolated, seasonal ponds would raise "significant constitutional questions" regarding Congress' constitutional authority and that there is "nothing approaching a clear statement from Congress" that it had sought to invoke the outermost limits on that authority. *Id*. at 174. To the contrary, Congress specifically chose to "'recognize, preserve, and protect the primary responsibilities and rights of States….to plan the development and use…of land and water resources…'" *Id.* (quoting 33 U. S. C. § 1251(b)). (p. 3-4)

Agency Response: **The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C.**

10.285 Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court further narrowed the Agencies' regulatory authority under the Act. *Rapanos* involved the Corps' attempt to assert CWA jurisdiction over several wetlands adjacent to nonnavigable tributaries of core waters. The Court's majority consisted of two opinions:

First, Justice Scalia wrote a plurality opinion on behalf of four Justices rejecting the Corps' expansive interpretation of "waters of the United States." The plurality first

explained that "[i]n applying the definition of ['waters of the United States'] to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody." Id. at 734. The plurality then held that ''waters of the United States'' covers only ''relatively permanent, standing or continuously flowing bodies of water'' and secondary waters, which have a "continuous surface connection" to these relatively permanent waters. *See Id*. at 739-42. In contrast, "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters." *Id*. at 742.

Second, Justice Kennedy also rejected the Corps' interpretation, explaining that CWA jurisdiction was only appropriate where the waters involved are "waters that are navigable in fact or that could reasonably be so made" or secondary waters that have a "significant nexus" to in-fact navigable waters. *Id* at 759. Writing only for himself, Justice Kennedy articulated that a "significant nexus" exists only where the wetlands, "alone or in combination with similarly situated lands in the region," "significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." *Id*. at 780. Justice Kennedy explained that the Agencies' overbroad approach is impermissible because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778. Justice Kennedy added that an interpretation that permitted the Agencies to assert jurisdiction over a "wetlands (however remote)" or "a continuously flowing stream (however small)" would similarly fall outside of the CWA's reach. *Id*. at 776-77 (p. 4)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

10.286 The Proposed Rule declares that all geographically-related "adjacent" waters are *always and per se* covered by the CWA. *Id.* § 230.3(s)(6). The Proposed Rule defines "adjacent" waters as—among other features—those waters "within the riparian area or floodplain of" core waters, impoundments, or tributaries. *Id.* § 230.3(u)(l)-(2). "Riparian area" and "floodplain" are broad, poorly defined concepts that sweep up large portions of water, wetlands, and lands usually dry for most of the year. *Id*. § 230.3(u)(3)-(4).

Even for waters that escape the Agencies' capacious *per se* categories, the Proposed Rule provides that such waters are covered by the CWA on a "case-by-case basis," so long as a particular water "in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" core water. The Rule defines this inquiry as whether these "similarly situated waters" "significantly affect[] the chemical, physical, *or* biological integrity" of a core water. *Id.* § 230.3(s)(7). The Rule defines this inquiry as whether these "similarly situated waters" "significantly affect[] the chemical, physical, *or* biological integrity" of a core water. *Id.* § 230.3(u)(7).[448]

[448] The Proposed Rule also includes several very narrow exceptions regarding waters that the Agencies have deemed never to have a "significant nexus" to core waters. *Id.* § 230.3(t).

The sum total of these provisions is that the Proposed Rule would place virtually every river, creek, stream, along with vast amounts of neighboring lands, under the Agencies' CWA jurisdiction. Many of these features are dry the vast majority of the time and are already in use by farmers, developers, or homeowners. (p. 5-6)

Agency Response: In response to comments, the rule has made changes to the definition of "adjacent waters" and "neighboring," see Preamble, IV.G, and the rule establish limits on the case-specific significant analyses, see Preamble IV.I. Ephemeral waters may be tributaries as defined under the rule. Preamble IV.F, III, Technical Support Document, VI.

Texas Commission on Environmental Quality (Doc. #14279.1)

10.287 In *SWANCC*, the Court concluded that the presence of migratory birds was not sufficient to provide the USACE with jurisdiction over an isolated, non-navigable, intrastate water under the CWA. The TCEQ believes that EPA has not demonstrated a need for these water bodies to be under federal jurisdiction, nor have EPA and the USACE demonstrated how the proposed rule is consistent with *SWANCC*.

The CWA defines the term "navigable waters" as "the waters of the United States, including the territorial seas." In *Rapanos*, Justice Scalia stated that waters of the United States must be "relatively permanent, standing or continuously flowing bodies of water." In addition, he stated there must be a "continuous surface connection" between wetlands and waters of the United States to trigger EPA/USACE jurisdiction over the wetlands.

The TCEQ believes the connection between water bodies must be natural and not the result of pumping the water from one water body to another. In *Rapanos*, Justice Scalia noted that if a non-navigable tributary does not have a "relatively permanent, standing, or continuous" flow and a "continuous surface connection" to a navigable water body, there is no federal jurisdiction over the tributary. The Scalia test, rather than the Kennedy test, would best preserve the Congress's express policy to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources" in Section 101(b) of the CWA, especially if the test is applied to all non-navigable waters, by providing states with the ability to regulate water quality within its boundaries. Therefore, the TCEQ believes the Scalia test should be used by EPA and the USACE to clarify the definition of waters of the United States and that the connection between water bodies must be natural and not the result of pumping the water from one water body to another. As discussed earlier, the most objective and certain path forward is to follow the test set by Justice Scalia's plurality opinion rather than the "significant nexus" test set by Justice Kennedy's concurring opinion. Therefore, TCEQ requests that the EPA/USACE follow the Scalia test in defining waters of the United States, require that the connection between water bodies be natural and not the result of pumping the water from one water body to another, and apply it not only to wetlands but also to other non-navigable waterbodies. (p. 3-5)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C. Neither the agencies nor the courts have interpreted "waters of the U.S." to include only "natural" waters or "natural" connections.

Consolidated Drainage District #1, Mississippi County, MO (Doc. #6254)

10.288 The idea that the body of water is actually navigable is key here for constitutional reasons. Neither the EPA nor the USACE have jurisdiction over non-navigable bodies of water under the Constitution. That federal jurisprudence has extended their jurisdiction to include wetlands adjacent to and part of the watershed of navigable bodies of water is one that we recognize (though we do not completely agree with it). Yet the fact that the navigable bodies of water must actually be navigable is highly important to maintain in the law. Clearly Justice Anthony Kennedy thought so in the *Rapanos* case. He explained that USACE had a burden to show that there was an ecological and hydrological connection between the land and an actually navigable body of water. Such an approach respects the need of various local governments and the states to regulate land within its boundaries, while also protecting a private property owner who may be quite vulnerable financially if he or she has to fight federal overreach or an aggressive federal agency.

By placing this burden on USACE, Justice Kennedy appears to have desired to make it incumbent upon the regulating agency to prove the necessity of regulation, rather than burdening individual property owners with the need to demonstrate the lack of that necessity. This means regulation is absolutely possible provided the agency can demonstrate its necessity. Again, the burden, under this standard, is on the regulatory agency. This, in our view, comports with the theory of the takings clause litigation that *Rapanos* as well as *SWANCC* are both a part. They support the view that governmental regulation of land, while at times necessary for the public good, must not overburden individual property owners without due process and just compensation. If the agency can show that the connection exists, then they can regulate the land; but if the agency cannot show that clearly and persuade a judge, then the agency must change its direction. (p. 3)

Agency Response: The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C.

Jefferson Mining District (Doc. #15706)

10.289 As a matter of law, there is a limit to an agency's authority. Extent of delegation therefore is an important consideration and though the Council of Environmental Quality, i.e.,Environmental Protection Agency; EPA, and the Army. Corps of Engineers, ACOE Agency, evades the land, rather sailing to claim the point at which waters and subsequently their authority ends, the proposal, upon the apparent suggestion of the Supreme Court, "to choose some point", intends the point be so large as to encompass every drop of water conceivably "connected" no matter what other law or constraint may demand upon the subject matter.

Under the law, as are all -disposed property, water bodies are distinguished according to their use. The important distinction in the case of "navigable water v which are, "waters of the United States", is these are used for business or transportation; i.e., commerce, purposes, whether in aid of or for navigation, are public, and are forever free.. The U.S Supreme Court has held that the Commerce Clause (Article 1, Section 8) gives the federal government authority to regulate interstate commerce. (p. 2)

Agency Response: The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A. and C.

10.290 That "the purposes of the proposed rule are to ensure protection of our nation's aquatic resources" by some undisclosed mandate, and for the sake of crediting to Agency, at least, an implied notice, such as, maybe, the North American Free Trade Agreement, NAFTA, is not sufficient authority to expand any Constitutionally disposed jurisdiction beyond that of declared navigable, or of commerce, designation of a particular water body. In this regard, the distinctions called "Upstream" or "Downstream" or artificial deceptions. The definition being jurisdictional is limited by Constitution and subject to other constraints, any "significant nexus" will be limited to the commerce nature affected and not otherwise pre-disposed or conditioned by other obligations, such as soil and water disposal.

Jurisdictionally speaking then, there are simply navigable waters and non-navigable waters identified for the purpose of determining federal jurisdiction, subject matter areas determined by the State if in question; not federal Agency.

The new rule proposal, as well, essentially, 'unnaturally mistreats "upstream" waters of a natural topography as a point source for a purpose, or as scheme and artifice, which is contrary to law and contrary to the fact It is at least arbitrary and 'capricious, rather irrational to differentiate upstream from downstream where non-navigable natural water body meets the navigable without regard of the requirement for the existence of a different facility or "point source" making "addition". The important element is identifying whether one surface area and substance is disposed to different jurisdictional classification or use,' such as patent land or those treated as patent, including water. The primary focus upon any relation of the water by mere connection is misplaced. The lawful delineations determined by disposal are for purposes of establishing underlying jurisdiction and authority. Data, science, the CWA, and administrative case law, or any connectivity report cannot expand any lawful jurisdiction of an agency, change the Law, the extent of an authority over a subject matter or alter obligations fulfilled by Act of Congress- pursuant to other Obligation, such as any State Enabling Act, Constitution, or as these are fulfilled in part by the General Mining Law or water and other land disposal laws.

Critically, the proposed rule attempts to expand/clarify regulatory authority, to differentiate "upstream" from "downstream" for purposes of unlawful unification, but in doing so acknowledges in the distinction the jurisdictional boundary of which neither the EPA nor the ACOE can alter by term rule change, or encroach upon. The so-called, "upstream" the natural and lawful sense is simply nonnavigable, disposed, such as patent land or those treated as patent, including water, and irretrievably outside of federal agency jurisdiction as a matter of settled law. The proposed definition, also, appears to eliminate recognition of lawfully disposed non-polluting nonpoint sources, to trespass upon them.

Furthermore, to encroach "Upstream", as a pre-determined rule, will be to come in conflict with the exhausted Power of Congress and its obligations; The Constitutional, Property, Commercial, and Fiduciary limitation, to unlawfully infringe upon congressional fulfillment of land and water disposal to local public or private possession, insulting various grant Acts of Congress to producers, Production, Relation, obligation, and conveyed lawful production the land is disposed to and under exclusive state jurisdiction, such as patent land or those treated as patent, including water, or that of

Jefferson Mining District, interfering in a wholesale way with the very economic vitality of the entirety of each affected state: Belying Agency certificate, declaring no economic effect is a fraud.

The very distinction between the area claimed under the jurisdiction of Agency as "downstream", the navigable water, and that which is not under the jurisdiction, "upstream", of which is the subject matter of Enabling or Admissions Acts obligations or other Act of Congress, admits to the limit of the authority over which Congress, let alone the agency, cannot encroach and shows that the proposal has no basis in law, is a waste of time, resources, a misappropriation of the government fisc.

Whether by Act of Congress or further described by international agreement, Agency did not show where any can encroach upon the disposal obligations of Congress, whether or not fulfilled in the Mining Law Act of 1872, amending the Act of July 26, 1866, or-other Acts of Congress, by whatever excuse, scheme or artifice, nor show authority to ignore the constraints placed upon the EPA, if constitutionally legitimate, or the ACOE, or through the National Environmental Protection Act, nor, ignore any Burdens thereunder with respect to such things as the balance-favoring productive needs of man's environment prevailing the lesser identified environment; Firmly recognizing the constitutional and other Obligations of Congress, and its intent, such as, and not limited to soil and water disposal, "upstream" and off-limits to the agency.

If Agency now claims jurisdiction over all of the waters "connected upstream", then what was it Congress granted or conveyed for appropriations in Acts of Congress predating any agency? Acts of Congress expressing no reservation or acknowledgment to regulatory or administrative oversight of privately or publicly conveyed exclusively held property. (p. 2-4)

Agency Response: **The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A. and C.**

Waters Advocacy Coalition (Doc. #17921.1)

10.291 The Proposed Rule provides for expanded assertions of jurisdiction that are beyond the limits of the Commerce Clause. Although the Supreme Court has found on two separate occasions that the agencies' broad assertions of CWA jurisdiction stretched the outer limits of the Commerce Clause, the proposed rule again asserts expansive jurisdiction that is well beyond the commerce authority Congress exercised in enacting the CWA. Even EPA and the Corps acknowledge in the preamble to the proposed rule that "constitutional concerns…led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos*." 79 Fed. Reg. at 22,259.

The *SWANCC* Court held that although the term "navigable waters" is to be interpreted broadly, the term "navigable" has meaning and cannot be read out of the statute. *SWANCC*, 531 U.S. at 172. The word "navigable," the Court found "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citing *United States v. Appalachian Elec.*

Power Co., 311 U.S. 377, 407-408 (1940)). In light of Congress's intent to exercise its traditional "commerce power over navigation," *Id*. at 168 n.3[449] the Corps' assertion of jurisdiction over sand and gravel pits based on their use by migratory birds raised "significant constitutional questions," *SWANCC*, 531 U.S. at 174. As such, the Court held that extending CWA jurisdiction to isolated, non-navigable waters like those at issue in SWANCC "is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id*. Similarly, the Supreme Court in *Rapanos* found that the agencies' assertion of jurisdiction under the "any connection" theory over wetlands that were not adjacent to traditional navigable waters "stretch[ed] the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 738 (plurality). Therefore, according to the Supreme Court, the Constitution allows for the CWA to reach more than "navigable-in-fact" waters, but asserting jurisdiction over an area based on a mere connection to a non-navigable water raises serious constitutional concerns.[450]

The proposed rule extends jurisdiction so far that it extends well beyond the commerce power over navigation that Congress exercised in enacting the CWA. With the proposed rule, the agencies are attempting to assert authority even broader than the authority they claimed under the sweeping jurisdictional theories that were struck down in *SWANCC* and *Rapanos*. The proposed rule provides for jurisdiction over non-navigable features, such as isolated wetlands, ephemeral drainages, and isolated ponds, that lack any meaningful connection to navigable waters and that have previously been non-jurisdictional. Like the features at issue in *SWANCC* and *Rapanos*, these features are a far cry from the "navigable waters" over which Congress sought to exercise its commerce power. The proposed rule wholly ignores the limits recognized by the Supreme Court, and once again the agencies' expansive jurisdictional interpretations run afoul of the limits of Congress's commerce power over navigation. (p. 15-16)

Agency Response: The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A. and C.

10.292 Contrary to the ELI study relied on by the Agencies, states have many regulatory mechanisms to protect non-CWA waters. The agencies have claimed this rule is needed to broaden the definition of "waters of the United States" because the States cannot be relied upon to "fill the gap" in CWA coverage that would result from faithful

[449] The Supreme Court has divided Congress's commerce power into three broad categories, the power to regulate (1) "channels of interstate commerce," (2) the "instrumentalities of commerce," (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The *SWANCC* decision squarely forecloses the argument that the CWA authorizes regulation of certain marginal waters or wetlands based on the "substantial effects" that activities in those areas may have on interstate commerce. 531 U.S. at 173. Rather, the power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2001) (including "navigable rivers, lakes, and canals" among the channels of commerce).

[450] Professor Jonathan Adler, a prominent constitutional scholar, has noted that, by defining "navigable waters" to "include all waters and wetlands irrespective of their navigability or relationship to interstate commerce,… the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause." See, Constitutional Considerations: State vs. Federal Environmental Policy Implementation, Hearing before the House Subcomm. on Environment and the Economy (Testimony of Jonathan H. Adler) at 11 (July 11, 2014), available at http://docs.house.gov/meetings/IF/IF18/20140711/102452/HHRG-113-IF18-Wstate-AdlerJ-20140711.pdf.

interpretation of SWANCC and Rapanos.[451] In support of this assertion, they cite a study published in May 2013 by the Environmental Law Institute ("ELI") that concludes that "State laws imposing limitations on the authority of state agencies to protect aquatic resources are commonplace . . . [, and] the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that states are not currently 'filling the gap' left by U.S. Supreme Court rulings . . ., and face significant obstacles to doing so."[452] The agencies' reliance on this concern over "filling the gap" in CWA coverage essentially functions as an admission that the proposed rule increases jurisdiction and seeks to take on a role previously considered to be solely within the authority of the States.

Tellingly, the agencies touted this gap in coverage as a primary reason the rule is needed during their roll out of the proposed rule,[453] but it is not discussed in the rule itself nor in the preamble. That the agencies do not mention State constraints or the ELI Study in the proposed rule suggests that it is not an important justification – if it were, the Administrative Procedure Act ("APA") would require the agencies to identify this as a basis for the rule. Indeed, the agencies' claims that the proposed rule does not expand jurisdiction would suggest that there are few gaps in coverage that need to be filled by the federal agencies.

Based on the ELI Study, EPA expresses concern that "36 states have legal limitations on their ability to fully protect waters that are not covered by the Clean Water Act."[454] But, as discussed in more detail in Exhibit 4, there are a number of problems with ELI's study and EPA's conclusion.[455]

First, as its title indicates, the ELI Study looks at regulation of water beyond the scope of the CWA, and therefore the study cannot be used to justify the agencies expanding their authority under the Act. A State's legal authority to protect the waters within the State's jurisdiction is virtually unfettered. More importantly, how and to what degree a State chooses to regulate waters within the State has no relation whatsoever to the question of

[451] EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (last visited Oct. 29, 2014); EPA, Transcript for the Watershed Academy Webcast Series: Waters of the U.S. Proposed Rule at 7 (Apr. 7, 2014) ("Watershed Academy Webcast Transcript"), http://water.epa.gov/learn/training/wacademy/upload/040714-wous-transcript.pdf.

[452] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 2 (May 2013), available at http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters ("ELI Study").

[453] See, e.g., Watershed Academy Webcast Transcript at 7; EPA, Press Release, "EPA and Army Corps of Engineers Clarify Protection for Nation's Streams and Wetlands: Agriculture's Exemptions and Exclusions from Clean Water Act Expanded by Proposal (Mar. 25, 2014), http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30 ("The proposed rule also helps states and tribes – according to a study by the Environmental Law Institute, 36 states have legal limitations on their ability to fully protect waters that aren't covered by the Clean Water Act.").

[454] EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (last visited Oct. 29, 2014).

[455] See State Practitioner Review of ELI Study, Exhibit 4.

federal jurisdiction.[456] State jurisdiction is solely at the discretion of the State legislature and can be broad or more limited; federal jurisdiction is derived from the U.S. Constitution and is limited. The breadth of federal jurisdiction is not a creature of State decision making, be it limited or broad. Indeed, "non-CWA" waters are simply that: waters that fall beyond the scope of authority granted Congress and EPA under the Constitution. What EPA may allege is a "failure" of State decision-making may well be a conscious decision by State authorities to use their authority in a manner best suited for the needs and benefits of their own citizens. The fact that EPA disagrees with a State's decision on "non-CWA" waters bears no relationship whatsoever to the question of federal jurisdiction and cannot be used to boot-strap an imagined federal authority where the Constitution has provided none.

Second, the results of the Study do not support ELI's conclusions. To the contrary, they indicate that whether a "constraint" exists under State law has little bearing on whether the State regulates waters that are not regulated by the CWA.[457] Indeed, roughly half of the States in each category (constraint or no constraint) regulate non-CWA waters. *Id.*[458]

Third, most of the laws characterized as "constraints" in the Study do not prohibit or limit regulation. The "qualified" stringency provisions claimed to limit water quality laws in 23 States – which ELI admits "stop[] short of creating a bar to state agency action," ELI Study at 1 – are nothing more than procedural requirements common to administrative practice, such as notice and- comment rulemaking requirements.[459] As noted by West Virginia practitioner Robert McLusky, contrary to the ELI Study's characterization, these provisions are not "burdens," they are "legitimate legislative check[s]" on State agencies.[460] And many of the other cited provisions are very narrow, focusing on State-

[456] Often, States' "waters of the State" definitions incorporate the federal definition of "waters of the United States" as a subset of the term "waters of the State." See, e.g., Fla. Stat. s. 403.031(13) (Solely for purposes of implementing the NPDES program in Florida, "waters of the state also include navigable waters or waters of the contiguous zone as used in s. 502 of the Clean Water Act, as amended, 33 U.S.C. §§ 1251 et seq., as in existence on January 1, 1993, except for those navigable waters seaward of the boundaries of the state set forth in s. 1, Art. II of the State Constitution."). Thus, what is interpreted as a "water of the United States" is automatically also considered a "water of the State," in addition to other waters covered by the more expansive state term. See Frank Matthews and Susan Stephens, ELI Report: State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act: Florida, at 3-4 (May 12, 2014), Exhibit 4, Attachment D.

[457] ELI's data indicate a near-even split among States that regulate non-CWA waters and those that do not, regardless of whether a "constraint" exists under State law. Of the 36 jurisdictions ELI characterizes as having constraints, 17 (47%) regulate non-CWA waters and 19 (53%) do not. See ELI Study at 2, 34-35. And of the 15 States without constraints, eight (53%) regulate non-CWA waters and seven (47%) do not. *Id*.

[458] For instance, the ELI Study identifies Pennsylvania as a State where a constraint exists, citing a generally applicable executive order requiring justification before promulgating regulations that exceed federal standards. However, the ELI Study ignores that Pennsylvania's Clean Streams Law, which was enacted long before the executive order, unambiguously requires regulation of all "waters of the Commonwealth," broadly defined to include all surface and groundwater, both artificial and natural, without exception. See Craig P. Wilson, Tad J. Macfarlan, Response to ELI Report on State Constraints: The Scope of Regulated Waters in Pennsylvania, at 4 (June 4, 2014), Exhibit 4, Attachment I.

[459] These provisions include such things as notice-and-comment rulemaking, written justifications of the need for regulation, findings regarding the need to address particular issues, and reports to state legislature. See ELI Study at 13-14. Also, in many instances, these so called "constraints" are irrelevant because expansion of the State program is not necessary to reach non-CWA waters. See, e.g., Exhibit 4, Attachment I at 4.

[460] See Robert G. McLusky, Jackson Kelly, ELI Report on State Constraints: State Imposed Limitations on

specific concerns. They are not across-the-board prohibitions against regulating more broadly than the CWA. For example, Oregon focuses on effluent limitations for nonpoint source pollutants from forest operations, Virginia addresses treatment levels for sewage treatment works, Colorado addresses agricultural irrigation flows, and Minnesota has a provision that would come into effect should Minnesota assume section 404 permitting authority. ELI Study at 12, n.27.

Fourth, some of the restrictions cited by ELI do not actually restrict State regulation under State law, but merely limit what the State can do when it is exercising federal authority under the CWA.[461] It is hardly surprising that when a State elects to take over the NPDES program, it would also decide that its program should not outrun the CWA unless certain conditions are met.

Fifth, ELI's "property-based" limitations[462] do nothing to limit the ability of State agencies to act – they simply "create additional processes for an agency to follow when a proposed regulation is likely to affect private property rights,"[463] and require State agencies to compensate property owners in the event that regulation results in a physical or regulatory[464] taking. ELI Study at 20-21.

Sixth, ELI simply misrepresents data from some States: some States counted in ELI's study as not regulating non-CWA waters actually do regulate non-CWA waters.[465] Finally, and most importantly, ELI misunderstands many of the State laws it references. State experts who have examined ELI's "State Profiles" (contained in the ELI Study's Appendix 2) have identified serious errors in ELI's assessments of their States' laws. See Exhibit 4.[466] Indeed, the ELI Study shows a fundamental misunderstanding of State

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the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act – West Virginia, at 1 (June 3, 2014), Exhibit 4, Attachment K.

[461] See, e.g., ELI Study at 169 (The North Dakota Department of Health "is prohibited from adopting a rule for purposes of administering a program under the federal Clean Water Act that is 'more stringent than corresponding federal regulations which address the same circumstances,' or for which there is no corresponding federal regulation—unless the [state] satisfies additional requirements.") (describing N.D. Cent. Code § 23-01-04.1 (1)-(3), (5)) (emphasis added); id. at 213 (Utah has a similar law).

[462] These limitations "are an outgrowth of 'takings' law," which is "based on the Takings Clause of the Fifth Amendment of the U.S. Constitution." ELI Study at 20.

[463] As noted by Charles M. Carvell, "During my 26 years as an Assistant Attorney General for the State of North Dakota, . . . I don't recall an instance in which a state agency refrained from rule-making due to processes and procedures imposed by the legislature. . . . I am unaware of any instance in which an agency backed away from rulemaking because it was required to conduct a takings assessment." Charles M. Carvell, Proposed Federal Rule Defining "Waters of the United States" – Comments on the Environmental Law Institute's Interpretation of North Dakota Law, at 2 (Sept. 2, 2104), Exhibit 4, Attachment G.

[464] As ELI acknowledges, "most regulation does not meet the threshold constitutional standards that would require compensation under principles of takings law." ELI Study at 20.

[465] ELI lists 26 States as having "no" coverage of non-CWA waters, but acknowledges in a footnote that "[e]ven for states [categorized as not regulating non-CWA waters], the state may still provide protection in coastal areas that could be construed as regulating waters more broadly than the federal [CWA]." ELI Study at 8-9, Table 1 & n.3. Thus, by ELI's own admission, at least, nine of the States in ELI's "no" columns may, in fact, cover non- CWA waters (Alabama, Alaska, Delaware, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, and Texas).

[466] For example, the ELI Study states that Arizona State law does not cover non-CWA waters, but this is simply incorrect. Arizona's statute defines "waters of the State" much more broadly and includes groundwater. Moreover, the Arizona Department of Environmental Quality has the authority to set enforceable water quality

regulation. The Pennsylvania Department of Environmental Protection's ("PDEP") comments on the proposed rule explain, "[o]ne of DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study . . . ."[467] PDEP notes that the ELI Study characterizes Pennsylvania as one State program where protection of water resources are lacking, and PDEP states that "[t]his characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with the states."[468]

For all these reasons, the ELI Study cannot be relied upon to draw legitimate conclusions about whether States are constrained from regulating non-CWA waters. In fact, States have primary authority to regulate water resources. If States have chosen not to regulate non-CWA waters, it is not necessarily because they are prevented by law. Rather, in many cases, the States have determined that certain non-CWA waters and features do not require regulation. In sum, the agencies cannot rely on false claims that States are limited in their ability to protect non- CWA waters to justify a rulemaking that captures such an expansive scope of "waters of the United States." (p. 17-21)

Agency Response: **The rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the statute and the Supreme Court opinions. See Preamble, III and IV. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the CWA. State law does not, however, constrain the scope of the statute, and thus the strengths or weaknesses of the referenced study with respect to State authority is not relevant to the rule.**

10.293 The Proposed Rule has no bounds and is tantamount to the broad theories of jurisdiction rejected by the Supreme Court in *SWANCC* and *Rapanos*. The agencies claim that the proposed rule does not broaden the historical coverage of the CWA.[469] But, as discussed above, the "historical coverage" has twice been determined by the Supreme Court to be overbroad. In *SWANCC*, the Supreme Court rejected the agencies' attempts to assert jurisdiction over an abandoned sand and gravel pit based on the theory that the isolated pond was used by migratory birds. (This theory was known as the Migratory Bird Rule.)

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standards for protecting the broader category of "waters of the State." Robert D. Anderson, General Comments on the Environmental Law Institute's State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 1-2 (Sept. 29, 2014), Exhibit 4, Attachment A. Likewise, the ELI Study presents Florida's coverage of non-CWA waters as much more limited than it is. It does not acknowledge that Florida regulates far more waters, and far more activities in those waters, than does the CWA. Moreover, ELI scarcely mentions Florida's Environmental Resources Permitting (ERP) program. By contrast, a report issued by ELI in 2006 praised the ERP program for its "comprehensive wetland protection strategy." The State's wetland program has expanded since the 2006 report was issued. See Exhibit 4, Attachment D at 7-8.

[467] PDEP, Comments on Proposed Rulemaking: Definition of "Waters of the United States" Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880-7985, at 2 (Oct. 8, 2014).

[468] *Id*.

[469] See, e.g., EPA, Questions and Answers About Waters of the U.S. (July 2014), http://www2.epa.gov/sites/production/files/2014-07/documents/questions_and_answers_about_wotus_0.pdf. ("EPA WOTUS Questions and Answers").

SWANCC, 531 U.S. at 174. And in *Rapanos*, five Justices rejected the agencies' attempts to assert jurisdiction over wetlands not adjacent to navigable waters based on the theory that CWA jurisdiction extends to any non-navigable water that has a "mere hydrologic connection" to navigable waters. *Rapanos*, 547 U.S. at 739-40. The proposed rule allows for sweeping jurisdiction based on connections as tenuous as the Migratory Bird Rule that was rejected in *SWANCC*, and essentially amounts to the "any connection" theory that was rejected in *Rapanos*. Thus, the agencies' assertions that they are not "changing" anything or "expanding" jurisdiction are impossible to support. In the Appendix to these comments, we provide a more detailed legal analysis of the proposed rule's specific categories of regulation and explain how they are inconsistent with *SWANCC* and *Rapanos*.

Essentially, under this proposed rule, the agencies' authority to assert jurisdiction is limitless. It will most certainly reach features like the remote waterbodies that troubled Justice Kennedy in *Rapanos* that are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). The proposed rule would apply the "waters of the United States" definition to a whole host of features that are remote from TNWs and carry minor water volumes, including ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, manmade drainage ditches, and arroyos, all of which the *Rapanos* Court made clear are beyond the scope of federal jurisdiction. *Id*. at 734 (plurality); *id*. at 781 (Kennedy, J., concurring). Once again, the term "waters of the United States" "cannot bear the expansive meaning" the agencies would give it. *Id*. at 731 (plurality).

It is well settled that Congress – and only Congress – has the power to override U.S. Supreme Court statutory interpretation decisions.[470] Indeed, Congress has frequently overridden, or attempted to override, Supreme Court statutory interpretation decisions because it disagreed with the Court's reading of the relevant statute.[471] The *Rapanos* plurality made clear that this was a possible option, stating that it "would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." *Rapanos*, 547 U.S. at 738 (citations omitted). Indeed, in the wake of *Rapanos*, the agencies and others were pushing Congress to delete the term "navigable" from the CWA because they recognized it was limiting. In 2008, Representative Jim Oberstar introduced a bill, H.R. 2421, that would have done just that, but Congress rejected it. In 2010, when asked if, in the absence of new legislation, EPA and the Corps could regulate all waters, as opposed to just those deemed "navigable," Oberstar noted that if regulators could, "they would have done so." He further noted, "EPA and the Army Corps and the Department of Agriculture and CEQ [the White House Council on Environmental Quality] all are constrained by the Supreme Court

[470] See W. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L. J. 331 (1991), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4816&context=fss_papers ; *Lane v. Pena*, 518 U.S. 187, 198-199 (1996) (recognizing Congressional response to statutory interpretation decision); *Rivers v. Roadway Exp., Inc*., 511 U.S. 298, 304-305, n.5 (recognizing Congress's power to "alter the rule of law established in one of [the U.S. Supreme Court's] cases.")

[471] A recent example includes Congress's overriding the Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co*., 550 U.S. 618 (2007), by enacting the Lilly Ledbetter Fair Pay Act of 2009.

decision…"[472] However, in the eight years since *Rapanos* was decided, Congress has declined to expand the definition of "water of the United States."[473]

Additionally, the Supreme Court has made clear that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' [the Court] typically greet[s] the announcement with a measure of skepticism." *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (citations and quotations omitted). Again, the Court points to Congress, stating that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* (citations and quotations omitted).

Accordingly, for the foregoing reasons and those stated elsewhere in these comments, the proposed rule impermissibly attempts to expand jurisdiction beyond the agencies' statutory authority under the CWA. (p. 22-24)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution and is narrower in scope than the existing regulation. Technical Support Document, I.A, B. and C.

10.294 The agencies claim that the proposed rule does not change the scope of what is jurisdictional today.[474] But in fact the proposed rule is a substantial expansion from current practice and from appropriate application of the *SWANCC* and *Rapanos* decisions. Furthermore, the agencies' claim is somewhat meaningless because CWA jurisdiction has been a moving and inconsistent concept for years. For decades, proceeding largely case-by-case and often through guidance, the agencies have "stretched the term 'waters of the United States' beyond parody." *Rapanos*, 547 U.S. at 734 (plurality). Guidance documents have been unclear and inconsistently applied, leading to varied interpretations by regulatory offices within a single State and even between regulatory staff in the same office.[475] At the same time, as the agencies have eschewed notice and comment rulemaking, regulated parties generally have been unable to challenge the agencies' overreaching. And when regulated parties have attempted to challenge agency guidance or case-by-case jurisdictional claims in court, the agencies have wrongfully persuaded he lower courts that such jurisdictional claims are unreviewable. "Guidance" is argued by the agencies to be non-binding and immune from review[476] (although courts have disagreed with that position[477]), and case-by-case claims

[472] Paul Quinlan, Oberstar bearish on strengthening Clean Water Act, E&E Reporter (Nov. 16, 2010), available at http://www.eenews.net/eenewspm/stories/1059942202.

[473] In fact, on September 9, 2014, the House of Representatives passed H.R. 5078, legislation that would prevent EPA from implementing the proposed rule on the grounds that it is a regulatory overreach of EPA. While the bill's chances of passage in the Senate are uncertain, and the White House has threatened to veto the bill, it makes clear that Congress itself is acting to prevent the proposed rule's enactment on jurisdictional grounds.

[474] See EPA WOTUS Questions and Answers.

[475] See, e.g., U. S. General Accounting Office, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO No. 04-297 at 26 (Feb. 2004) ("GAO No. 04-297").

[476] See, e.g., *Nat'l Mining Ass'n v. Jackson*, 758 F.3d 243 (D.C. Cir. 2014).

[477] See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) (holding that a guidance document reflecting a settled agency position was final because it had legal consequences for those subject to regulation and the regulators). See also, e.g., *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1283-84 (S.D. Fla. 2010).

are characterized by the agencies as "preliminary" and likewise immune.[478] In this way, the agencies have attempted to insulate themselves from judicial oversight as they slowly recaptured many of the remote features that were held to be beyond the reach of the CWA by the *SWANCC* and *Rapanos* decisions.

But "an agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error." *Summit Petroleum v. EPA*, 690 F.3d 733,746 (6th Cir. 2012). In Summit Petroleum, the U.S. Court of Appeals for the Sixth Circuit vacated EPA's unreasonable interpretation of "adjacency" for purposes of determining whether multiple facilities could be aggregated as a single source for Clean Air Act permitting. *Id*. Although EPA pointed to previous guidance documents supporting its interpretation, the court declined to defer to EPA's interpretations. Id. Similarly, here, the fact that the agencies are currently asserting broad jurisdiction well beyond the limits recognized by the Supreme Court does not provide legal justification for the inclusion of such a sweeping interpretation of "waters of the United States" in the proposed rule. (p. 24-25)

Agency Response: **The rule is consistent with the statute, the caselaw, and the Constitution and is narrower in scope than the existing regulation. Technical Support Document, I.A, B. and C. The statement that the proposed rule (and the final rule) is narrower than the existing rule was to provide the public with context to comment on the proposal, rather than provide a "legal justification" for the rule.**

10.295 The Proposed Rule incorrectly applies only Justice Kennedy's *Rapanos* opinion and ignores *SWANCC* and the *Rapanos* plurality decisions. The proposed rule (and preamble) ignores *SWANCC* and misinterprets *Rapanos* in several key respects, consequently sows confusion instead of providing clarity, and sets forth a "waters of the United States" definition that does not comport with a true reading of the case law. Fundamentally, the agencies' proposed rule fails to adhere to the appropriate legal standard because the rule incorrectly applies only Justice Kennedy's *Rapanos* opinion and completely ignores the plurality decision. To comply with Supreme Court and common law precedent, the proposed rule should only find jurisdiction where both the plurality's and Justice Kennedy's standards are satisfied.

Under *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. 188, 193 (1977) (internal quotations omitted) (emphasis added). The *Marks* Court's reference to "the holding" and "that position" taken by the concurring Justices clearly reinforces the principle that a plurality decision, like all other Supreme Court decisions, must be read to produce a single holding on the point of law at issue in the case.

Supreme Court precedent and basic common law principles require that the agencies identify a single holding from *Rapanos*. *Id*. That holding is the readily identifiable

[478] See, e.g., *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014) (denying review of an approved jurisdictional determination); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008) (same). We think these cases are wrongly decided and reserve our rights to challenge all these points.

common logic of the plurality and Justice Kennedy that was "necessary" and "pivotal" to the decision in the case.[479] The judgment of the *Rapanos* Court, by a 5 to 4 vote, announced by Justice Scalia and with which Justice Kennedy concurred, was to "vacate the judgments" against *Rapanos* and *Carabell*, and remand for further proceedings. The plurality opinion and Justice Kennedy's opinion rejected the Corps' assertion that the CWA regulates any non-navigable water that has "any hydrological connection" to navigable waters. Although *Rapanos* was decided by a plurality of four Justices and a separate concurring Justice, those Justices agreed on a common framework and provided several limiting principles that restrain the agencies' jurisdiction under the CWA. This is the holding that is the narrowest, and under *Marks* is the holding the agencies must follow.[480]

To faithfully implement the single holding of *Rapanos*, which is the restriction of CWA jurisdiction based on limiting principles articulated by both the plurality and Justice Kennedy, only those waters that would meet both the plurality and Justice Kennedy tests can be deemed jurisdictional. The single holding from *Rapanos* is the plurality's and the concurrence's common reasoning on the boundaries of CWA jurisdiction. Although the plurality and Justice Kennedy did not agree on the specific tests for CWA jurisdiction, both found that the Corps had gone too far in its "any connection" theory, and both articulated principles that were intended to limit CWA jurisdiction.

Both the plurality and Justice Kennedy's opinion start from a common understanding of TNWs – i.e., the waters that were subject to regulation under the Rivers and Harbors Act ("RHA") prior to the passage of the CWA. See *Rapanos*, 547 U.S. at 731 (plurality), 767 (Kennedy, J., concurring). Both further agreed that "Congress intended to regulate at least some waters that are not navigable in the traditional sense," *id*. at 767 (Kennedy, J., concurring), 731 (plurality), but that "the qualifier 'navigable' is not devoid of significance," *id*. at 731 (plurality), and must be given "some meaning," *id*. at 779 (Kennedy, J., concurring).

With respect to tributaries, both opinions would allow jurisdiction over certain non navigable tributaries, but both the plurality and Justice Kennedy were concerned about far reaching jurisdiction over features distant from navigable waters and carrying only minor volumes of flow. Justice Kennedy criticized the agencies' "existing standard" which "deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark" because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id*. at 781 (Kennedy, J., concurring). Similarly, the plurality criticized the agencies for extending jurisdiction to "'ephemeral streams', 'wet meadows', storm sewers and culverts, 'directional sheet flow during storm events', drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert." *Id*. at 734 (plurality). Both opinions agreed that the Corps had gone

[479] See Black's Law Dictionary 849 (10th ed. 2004) (defining "holding" as "a court's determination of a matter of law pivotal to its decision"); see also *United States v. Garcia*, 413 F.3d 201, 232 n. 2 (2d Cir. 2005) (Calabresi, J., concurring) (defining a holding as "what is necessary to a decision").

[480] Our comments on the 2008 *Rapanos* Guidance provide an extensive Marks analysis and discuss the single holding of *Rapanos* at length. See AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 10-22.

too far in its assertion of jurisdiction over tributaries and that "mere adjacency to a tributary" is insufficient. *Id*. at 786 (Kennedy, J., concurring).

With respect to wetlands, both opinions would require the agencies to demonstrate a meaningful relationship between non-abutting wetlands and TNWs for those non-abutting wetlands to be jurisdictional. Both the plurality and Justice Kennedy agreed that a mere hydrological connection between a wetland and a TNW is not sufficient to establish jurisdiction. See *id*. at 732 (plurality), 784 (Kennedy, J., concurring). Beyond this starting point, the plurality found that only wetlands with "a continuous surface connection" to waters of the United States, "making it difficult to determine where the 'water' ends and the 'wetland' begins," are covered by the Act. *Id*. at 742 (emphasis in original). By contrast, Justice Kennedy would require that there be a "significant nexus" such that wetlands "significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 779, 780. Wetlands with "speculative or insubstantial" effects on water quality do not satisfy this standard. *Id*. at 780. Again, the combined impact of these limiting principles is that the agencies must demonstrate that wetlands have a meaningful relationship with TNWs to be jurisdictional.

In sum, five Justices agreed that a mere hydrologic connection is not enough to establish jurisdiction under the CWA, that the CWA does not extend to features distant from navigable waters and carrying only minor volumes of flow, and that there must be a meaningful relationship between non-abutting wetlands and TNWs for those non-abutting wetlands to be jurisdictional. Under *Marks* and basic common law principles, this framework represents the single holding of *Rapanos* that the agencies are legally bound to follow.

Thus, in light of *Marks*, only those waters that would be jurisdictional under elements common to both the plurality and Kennedy opinions are jurisdictional under *Rapanos*. To implement the holding of the *Rapanos* Court, only those waters that would meet both the plurality and Kennedy tests can be deemed jurisdictional. Waters that meet only one or the other test are not jurisdictional "waters of the United States." The proposed rule does not faithfully implement *Rapanos* because it is not based on determining which waters would meet both tests

The agencies cannot rely solely on Justice Kennedy's significant nexus standard as the governing holding of *Rapanos*. Throughout the proposed rule, the agencies rely only on their misinterpretation of Justice Kennedy's "significant nexus" standard. They ignore all limits on CWA jurisdiction that Justice Kennedy and the plurality agreed upon, and pay no attention whatsoever to the plurality's "relatively permanent waters" or "continuous surface connection" standards. This proposed rule signals a shift from the agencies' previous interpretations of *Rapanos*. In both the *Rapanos* Guidance[481] and the Draft 2011 Guidance, the agencies found jurisdiction if either the plurality's or Justice Kennedy's standards was satisfied. As we noted in comments on those guidance documents and have

[481] EPA and U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, (Dec. 2, 2008) ("*Rapanos* Guidance").

reiterated here, the "either/or" approach is not true to *Marks*.[482] Now, the agencies have shifted from an "either/or" approach to a "Kennedy only" approach (using an approach that itself is flawed) without any explanation of why they now view the significant nexus test as controlling.[483]

But the agencies cannot pick and choose which Supreme Court opinion they like best. *Marks* precludes reading *Rapanos* in a manner that produces multiple and potentially inconsistent holdings and instead seeks a single holding reconciling the views of the Members of the Court who concurred in the judgment. See *Marks*, 430 U.S. at 193. The four-Justice *Rapanos* plurality rejected the "significant nexus" test. *Rapanos*, 547 U.S. at 755. There is no good reason to select one concurring opinion as the single "winner" when four of the five Justices who issued the Court's decision rejected that opinion's approach. Under Marks and common law practices, the agencies cannot wholly ignore the plurality and treat Justice Kennedy's opinion as the sole controlling holding of *Rapanos*.

Nor can the agencies rely on dissenting Justices to support the proposed rule's adoption of only Justice Kennedy's significant nexus standard. Without acknowledging that the rule is based only on Justice Kennedy's standard, the preamble notes that the four dissenting Justices in *Rapanos* would have upheld CWA jurisdiction for "all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy." 79 Fed. Reg. at 22,192. The opinions of the dissenting Justices, however, are irrelevant. Only those opinions that "concur in the judgments" count toward determining the "holding of the Court."[484] The dissenting Justices did not concur in the judgment, and therefore the agencies cannot head-count across all of the opinions to come up with a majority.

Rather, as directed by *Marks*, the agencies must find a single holding based on the common elements of the plurality's and Justice Kennedy's opinions. Although finding the common ground between the plurality and concurring opinions is more complicated

[482] Interpreting *Rapanos* as supporting jurisdiction if either the plurality or Justice Kennedy's test is satisfied results in the Supreme Court's decision being interpreted as having two inconsistent holdings. *Marks* cannot be interpreted as allowing cases such as *Rapanos* to have multiple holdings, as evidenced by its use of the phrases "the holding" and "that position." See AFBF Comments on *Rapanos* Guidance at 16-18.

[483] The preamble does not explain why the agencies are relying solely on Justice Kennedy's standard. They do not claim that the significant nexus standard is the "narrowest" ground from Rapanos or that they are following the reasoning of any particular circuit court decisions. Rather, without explanation, the agencies create a new jurisdictional standard without relying on or abiding by the Rapanos plurality opinion. This is hardly reasoned decisionmaking.

[484] See *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("Dissenters, by definition, have not joined the Court's decision. . . . *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented. . . . It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day. . . ."); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

than simply adopting wholesale one opinion or the other, this is what Marks requires.[485] Chief Justice Roberts recognized that it would be complicated to apply the holding of *Rapanos*, noting that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

In sum, the agencies may not ignore the *Rapanos* plurality and rely solely on Justice Kennedy's opinion. To be true to Marks, the agencies can only find jurisdiction where both the plurality's and Justice Kennedy's tests are satisfied. (p. 25-29)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

10.296 The agencies cannot rely solely on Justice Kennedy's significant nexus standard as the governing holding of *Rapanos*. Yet the proposed rule relies heavily on the agencies' misinterpretation of Justice Kennedy's significant nexus standard, citing to Justice Kennedy's opinion 99 times, and holding it up as the controlling rule of law. The proposed rule categorically determines that all "tributaries" and "adjacent waters" have a significant nexus to (a)(1) through (a)(3) waters (TNWs, interstate waters, and territorial seas), and are therefore jurisdictional "waters of the United States." 79 Fed. Reg. at 22,204-05, 22,209-10. It also provides that, on a case-by-case basis, "other waters" will be jurisdictional if, when aggregated with all other waters in a watershed, the other waters have a significant nexus to an (a)(1) through (a)(3) water. *Id*. at 22,212. It is improper for the proposed rule to rely solely on Justice Kennedy's opinion, but the proposed rule fails to apply even its hallmark test correctly. The proposed rule's construction is problematic because it misconstrues and misapplies the significant nexus standard, resulting in much broader assertions of jurisdiction than Justice Kennedy's *Rapanos* opinion allows.

The proposed rule states that although Justice Kennedy's significant nexus standard involved wetlands, "it is reasonable to utilize the same standard" for non-wetland waters.

[485] Indeed, the complicated nature of this inquiry is likely why the Circuit Courts of Appeals are not uniform as to the controlling standard for "waters of the United States" under *Rapanos*. The crux of the circuit split is how one defines "narrower." In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the case interpreted by the *Marks* Court, the narrowest judgment is clear because it is a subset of the other two positions. In Memoirs, a plurality found that a particular book was not obscene. *Id*. at 421. Two concurring Justices also found the book was not obscene, but would have gone further regarding absolute First Amendment protections. *Id*. Thus, *Marks* held that the plurality opinion was based on the narrowest grounds and therefore constituted the holding of the Court and provided the governing standard. *Marks*, 430 U.S. at 194. Identifying the narrowest reasoning is not as straightforward with *Rapanos* because the two opinions do not create a nice, clear subset of jurisdictional waters – the concurring rationales do not fit within each other like Russian dolls. See *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); Joseph M. Cacace, Plurality Decisions in the Supreme Court of the United States: A Reexamination of the *Marks* Doctrine After *Rapanos v. United States*, 41 Suffolk U. L. Rev. 97, 98 (2007). Instead the plurality's and Justice Kennedy's opinions overlap in some cases and would lead to opposite results in other cases. Some courts argue that Justice Kennedy's is the narrower decision because it reins in federal authority less (e.g., *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006)), while others suggest that the plurality could be the narrower decision because it is most restrictive of government authority and avoids the expansion of the Commerce Clause (e.g., Johnson, 467 F.3d at 63). These circuit courts miss the mark, however. *Marks* does not require that we determine which opinion is narrowest. It requires determining the narrowest "position" taken by those members who concurred in the judgments. *Marks*, 430 U.S. at 193. Because the legal standards set by the two opinions create overlapping universes of jurisdictional waters, there is a clear narrow judgment that received the "assent of five Justices" in *Rapanos*. And that single holding is the framework discussed in section II.G.2.

79 Fed. Reg. at 22,204; see also 22,209, 22,212. But the agencies do not explain why it is reasonable to extend the application of the significant nexus test to tributaries and non-wetland waters that may not be serving the same functions for those TNWs that wetlands are. Indeed, as we have noted in the past,[486] the plain language of Justice Kennedy's concurrence and later case law interpreting the significant nexus standard demonstrate that the standard cannot be applied to non-wetlands as the agencies have done here.

Justice Kennedy's significant nexus standard has its origins in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). The *Riverside Bayview Homes* Court upheld the Corps' jurisdiction over wetlands abutting on navigable-in-fact waterways. 474 U.S. at 121. As later characterized by the *SWANCC* Court, "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167. In his concurring opinion, Justice Kennedy adopted this language as the standard for determining whether wetlands adjacent to nonnavigable tributaries are jurisdictional. It is clear from his language that wetlands were the sole focus of his inquiry. Justice Kennedy explained, "[W]etlands possess the requisite nexus…if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters…" *Rapanos*, 547 U.S. at 780 (emphasis added). Justice Kennedy instructed the agencies to apply a case-by-case significant nexus analysis when they "seek[] to regulate wetlands based on adjacency to nonnavigable tributaries." *Id*. at 782.

The U.S. Court of Appeals for the Ninth Circuit has squarely rejected the application of the significant nexus test to non-wetland waters, explaining that "*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent wetlands . . . . No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act." See *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007) (rejecting Baykeeper's argument that the Supreme Court has held that the CWA protects all waterbodies with a significant nexus to navigable waters). Thus, it is unreasonable for the agencies to extend Justice Kennedy's significant nexus test to tributaries, adjacent non-wetlands, and other waters because it results in the assertion of jurisdiction beyond what both Justice Kennedy and the plurality intended and is unsupported by judicial precedent.

The proposed rule's aggregation approach is inconsistent with Justice Kennedy's opinion and results in overly broad assertions of jurisdiction. Under the proposed rule, the agencies intend to aggregate "other waters" for purposes of assessing significant nexus. That is, to determine whether one water is jurisdictional, the agencies can aggregate all "similarly situated" waters within a watershed and look at whether all of those waters, taken together, have a significant nexus with (a)(1) through (a)(3) waters. 79 Fed. Reg. at 22,212. The agencies will deem waters to be "similarly situated" if they "perform similar functions" and are located "sufficiently close together." *Id*. at 22,213. Again, the agencies may not rely on Justice Kennedy's significant nexus standard as the governing holding of *Rapanos*. But this broad aggregation standard goes well beyond what Justice Kennedy

[486] See WAC Comments on the 2011 Draft Guidance, Exhibit 1 at 42-44; AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 34.

authorized and will allow for assertions of jurisdiction over remote features with tenuous connections to (a)(1) through (a)(3) waters.[487]

In his concurrence, Justice Kennedy rejected the agencies' assertion of jurisdiction over non-navigable waters based on "a mere hydrologic connection" to navigable waters. *Rapanos*, 547 U.S. at 784. He repeatedly cautioned that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a significant nexus. *Id*. at 778-79. In application of the significant nexus standard to the wetlands at issue in *Rapanos* and *Carabell*, Justice Kennedy did not aggregate wetlands in the same watershed, nor did he take the position that lower courts should determine jurisdiction over the wetlands at issue by aggregating impacts of all the wetlands surrounding the wetlands at issue. Rather, he focused on use of an individual significant nexus test and examination of the distance, quantity, and regularity of flow for each wetland at issue. *Id*. at 784-87. (p. 29-31)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C.**

10.297 The Proposed Rule, with its expansive, vague, and unclear provisions, fails under the "void for vagueness" doctrine. There are specific constitutional due process prohibitions on adoption of an expansive, vague, and unclear standard that will determine potential liability in civil and criminal enforcement actions, as the proposed rule here would under the CWA. Additionally, such an expansive and vague definition will open the floodgates to "bounty hunter" citizen suits under the CWA, burdening the regulated community and the courts with wasteful and unnecessary litigation. This will also produce inconsistent results in lower courts until the jurisdictional limits are, once again, addressed by the Supreme Court.

As stated by the Supreme Court, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment . . . [, and i]t requires the invalidation of laws that are impermissibly vague." *Id.*; see also *United States v. Williams*, 553 U.S. 285, 304 (2008). This doctrine is often referred to as the "void for vagueness" doctrine. The void for vagueness doctrine addresses two important due process concerns: "first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*; see also *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Here, the proposed rule is a clear example of a statute that fails under the void for vagueness doctrine. The CWA provides for both civil and criminal enforcement for alleged violation of permits, unpermitted discharges, and other alleged violations of CWA requirements. See 33 U.S.C. § 1319. The definition and scope of "waters of the United States" is a critical element in the Act and a factor in determining the scope of

[487] See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 44.

regulated activity and potential liability. As such, the jurisdictional limits must be defined in such a way as to "give fair notice of conduct that is forbidden or required." *F.C.C.*, 132 S. Ct. at 2317. Yet the proposed rule allows for sweeping jurisdiction based on tenuous connections, catch-all categories, and direct and indirect impacts, all of which leave a potentially liable person or entity in the dark as to what actions may or may not be subject to CWA enforcement. Such vague and ambiguous language fails to meet constitutional standards for enforcement actions. (p. 94)

Agency Response: **The Supreme Court has found that the phrase "waters of the United States" is ambiguous and therefore the agencies have authority to interpret it. The Supreme Court has never found that the phrase "waters of the United States" is void for vagueness. The final rule is also not vague, clearly identifying waters that are jurisdictional, waters that are not jurisdictional, and a limited set of waters for which case-specific significant nexus analyses will be performed. Preamble, IV.**

10.298 The Proposed Rule's definition of Traditional Navigable Waters is Inconsistent with the definition relied on by the Justices in *Rapanos*. The proposed rule's (a)(1) provision covers "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 79 Fed. Reg. at 22,262. These (a)(1) waters are commonly referred to as TNWs. Although the proposed rule would not change the regulatory text for TNWs from the existing regulations, the agencies' interpretation of the scope of waters that are considered TNWs broadly expands the concept of TNWs and is inconsistent with the definition relied on by the *Rapanos* plurality and Justice Kennedy's concurrence. The agencies' misinterpretation of TNWs was addressed in detail in our comments on the 2011 Draft Guidance.[488]

In *Rapanos*, both the plurality and Justice Kennedy based their jurisdictional tests on what they referred to, respectively, as "traditional interstate navigable waters" and "navigable waters in the traditional sense."[489] The waters to which the plurality and Justice Kennedy are referring are unmistakably clear from the cases they cite to describe them – *The Daniel Ball v. United States*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). These cases are cornerstones in a canon of well-established cases that define TNWs as waters that: (1) are navigable-in-fact (or capable of being rendered so) and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce. See *The Daniel Ball*, 77 U.S. at 563.

The proposed rule acknowledges the origins of the well-understood TNW definition, but vastly expands the idea by providing that a water will be considered an (a)(1) water, inter alia, if "a Federal court has determined that the water body is 'navigable-in-fact' under

[488] See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 25-34.

[489] *Rapanos*, 547 U.S. at 742 (plurality) (establishing that a wetland is covered by the CWA requires a showing that "the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters) . . ."); id. at 779 (Kennedy, J., concurring) ("the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.").

Federal law for any purpose." 79 Fed. Reg. at 22,255.[490] It also provides for a water to be considered a TNW if it is "currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)." 79 Fed. Reg. at 22,200. As the Supreme Court has explained, however, "any reliance upon judicial precedent" on the subject of navigability "must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979); see also *PPL Montana LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (noting that "the test for navigability is not applied in the same way in the[] distinct types of cases").

That a water is deemed a "navigable water" by a federal court for purposes of title, admiralty, or the RHA does not mean that it meets the two-part standard of a traditional navigable water. Indeed, a water can be a "navigable water" for purposes of the RHA, for example, but not be a CWA jurisdictional water. See *United States v. Milner*, 583 F.3d 1174, 1196 (9th Cir. 2009) (finding jurisdiction under the RHA, but not the CWA, noting "the RHA's concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other. Since the two laws serve different purposes, their regulatory powers will diverge in some circumstances, as is the case here."). Likewise, treating a waterbody as a TNW simply because a canoe or kayak can float on it is an impermissible expansion of the traditional navigable waters definition relied on by the *Rapanos* Court. Thus, the agencies' interpretation of what can be considered a TNW to be regulated under paragraph (a)(1) of the proposed rule should be limited to the traditional scope as relied upon in *Rapanos* and cannot be based on navigability determinations for other purposes or recreational use. (p. 99-100)

Agency Response: **The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. While the 2008 attachment, the preamble to the proposed rule, and the Technical Support Document reflect the considerations the agencies while use when making traditional navigable waters determinations, when such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. See Technical Support Document, III.**

Texas Association of Builders (Doc. #16516)

10.299 The proposed rule creates many areas of concern for our Association and industry. First, the proposed rule does not follow established law by ignoring the intent of Congress and recent Supreme Court rulings. The Clean Water Act was enacted as a means for Congress to exercise its traditional commerce power over navigation. The proposal's attempt to

[490] As examples, the agencies provide citations to several cases arising in non-CWA contexts, including FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151 (D.C. Cir. 2002) (stream met broad definition of "navigable waters" under Federal Power Act where canoe could be successfully navigated downstream); Alaska v. Ahtna, 891 F.3d 1401 (9th Cir. 1989) (river used for commercial fishing found to be navigable for purposes of "equal footing doctrine"). Although the waters at issue in these cases satisfied the navigability standard in their particular contexts, they would not necessarily satisfy The Daniel Ball and RHA standards and therefore may not be traditional navigable waters under the CWA.

expand the CWA's reach to isolated, non-navigable waters, among others, is a far cry from the navigable waters the statute intended to cover. In addition to ignoring this intent of Congress, the proposed rule fails to adhere to clear Supreme Court Holdings. In both *Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers* ("*SWANCC*"),[491] and *Rapanos v. United States & Carabell v. United States* ("Rapanos"),[492] the Supreme Court made it clear that there are limits to federal authority under the CWA. By proposing to expand coverage to include areas that are rarely wet or exhibit characteristics of regular flooding or flow, the Agencies are plainly ignoring these limits and Supreme Court precedent. (p. 1-2)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

Barrick Gold of North America (Doc. # 16914)

10.300 In the past, the agencies justified their broad jurisdictional reach in part based on the Supreme Court's holding in *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), which affirmed Clean Water Act jurisdiction over wetlands adjacent to or abutting traditional navigable waters. The Court recognized that Congress intended with the passage of the 1972 Act "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133. The Court reasoned that the "Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import" in interpreting the jurisdictional reach of the statute. For nearly 20 years after the Court's decision in *Riverside Bayview Homes* the agencies extended the definition of "waters of the United States" to cover waters more and more remote from traditional navigable waters.

That era ended in 2001, when the Supreme Court rejected the notion of unfettered Clean Water Act jurisdiction based on the Commerce Clause. The Court invalidated the Corps' "migratory bird rule," which (among other things) extended Clean Water Act jurisdiction to isolated wetlands used by migratory birds. In so doing, the Court revisited its *Riverside Bayview Homes* comment about the "limited" import of the word navigable, signaling a change in direction for the Court's views about Clean Water Act jurisdiction:

> We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute . . . does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands

[491] *Solid Waste Agency of Northern Cook County v. U.S Army Corps of Engineers*, 531 U.S 159 (2001).
[492] *Rapanos v. United States*, 547 U.S 715 (2006).

> adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. 531 U.S. at 171-72.

The Court found that a permissible definition of "waters of the United States" avoids "the significant constitutional and federalism questions raised" by a definition extending the scope of jurisdiction to the limits of Congress' Commerce Clause authority. *Id*. at 174. The Court noted that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we require a clear indication that Congress intended that result." *Id*. at 172. The Court found no evidence of such a clear intent from Congress in passing the Clean Water Act, and thus determined that an interpretation of "waters of the United States" that pushed the definition to the limits of Congress' Commerce Clause Authority was not allowed. *Id*. at 173-174. In effect, the Court held that the scope of "waters of the United States" is narrower than the limits of Congress' Commerce Clause Authority.

The Court's 2006 decision in *Rapanos* also rejected the Corps' expansive jurisdiction, but did so in a plurality opinion (authored by Justice Scalia on behalf of himself and three other justices) and a concurring opinion authored by Justice Kennedy, along with two separate 8 dissenting opinions. The plurality and Justice Kennedy agreed that the Corps' assertion of jurisdiction was too broad, but could not agree on a standard for analyzing the appropriate boundaries of Clean Water Act jurisdiction. Courts hearing Clean Water Act cases after *Rapanos* have failed to come up with a consistent view of Clean Water Act jurisdiction or the appropriate way to apply the plurality decision.[493]

However, the plurality and Justice Kennedy were able to agree on one thing in *Rapanos* – that the Court's prior decision in *SWANCC* remains good law. See e.g. 547 U.S. at 727 and 759. Accordingly, the Supreme Court has provided the agencies with guidance that is clear enough regarding the scope of Clean Water Act jurisdiction: the authority is broader than traditional navigable-in-fact waters, but also must be narrower than the limits of Congress' authority to regulate under the Commerce Clause. Put another way, the boundary between land and water must be drawn somewhere between wetlands physically abutting a traditional navigable water and isolated, intrastate ponds whose only

[493] Since the Court's decisions in *Rapanos* were issued in 2006, Circuit Courts have been divided over its precedential effect. Several Circuits have adopted a standard acknowledging jurisdiction if either the plurality's "surface connection" standard or Kennedy's significant nexus standard is met. Other Circuits have held that only Justice Kennedy's significant nexus standard should be applied. See e.g. *U.S. v. Gerke Excavating, Inc*., 464 F.3d 723, 724 (7th Cir. 2006). Still others have deftly avoided having to pick a standard. See *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). Both the plurality and Justice Kennedy made clear that nothing in their opinions in *Rapanos*, or the standards for assessing jurisdiction they asserted, modified the clear limits on jurisdiction established in *SWANCC*. See 547 U.S. at 748 and 781-82. Accordingly, in assessing whether the plurality or Kennedy's concurrence should control, care should be taken not to construe either standard so as to stretch the jurisdictional boundaries previously established. When viewed in this light it becomes clear that the plurality decision is "narrower" because it is "less doctrinally sweeping." Cundiff, 555 F.3d at 209. While Barrick considers this debate important, rather than setting out this discussion here, Barrick refers to the comments of the NMA and WAC on this issue.

connection to traditional navigable waters is their use by migratory birds. The proposed rule is legally unsustainable because it does not limit itself to a definition of "waters of the United States" that respects those boundaries. (p. 7-9)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C.

10.301 The Agencies' significant nexus test is inconsistent with Supreme Court precedent. The term "significant nexus" originated in the Court's *SWANCC* opinion, where the Court used the term to characterize why it recognized Clean Water Act jurisdiction over wetlands adjacent to traditionally navigable waters in *Riverside Bayview Homes*. 531 U.S. at 167. The term took on greater significance only after *Rapanos*, where Justice Kennedy based his concurring opinion on it, effectively describing it as a test that can be used to define the boundaries of Clean Water Act jurisdiction. 547 U.S. at 759.[494] However, Justice Kennedy also described limiting factors and offered observations that must be taken into account. First, he criticized the dissenting justices for ignoring the Clean Water Act's text, which grants jurisdiction over the "navigable waters." 547 U.S. at 778. Justice Kennedy emphasized that in defining jurisdiction, the words "navigable waters" must be given some effect. *Id*. Second, Justice Kennedy stipulated that the effects on navigable waters must be more than "speculative or insubstantial" to be considered "significant" for Clean Water Act jurisdictional purposes. 547 U.S. at 780. Third, Justice Kennedy criticized the Corps' then-existing rules asserting jurisdiction over wetlands adjacent to tributaries – however remote and insubstantial – as extending the "significant nexus" concept too far, and rejected those rules as a basis for deciding the *Rapanos* case. 547 U.S. at 781-82. And most importantly, Justice Kennedy implicitly criticized the Corps' pre-*Rapanos* standard for including all tributaries as jurisdictional, observing that it left "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it…." 547 U.S. at 781.

The agencies acknowledge some of this context in the rule preamble, but abandon it in practice in the text of the proposed rule. Nowhere to be found is any recognition of Justice Kennedy's criticism of jurisdiction asserted over water bodies that are remote from any navigable water. Instead, the agencies propose definitions of tributaries, adjacent waters, and other waters that have no objective or absolute geographic limit on what can be deemed a "water of the United States." Rather than using a test that is based on or resembles the Kennedy test, the agencies rely on the study conducted by EPA's Office of Research and Development, which the agencies refer to as "the Connectivity Report" to support these overreaching definitions in the proposed rule.[495] (p. 13-14)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C. The rule reflects the judgment of the agencies in balancing the science, the agencies' expertise, and the

[494] Justice Scalia, writing for the plurality, harshly criticized Justice Kennedy's focus on "significant nexus" as ignoring the Clean Water Act's text. 547 U.S. at 755.

[495] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence (Washington, D.C: U.S. Environmental Protection Agency, 2013).

regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the statute and the Supreme Court opinions. See Preamble, III and IV, Technical Support Document, II and VI.

Oregon Cattlemen's Association (Doc. #5273.1)

10.302 The jurisdictional scope of the CWA is limited to "navigable waters," defined in the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C . § 1362(7).

Long before the CWA was enacted, the Supreme Court interpreted the phrase "navigable waters of the United States" as it was used in statutes preceding the CWA to refer to waters that are "navigable in fact" or readily susceptible of being rendered so. *See Rapanos v. United States,* 547 U.S. 715, 723 (2006) (citing *The Daniel Ball,* 77 U.S. 557, 563 (1870); *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 406 (1940)).

Following the passage of the CWA, the Corps adopted an agency definition of "navigable waters" which echoed this idea that "navigable waters" means waters that are navigable in fact and have the capability of being used for the transportation of goods in interstate commerce. 33 C.F.R. pts. 209.l 20(d)(I), 203.230(e)(I).

Subsequent Supreme Court interpretations of the meaning of the term "navigable waters" have held that the deliberate inclusion of the word "navigable" in the CWA is useful to the Court in that it is indicative of what Congress believed to be the scope of its own authority in enacting the CWA, and therefore the intended scope of waters that would fall under CWA jurisdiction. *Solid Waste Agency of N. Cook Cnty. v. U.S Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (*SWANCC*) (citing *Riverside Bayview Homes, Inc*., 474 U.S. 121, 134, 1(1985)). (p. 1-2)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C.

10.303 The Supreme Court has also found that Congress intended the scope of its authority in enacting the CWA to extend to "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* (citing *Appalachian Electric*, 311 U.S. at 407-408).

In *Riverside Bayview*, the Supreme Court stated that the phrase "the waters of the United States" as it is used in the CWA refers primarily to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'." *Riverside Bayview*. This interpretation echoes the prior Supreme Court decisions in *The Daniel Ball*, in which the Court referred to the terms "waters" and "rivers" interchangeably, and *Appalachian Electric*, in which the Court consistently referred to "navigable waters" as "waterways." *The Daniel Ball*, 77 U.S. at 563; *Appalachian Electric*, 311 U.S. at 407-409; *See Rapanos*, 547 U.S. at 734.

The Court further clarified its belief that "the waters of the United States" connotes the presence of some hydrographic features conventionally identifiable as "waters" in both *Riverside Bayview* and *SWANCC* by repeatedly referring to the "navigable waters" covered by the CWA as "open waters." *Riverside Bayview*, 474 U.S. at 132 and n. 8, 134; *SWANCC*, 531 U.S. at 167, 172.

While the Agencies do have some authority in enacting regulations interpreting what Congress meant by "the waters of the United States," the Agencies' interpretation must be "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc*., 467 U.S. 837, 843 (1984). The Agencies' proposal to expand the scope of waters to include waters which are not "waters" in the conventional sense, but merely "significantly affect" such conventionally-identifiable waters is not a permissible construction of the CWA. (p. 2)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C.

Montana Wool Growers Association, (Doc. #5843.1)

10.304 MWGA is concerned that the Agencies try to do too much with an oversimplified simple definition. The Proposed Rule would rewrite the CWA (and constitutional limits on federal authority) through the definition of navigable waters. As explained in the following sections, the CWA does not contemplate the broad spectrum of regulation provided for under the Proposed Rule. Further, the Proposed Rule's definition of "navigable waters" is contradictory to statutory language in the CWA, parallel statutes in Title 33, case law, and to the Constitution of the United States. The CWA contemplates the end result (improving water quality in navigable waters), but does not contemplate the means. (p. 1-2)

Agency Response: The rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C.

10.305 Title 33 of the United States Code, "Navigation and Navigable Waters," contains the CWA, as added in 1972 and amended in 1977, and the Rivers and Harbors Act of 1899, among other statutes. The Rivers and Harbors Act and the CWA both use the phrase "navigable waters of the U.S." or "navigable waters of the United States" throughout their statutes. "Navigable waters of the United States" is defined in 33 C.F.R. Part 329 for purposes of the Rivers and Harbors Act as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. 329.4 The Agencies agree "navigable waters," as used in Title 33, means navigable-in-fact or capable of being made navigable-in-fact. 79 Fed. Reg. at 22252-53.

The agencies aver "navigable waters" holds a different meaning in the CWA because the CWA has a broader objective. However, neither the CWA nor other statutes in Title 33 indicate a statute's objectives should be considered in determining the meaning of "navigable waters." In fact, Title 33 contains an introductory chapter named "Navigable Waters Generally" which indicates the phrase "navigable waters" is used consistently throughout the title. Further, the Corps originally defined "navigable waters" the same in regulations for the Rivers and Harbors Act and the CWA. As explained in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* the Corps expanded the rule without explanation in 1977. 531 U.S. 159, 168 (2001). (p. 4)

Agency Response: The agencies do not agree that "navigable waters," as used in the CWA means navigable-in-fact or capable of being made navigable-in-fact, nor do they agree that "navigable waters of the United States" in the Rivers in Harbor

Act means the same thing as "navigable waters" in the CWA. No Justice of the Supreme Court has ever held the CWA to be so limited. The rule is consistent with the statute, caselaw and Constitution. Technical Support Document, I.A. and C.

Maury County Farm Bureau (Doc. #9728)

10.306 Congress has spoken through the Clean Water Act. We certainly don't agree with all of the act, but it clearly limits federal jurisdiction to "Navigable Waters". The Supreme Court has repeatedly ruled that the wording of the CWA puts significant limits on the jurisdiction of the federal government. It is well past time for the EPA to listen to Congress and the Supreme Court, rather than issuing a rule that is clearly intended to circumvent the limits properly placed on them. This rule should be scrapped and work should begin on a new rule that limits federal jurisdiction in accordance with the CWA and the decisions of the Supreme Court. (p. 2)

Agency Response: The rule is consistent with the statute, caselaw and Constitution. Technical Support Document, I.A. and C.

Kansas Agricultural Alliance (Doc. #14424)

10.307 The proposed WOTUS rule exceeds the authority of the agencies granted by Congress under the CWA and violates the Commerce Clause of the U.S. Constitution. The basis of the CWA is to give the federal government limited authority to control pollution in water bodies that cross state lines and are subject to or effect commerce, and reserve the balance of pollution control authority to the states. This is embodied in section 101 of the CWA: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . ."[4] Through its proposed rule the agencies have completely eviscerated the concept of federalism integrated into the CWA because its rule purports to regulate anything that is wet.(p. 2)

Agency Response: The rule is consistent with the statute, caselaw and Constitution. Technical Support Document, I.A. and C.

National Corn Growers Association (Doc. #14968)

10.308 Jurisdictional determinations must be grounded meaningfully in navigability--Our views of the law go back to the foundational CWA premise, that jurisdictional waters be tied in a clear, direct, substantive and non-speculative fashion to navigation and navigability. Other non-navigable waters are of course jurisdictional under the CWA, but it is through their close, direct and substantial hydrological contribution to these navigable waters that they can be considered as part of a navigable system and therefore WOTUS. While the chemical, physical and biological effects of these other, non-navigable waters on downstream waters can and should be taken into account, the courts have made it clear that the term "navigable" in these jurisdictional determinations must be given real meaning. It is our view, in light of the three applicable Supreme Court decisions on this subject, that this proposed rule claims or could be claiming jurisdiction over features and waters that are so remote, and with such limited flowing water in them that they cannot in any way be considered as making a significant contribution to the navigability of the TNW. (p.18-19)

Agency Response: **The rule reflects the judgment of the agencies that certain waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The agencies disagree with the commenter that under the statute or caselaw "waters of the United States" must make a significant contribution to navigability of a traditional navigable water. The agencies balance the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the statute and the Supreme Court opinions. See Preamble, III and IV, Technical Support Document, II and VI.**

Union Pacific Railroad Company (Doc. # 15254)

10.309 The Proposed Rule is Contrary to Controlling Supreme Court Precedent Interpreting the Limitations on CWA Jurisdiction The Agencies claim that "the scope of regulatory jurisdiction in this proposed rule is narrower than that under existing regulations." 496 In making this claim, they acknowledge that narrower jurisdiction is required by the Supreme Court's decisions in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 169-174 (2001) ("SWANCC") and *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*").497 They also contend that the Proposed Rule is consistent with *SWANCC* and *Rapanos*,498 yet the Agencies have admitted elsewhere that the Proposed Rule expands CWA jurisdiction to take federal control of waters and features within the authority of the States. 499 Indeed, these purported "gaps" in State regulation were used by the Agencies to attempt to justify the need for the Proposed Rule. The Agencies cannot have it both ways, claiming on the one hand that the Proposed Rule is narrower, consistent with *SWANCC* and *Rapanos*, while admitting on the other hand that it expands CWA jurisdiction to fill purported gaps in State regulation. The Agencies' position that the Proposed Rule is consistent with the jurisdictional limitations of *SWANCC* and *Rapanos* requires a tortured reading of both of these controlling Supreme Court decisions. Additionally, the Agencies' position is neither a correct interpretation of Justice Kennedy's concurring opinion in *Rapanos* nor a correct application of the standards by which the plurality and concurring opinions must be interpreted in Supreme Court jurisprudence. In *Rapanos*, five Justices of the United States Supreme Court held that the Agencies had overreached in the breadth and interpretation of their definition of "waters of the United States." Justice Scalia's plurality opinion took the Agencies to task for their expansive interpretation of navigable waters, finding their assertions of jurisdiction to be "beyond parody." *Id*., 547 U.S. at 734. The plurality opinion held that "waters of the United States" means "only those relatively permanent, standing or

[496] *See* 79 Fed. Reg. at 22,189.
[497] *Id*.
[498] See, e.g., 79 Fed. Reg. at 22,192, 22,200, 22,210.
[499] See, e.g., http://www2.epa.gov/uswaters (Proposed Rule "[h]elps states to protect their waters") (Oct. 1, 2014); EPA Watershed Academy Webcast (Apr. 7, 2014), http://water.epa.gov/learn/training/wacademy/upload/040714-wous-transcript.pdf; EPA, Press Release, "EPA and Army Corps of Engineers Clarify Protection for Nation's Streams and Wetlands: Agriculture's Exemptions and Exclusions from Clean Water Act Expanded by Proposal(Mar. 25, 2014), http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600555. See 79 Fed. Reg. at 22,189. 6 *Id*.

continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams…, oceans, rivers, [and] lakes'…[and] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*., 547 U.S. at 739. On this basis, the plurality found the Agencies' expansive interpretation was not a permissible construction of the Clean Water Act. *Id*.; see also *SWANCC*, 531 U.S. at 169-174 (construing CWA jurisdiction as far more limited than the Agencies are now suggesting in the Proposed Rule). Justice Kennedy's concurring opinion in *Rapanos* also concluded that the test the Agencies were using to determine jurisdiction was too broad, expressly rejecting the premise that a seasonal drainage is transformed into a "water of the United States" merely because there is some intermittent or ephemeral hydrologic connection to a traditional navigable water. *Id*., 547 U.S. at 778-782. Under the approach adopted in the concurring opinion, a case-by-case analysis is required to determine whether there exists a "significant nexus" to navigable waters such that the upgradient drainages "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood" and "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*., 547 U.S. at 780-782. Notably, both the plurality opinion in *Rapanos* and Justice Kennedy's concurrence rejected the Corps claim – remarkably similar to the scope of jurisdiction under the Proposed Rule – that the CWA regulates waters that have any "hydrological connection" to navigable waters. *Id*., 547 U.S. at 734-739, 778-782. Following the *Rapanos* decision, the vast majority of stakeholders expected that the Agencies would follow the Court's direction and more narrowly and carefully define the scope of waters subject to the Agencies' CWA jurisdiction. Instead, the Proposed Rule ignores the plurality opinion and selectively quotes Justice Kennedy's concurring opinion, applying those words out of context to create broad, inconsistent and confusing standards and exceptions, and a regulatory framework in which it would be difficult to find a surface feature that collects water even a hundred miles away from a navigable water that is not jurisdictional.9 Neither the plurality nor Justice Kennedy would have anticipated this result. It is not a permissible construction of the statute under *Rapanos* and *SWANCC*. Consistent with the comments set forth herein, the Agencies should withdraw the Proposed Rule and work with stakeholders, including States, local governments and regulated entities to develop a revised rule that is consistent with Congressional intent and statutory and Constitutional limitations, and that is supported by science, provides clear standards, avoids unnecessary burdens and serves the public interest. B. Absent Congressional Action, the Agencies Cannot Expand Jurisdiction Beyond the Supreme Court's Interpretation of CWA Jurisdiction The Proposed Rule impermissibly attempts to expand jurisdiction beyond the Agencies' statutory authority under the CWA. Specifically, where, as here, (1) the United States Supreme Court opinions in *SWANCC* and *Rapanos* have construed Congressional intent as more limited than the regulatory interpretations of jurisdictional waters under the CWA, (2) Congress has not amended the statute to expand the definition of "waters of the United States" since *SWANCC* and *Rapanos*, and (3) the Proposed Rule is inconsistent with the limitations set by the *Rapanos* plurality opinion and Justice Kennedy's concurrence, the Agencies are exceeding their statutory authority in this Proposed Rule. We recognize that the Agencies contend that the Proposed Rule is consistent with Justice Kennedy's

concurring opinion in *Rapanos*. However, the Agencies' position is neither a correct interpretation of Justice Kennedy's opinion nor a correct application of the standards by which the plurality and concurring opinions must be interpreted. The Agencies' position cannot support the validity of the Proposed Rule. To the contrary, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). Thus, controlling Supreme Court precedent requires that the Agencies identify a single, narrow holding from *Rapanos* that was "necessary" and "pivotal" to the decision in the case. Instead, the Agencies' position and the Proposed Rule (1) ignores the plurality opinion; (2) ignores the common holding of the plurality and concurring opinions that the criteria used by the Agencies to determine jurisdiction was too broad; (3) ignores the common holding of the 500 connection" can provide CWA jurisdiction, and that a seasonal drainage is transformed into a "water of the United States" merely because there is some intermittent or ephemeral hydrologic connection to a traditional navigable water; and (4) quotes Justice Kennedy's concurring opinion selectively and out of context to attempt to support expanded jurisdiction. Indeed, the Agencies' position is quite remarkable: Both *Rapanos* and *SWANCC* held that the Agencies must exercise less, not more, jurisdiction than they had sought to assert under the CWA. Since then, Congress has not acted to amend the statute to expand the definition of "waters of the United States." Yet through the Proposed Rule, the same Agencies that the Supreme Court has expressly constrained on this same issue are again attempting to expand their jurisdiction, claiming to be following these Supreme Court decisions. The Agencies are, in fact, attempting to override the Supreme Court's decisions. It is well settled that only Congress has the power to override United States Supreme Court statutory interpretation decisions. See William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991); *Lane v. Pena*, 518 U.S. 187, 198- 199 (1996) (recognizing Congressional response to statutory interpretation decision); Rivers v. Roadway Express, Inc., 511 U.S. 298, 304-305, fn. 5 (1994) (recognizing Congress' power to "alter the rule of law established in one of [the U.S. Supreme Court's] cases"). Earlier this year the Supreme Court confirmed that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' [the Court] typically greet[s] the announcement with a measure of skepticism." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citations and quotations omitted). The Court "expects[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id*. (citations and quotations omitted).501 Congress has

[500] For example, although the Agencies admit that "puddles" are generally not be subject to CWA jurisdiction because they usually "exist for only a brief period of time before the water in the puddle evaporates or sinks into the ground," they contend that the term puddle is "not a sufficiently precise hydrologic term or a hydrologic feature" to be excluded altogether. 79 Fed.Reg. 22,218. Presumably, under the Proposed Rule, even a puddle could be subject to CWA jurisdiction if the Agencies determined it had a significant, intermittent or ephemeral surface or shallow subsurface nexus to waters of the United States.

[501] The Supreme Court has previously rejected the Agencies' argument in SWANCC and Rapanos that Congress' failure to disapprove earlier regulations expanding CWA jurisdiction should be considered tacit approval: "Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a

frequently overridden, or attempted to override, United States Supreme Court statutory interpretation decisions when it has disagreed with the Court's reading of the relevant statute. The Rapanos plurality acknowledged this power in finding that Congress had not extended the CWA jurisdiction as claimed by the Agencies, stating that it "would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." *Rapanos*, 547 U.S. at 738 (citations omitted). In the eight years since *Rapanos* was decided, Congress has not expanded the definition of "waters of the United States." The Agencies cannot do so without Congressional action. (p. 4-7)

Agency Response: The rule is narrower in scope than the existing regulation, and is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C.

10.310 …Congress has not simply declined to take action to expand the definition of "waters of the United States" following *Rapano*s. Congress has recently initiated action to disapprove the expansion of CWA jurisdiction in the Proposed Rule, with passage of H.R. 5078, entitled the "Waters of the United States Regulatory Overreach Protection Act of 2014." The legislation has 120 cosponsors and was approved by the House of Representatives by a vote of 262 to 152 on September 9, 2014. It is currently awaiting action by the Senate.[502] The legislation would prohibit the Agencies from developing, finalizing, adopting, implementing or enforcing either the Proposed Rule or the 2012 "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act," or using either as a basis for a new rule or guidance. Additionally, the legislation would require the Agencies to jointly consult with state and local regulatory officials to develop recommendations for an alternative proposal and to provide Congress with a report on those recommendations.[503] The stated purpose of this legislation is to respond to concerns of stakeholders, including Congress itself, that the Proposed Rule "fails to provide reasonable clarity, is inconsistent with Supreme Court precedent, and could broaden the scope of CWA jurisdiction, thereby triggering greater regulatory obligations" under the CWA. H.R. Rep. No. 113-568, at 9 (2014).[504] The fact that H.R. 5078 not only passed, but passed by a significant margin, provides further support for the conclusion that the Agencies' position is not consistent with Congressional intent or the Supreme Court's directives. Indeed, it appears Congress has the same concerns about Agencies' efforts to expand CWA jurisdiction as the concerns expressed by UPRR in these comments, and by other stakeholders providing comments on the Proposed Rule. The House Committee reporting on the legislation has elaborated that the Proposed Rule constitutes a significant overreach of the Agencies' statutory authority and an end-run around Congress and the Supreme Court. Specifically, the Report of the House Committee on Transportation and Infrastructure noted that "in both the SWANCC and Rapanos case decisions, the Supreme Court began to articulate limits to federal jurisdiction under the CWA regarding

statute with an amended agency interpretation." SWANCC, 531 U.S. at 169-170; Rapanos, 547 U.S. at 750. Here the Agencies can make no such argument.

[502] See H.R. 5078, available at: https://www.congress.gov/113/bills/hr5078/BILLS-113hr5078pcs.pdf.

[503] *Id*.

[504] See H.R. Rep. No. 113-568 (2014), available at: https://www.congress.gov/113/crpt/hrpt568/CRPT-113hrpt568.pdf. .

the scope of what are considered 'waters of the United States.'" Id., at 4.[505] Additionally, at the June 11, 2014 hearing of the House Subcommittee on Water Resources and Environment, Representative Bill Shuster, Chair of the House Committee on Transportation and Infrastructure, stated that the Proposed Rule would effectively be bypassing Congress, ignoring Supreme Court rulings of the past, "unilaterally broadening the scope of the Clean Water Act and the federal government's reach into our everyday lives will adversely affect the Nation's economy, threaten jobs, invite costly litigation, and restrict the rights of landowners, states, and local governments to make decisions about their [own] lands."[506] Representative Shuster noted that "[i]t is the responsibility of Congress, and not the Administration, to define the scope of jurisdiction under the Clean Water Act." Id.[507] Accordingly, for the foregoing reasons and those stated elsewhere in these comments, the Proposed Rule impermissibly attempts to expand jurisdiction beyond the Agencies' statutory authority under the CWA, contrary to Congressional intent and the Supreme Court's controlling interpretations of the statute in SWANCC and Rapanos.(p.7-9)

Agency Response: **The rule is narrower in scope than the existing regulation, and is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C. The agencies have complied with all applicable laws.**

10.311 **PROPOSED RULE PROVIDES FOR VAGUE AND EXPANSIVE JURISDICTION THAT VIOLATES CONSTITUTIONAL PROTECTIONS**

A. The Proposed Rule's Expansive Jurisdiction Violates the Commerce Clause
The Proposed Rule's expansive scope of CWA jurisdiction cannot be justified under any test of federal Commerce Clause authority. The Supreme Court's decision in SWANCC squarely forecloses the argument that the CWA authorizes regulation of intermittent, remote or isolated waters based on the "substantial effects" that activities in those areas may have on interstate commerce. SWANCC, 531 U.S. at 173. Rather, the Supreme Court held in SWANCC that employing a substantial effects test to reach waters lying beyond navigable waters is entirely inconsistent with Congress's intent to exercise its traditional "commerce power over navigation." Id. at 168 n.3. The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce. The Supreme Court found in SWANCC that navigable "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could

[505] *Id*.
[506] See Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Hearing Before the Subcommittee on Water Resources and Environment of the H. Comm. On Transportation and Infrastructure, 113th Cong. 2d Session (2014) (statement of Rep. Bill Shuster, Chairman, House Committee on Transportation and Infrastructure); video available at: http://transportation.house.gov/calendar/eventsingle.aspx?EventID=378392.
[507] At that same hearing, Representative Bob Gibbs, Chair of the House Subcommittee on Water Resources and the Environment, similarly noted that "the proposed rule misconstrues and manipulates the legal standards announced in the SWANCC and Rapanos Supreme Court cases," and that "[t]he agencies cannot, through guidance or a rule, change the scope and meaning of the Clean Water Act, as they are trying to do here." Id. Additionally, he observed that the agencies "chose to write many of the provisions in the proposed rule vaguely . . . [and] this vagueness will leave the regulated community without any clarity and certainty as to their regulatory status and will leave them exposed to citizen suits.

reasonably be so made." Id. at 172. The Court held that the Corps's application of their regulations raised "significant constitutional questions" and that extending CWA jurisdiction to isolated, non-navigable waters like those at issue in SWANCC "is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." Id. at 173-74. Similarly, the plurality opinion in Rapanos found that the term "navigable waters" confers jurisdiction only over "relatively permanent bodies of water," that the assertion of jurisdiction over wetlands that were not adjacent to traditional navigable waters under the "any connection" theory "stretches the outer limits of Congress's commerce power," and that interpretation of "waters of the United States" to include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" is "not 'based on a permissible construction of the statute.'" Rapanos, 547 U.S. at 738-39, quoting Chevron USA Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Both the plurality opinion as well as Justice Kennedy's concurrence expressly rejected the expansive definitions of "water of the United States" now proposed by the Agencies. Rapanos, 547 U.S. at 734-739, 778-782. Even the Agencies acknowledge in the preamble to the Proposed Rule that "constitutional concerns . . . led the Supreme Court to decline to defer to agency regulations in SWANCC and Rapanos." 79 Fed. Reg. at 22,259. However, the Agencies cavalierly claim that they "are in the best position to address issues which may arise when waters cross state boundaries" and can do so "unless and until the Supreme Court elects to revisit its holding" in Illinois v. City of Milwaukee, 406 U.S. 91 (1972).17 79 Fed. Reg. at 22, 259. The question in Illinois v. City of Milwaukee was federal jurisdiction to decide controversies between States, not the scope of Clean Water jurisdiction. That holding provides no support for the Agencies position on the Commerce Clause issues presented by the Proposed Rule, which are squarely addressed by the more recent and controlling directives of the Supreme Court in Rapanos and SWANCC. The Proposed Rule extends CWA jurisdiction well beyond Congress' power to regulate "channels of interstate commerce." With the Proposed Rule, the Agencies are attempting to assert authority even broader than that which was struck down in SWANCC and Rapanos. The Proposed Rule provides for jurisdiction over non-navigable features that lack any meaningful connection to navigable waters, such as isolated wetlands, ephemeral drainages, and isolated ponds. Like the features at issue in SWANCC and Rapanos, these have no cognizable relationship to the "navigable waters" over which Congress sought to exercise its commerce power. The Proposed Rule wholly ignores the limits recognized by the Supreme Court and, in the pending legislation, recognized by Congress itself. (p.9-10)

Agency Response: **The rule is narrower in scope than the existing regulation, and is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C, IV.**

10.312 The Proposed Rule is Unconstitutionally Void for Vagueness

The Proposed Rule, with its expansive, vague and unclear provisions, fails to meet Constitutional requirement for due process and is void for vagueness. The United States Constitution prohibits adoption of expansive, vague and unclear standards that will require compliance and determine potential liability, including potential liability in administrative, civil and criminal enforcement proceedings. Additionally, an expansive

and vague definition of "waters of the United States" will open the floodgates to "citizen suits" under the CWA, burdening the regulated community and the courts with wasteful and unnecessary litigation. The Proposed Rule will also produce inconsistent results in lower courts until the jurisdictional limits are, once again, addressed by the Supreme Court. The consequences of these vague standards directly affect Constitutional requirements for fundamental fairness and due process. As noted above, the CWA provides not only permitting and compliance requirements, it also provides for administrative, civil and criminal enforcement for alleged violation of permits, unpermitted discharges and other alleged violations. See 33 U.S.C. § 1319. The definition and scope of "waters of the United States" is a critical element of the CWA, a requirement for fair notice of regulated and prohibited activities, and an important factor in determining the scope of regulated activity and potential liability. As such, the jurisdictional limits must be defined in such a way as to "give fair notice of conduct that is forbidden or required." FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012). The Supreme Court has made it clear that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." FCC, 132 S. Ct. at 2317. "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment . . . [and i]t requires the invalidation of laws that are impermissibly vague." Id.; see also United States v. Williams, 553 U.S. 285, 304 (2008). This doctrine is often referred to as the "void for vagueness" doctrine The void for vagueness doctrine addresses two important due process concerns: "first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." FCC, 132 S. Ct. at 2317; see also Grayned v. City of Rockford, 408 U.S. 104 (1972). Although the Agencies claim the Proposed Rule is intended to provide "greater predictability and consistency through increased clarity,"18 the expansive, internally inconsistent and confusing language will lead to the opposite result. Examples of the vague, confusing and expansive language include:

• The categorical regulation of "tributaries," which would expand the concept of tributary to essentially any type of water. See 79 Fed. Reg. at 22,201; 22,263.
• The assertion of jurisdiction based on a "shallow subsurface" hydrologic connection, which cannot be determined without expert analysis. See 79 Fed. Reg. at 22,208.
• The inclusion of "ditches" within the definition of tributary (79 Fed. Reg. at 22202), despite clear direction that ditches should not be subject to CWA jurisdiction. Rapanos, 547 U.S. at 733-34, 781.
• The presumption that every tributary in a watershed is "similarly situated" and subject to CWA jurisdiction if one tributary is subject to jurisdiction. See 79 Fed. Reg. at 22,204.
• The further presumption that any feature with a bed, bank and ordinary high water mark ("OHWM") is hydrologically connected to a traditional navigable water. See 79 Fed. Reg. at 22,204-22,206.
• The assertion of jurisdiction over "adjacent waters" (79 Fed. Reg. at 22197) despite rejection of "adjacency" by SWANCC and Rapanos. SWANCC, 531 U.S. at 168. Rapanos, 547 U.S. at 780.
• The use of "other waters" to capture features "in the same region" as a jurisdictional water but which do not fit other categories. See 79 Fed.Reg. 22,211, 22,263.

• The refusal to exclude "puddles" from potential CWA jurisdiction, ironically because the Agencies contend "puddle" is not "sufficiently precise." See 79 Fed.Reg. 22,218. It is difficult to understand how the Agencies can claim the Proposed Rule's treatment of ditches, adjacent waters and other waters will contribute to the professed goals of "greater predictability and consistency through increased clarity,"19 while at the same time contending that "puddles" is "not a sufficiently precise hydrologic term or a hydrologic feature" to be excluded from jurisdiction. 79 Fed.Reg. 22,218. The Proposed Rule is replete with vague standards that will confuse rather than clarify CWA jurisdiction The Proposed Rule allows for sweeping jurisdiction based on tenuous connections, catchall categories and direct and indirect impacts, all of which leave a person or entity in the dark as to what actions may or may not be subject to Clean Water Act compliance or enforcement. Such vague and ambiguous language fails to meet Constitutional standards for fair notice of regulated or prohibited activities, and the potential for liability. For these reasons, the Proposed Rule fails to meet Constitutional requirements for fundamental fairness and due process, as well as Commerce Clause jurisdiction, cooperative federalism and the State's primary responsibility for land and water resources.(p.11-13)

Agency Response: **The Supreme Court has found that the phrase "waters of the United States" is ambiguous and therefore the agencies have authority to interpret it. The Supreme Court has never found that the phrase "waters of the United States" is void for vagueness. The final rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A and C. The final rule is also not vague, clearly identifying waters that are jurisdictional, waters that are not jurisdictional, and a limited set of waters for which case-specific significant nexus analyses will be performed. Preamble, IV. The rule excludes puddles from the definition of "waters of the United States."**

10.313 **THE PROPOSED RULE MISINTERPRETS AND MISLEADINGLY APPLIES JUSTICE KENNEDY'S CONCURRING OPINION**

A. The Proposed Rule Misleadingly Interprets Justice Kennedy's Significant Nexus The Proposed Rule states that it is most consistent with the Rapanos decision to assert jurisdiction over waters that satisfy the standards set out in either the plurality opinion or Justice Kennedy's concurrence. See 79 Fed. Reg. at 22,192, 22,212-22,213. As noted above, this is an incorrect application of the standards by which the plurality and concurring opinions must be interpreted. Those standards provide that the holding of the Court is the narrowest ground shared by the plurality and concurring opinions. Marks v. United States, 430 U.S. at 193. Applying those standards, Rapanos held that CWA jurisdiction requires the water to have a relatively permanent and direct surface connection to a traditional navigable water, and rejected the premise that adjacency or any "hydrological connection" could support the Agencies' assertion of jurisdiction. Id., 547 U.S. at 734-739, 778-782. However, even assuming arguendo that Justice Kennedy's significant nexus test is applicable in determining the extent of the hydrological connection, it must be applied in a manner consistent with the plurality opinion role in Rapanos and the context provided by the other language in Justice Kennedy's opinion. Justice Kennedy clearly did not intend to provide the Agencies with unfettered discretion to interpret the significant nexus standard so that almost every seasonal, intermittent or ephemeral water would be covered, no matter how remote from a traditional navigable

water. Rapanos, 547 U.S. at 778-782. Indeed, Justice Kennedy cautioned against applying the standard when the effects on water quality are "speculative or insubstantial." Id., 547 U.S. at 780. Yet that is the very real and practical effect of the significant nexus test in the Proposed Rule. The Supreme Court and Justice Kennedy never intended such an expansive definition as the Agencies have set forth in the Proposed Rule. In SWANCC, the Court held that to constitute "navigable waters" under the CWA, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. 531 U.S. at 167, 172. SWANCC involved abandoned sand and gravel pit mining operations where remnant excavation trenches had changed over time into scattered permanent and seasonal ponds. These ponds and mudflats were "isolated in the sense of being unconnected to other waters covered by the Act." Rapanos, 547 U.S. at 767, citing SWANCC, 531 U.S. at 171. The Corps attempted to assert CWA jurisdiction over these waters pursuant to its "Migratory Bird Rule," arguing that the 12 ponds were navigable waters because they were used as habitat by migratory birds. The Supreme Court rejected this theory and held that, "It was the significant nexus between the wetlands and "navigable waters" that informed [the Supreme Court's] reading of the CWA in Riverside Bayview Homes." Id., at 167. Because this significant nexus did not exist between the SWANCC ponds and mudflats and any navigable water, jurisdiction did not exist. At the other end of the spectrum is the Supreme Court's decision in United States v. Riverside Bayview Homes, Inc., 474 U. S. 121 (1985). In Riverside Bayview, the lands at issue formed part of a wetland that directly abutted a navigable-in-fact creek. The Supreme Court held that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [Clean Water] Act." Id., 474 U.S. at 134. Because the waters at issue were adjacent to a navigable water, a significant ecological nexus existed, and the Supreme Court upheld the Corps jurisdiction over wetlands adjacent to the navigable-in-fact creek. In Rapanos, both the plurality opinion and Justice Kennedy's concurrence rejected adjacency as a basis for jurisdiction. Id., 547 U.S. at 734-739, 778-782. However, Justice Kennedy found that proximity is a factor, and that SWANCC and Riverside Bayview "establish the framework" for a significant nexus inquiry: Do the Corps' regulations, as applied to the wetlands in Carabell and the three wetlands parcels in Rapanos, constitute a reasonable interpretation of "navigable waters" as in Riverside Bayview or an invalid construction as in SWANCC? Taken together these cases establish that in some instances, as exemplified by Riverside Bayview, the connection between a non-navigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by SWANCC, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. Rapanos, 547 U.S. at 767, 780. The test as applied by Justice Kennedy for determining whether a significant nexus exists is not whether under any connection, no matter how small, exists between the water at issue and the navigable water. Rather, the test is whether the connection is "so close, or potentially so close" and "affect the chemical, physical, and biological integrity" of a traditional navigable water sufficient to provide CWA jurisdiction. Id. The Agencies selectively reference Justice Kennedy's description of the test in misapplying the "significant nexus" to expansively interpret the scope of their authority, ignoring the

constraints that Justice Kennedy set forth and the limitations that must be considered in the plurality opinion. For example, the Proposed Rule provides that all "similarly situated" waters in the same region, along with the water body or feature at issue, must be considered in determining whether a significant nexus exists with respect to a navigable water. See 79 Fed. Reg. at 22,212-214. The Agencies declare, without legal support or scientific analysis, that the same "region" means the same watershed. See 79 Fed. Reg. at 22,199, n.6; 22,212. 13 Thus, the Proposed Rule would eliminate evaluation of whether the specific water body or feature has a significant nexus to a navigable water: If one tributary satisfies the Agencies' formulation of the test, then all "similarly situated" waters in the same watershed are categorically subject to CWA jurisdiction, even if there is a natural or manmade break in the potential flow. This expansive interpretation cannot be reconciled with SWANCC or Rapanos, or with any fair reading of Justice Kennedy's concurring opinion in Rapanos. B. The Proposed Rule Ignores Justice Kennedy's Admonitions Concerning Limitations on Jurisdiction, as well as Those of the Supreme Court Plurality The Proposed Rule ignores Justice Kennedy's admonition that there is no jurisdiction over waterways whose "effects on water quality are speculative or insubstantial," disregards Justice Kennedy's rejection of jurisdiction based on insignificant seasonal, intermittent or ephemeral hydrologic connections to a traditional navigable water, and ignores the plurality opinion's conclusion that jurisdiction is limited to "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams . . . , oceans, rivers, [and] lakes' . . . [and] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Rapanos, 547 U.S. at 739, 780, 778-782. For example, the Proposed Rule presumes that jurisdiction exists over a tributary if the tributary has a bed, bank and an OHWM (see 79 Fed. Reg. at 22,201), and then presumes that every other tributary in the watershed is "similarly situated," and is subject to CWA jurisdiction if a significant nexus exists. See 79 Fed. Reg. at 22,204. There appears to be no consideration or analysis of factors such as the size, flow, structure, channel profile, proximity to the navigable water or the tributary at issue, surrounding geology, or other characteristics of those other tributaries. As a result, virtually every waterway in the watershed would be deemed to be "similarly situated" and, collectively, would be deemed to satisfy the "significant nexus" test and are jurisdictional waters. This is entirely inconsistent with the limitations on jurisdiction expressly identified in Justice Kennedy's concurrence and the plurality opinion in Rapanos, as well as the holding in SWANCC. Another example of the Agencies' disregard for the Supreme Court limitations on CWA jurisdiction is the Proposed Rule's treatment of natural or manmade breaks in tributaries. The Proposed Rule states that a tributary continues as far upstream as a channel (i.e., bed and bank) is present. See 79 Fed. Reg. at 22,202. According to the Proposed Rule, a natural or manmade break (e.g., levee, dam, weir elevated grade or similar break) does not establish the upstream limit of a tributary in cases where a bed and bank and an OHWM can be identified upstream and downstream of the break. Id. Of course, this greatly expands the upstream reach of CWA jurisdiction over tributaries, especially in arid parts of the country, while completely ignoring the meaning of the term "navigable waters" in 33 U.S.C. § 1362(7). Such a remote upstream, unconnected extension of a tributary is not "so close" to a navigable water that jurisdiction would exist under Justice Kennedy's

significant nexus test. The Proposed Rule builds one supposition on top of another to ensure that jurisdiction ultimately is found: A tributary is any feature that has a bed, bank and OHWM (see 79 Fed. Reg. at 22,201; 22,263); the tributary need only be part of a tributary system to a traditional navigable 14 water (Id. at 22,202); the upstream limit of the tributary is defined where the highest upstream bed, bank and OHWM exist, regardless of natural or manmade breaks (Id.); the tributary is considered with all other "similarly situated" tributaries in the whole watershed to determine if a significant nexus exists (Id. at 22,204); and if the tributary, and those similarly situated, have a bed, bank and OHWM, the Agencies presume it "can" transport pollution - even if just by flood waters - to that traditional navigable water (Id. at 22,204-22,206). [508] Under the Proposed Rule, the Agencies may never need to conduct an inspection of the particular water body at issue in reaching the determination that it is a jurisdictional water. This is far from what Justice Kennedy intended based upon the plain language of his concurring opinion. For example, Justice Kennedy criticized the dissent in Rapanos, stating: [T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation . . . does not extend so far. . . . Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable . . . . Nevertheless, the word 'navigable' in the Act must be given some effect. [citations omitted]. Thus, in SWANCC, the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters. Rapanos, 547 U.S. at. 779 (emphasis added), citing SWANCC, 531 U.S. 172. Indeed, in setting forth the criteria for the significant nexus test relied upon by the Agencies, Justice Kennedy emphasized that limits must be placed on the Agencies' assertion of CWA jurisdiction. He stressed: Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." . . . The Corps' theory of jurisdiction in these consolidated cases [Rapanos] --adjacency to tributaries, however remote and insubstantial -- raises concerns that go beyond the holding of Riverside Bayview; and so the Corps' assertion of jurisdiction cannot rest on that case." 20 The Proposed Rule should also clarify that for a tributary to be jurisdictional, it must both: (a) satisfy all criteria to qualify as a tributary (e.g. it must have a clearly definable bed, bank and OHWM); and (b) have a significant nexus to a traditional navigable water. Substituting "bed, bank and OHWM" for "OHWM" hardly meets Justice Kennedy's standard for showing a "significant nexus." The Proposed Rule flies in the face of his admonition that the Agencies cannot assert jurisdiction so broad as to encompass "drains, ditches, and streams remote from any navigable- in-fact water and carrying only minor

[508] The Proposed Rule should also clarify that for a tributary to be jurisdictional, it must both: (a) satisfy all criteria to qualify as a tributary (e.g. it must have a clearly definable bed, bank and OHWM); and (b) have a significant nexus to a traditional navigable water. Substituting "bed, bank and OHWM" for "OHWM" hardly meets Justice Kennedy's standard for showing a "significant nexus." The Proposed Rule flies in the face of his admonition that the Agencies cannot assert jurisdiction so broad as to encompass "drains, ditches, and streams remote from any navigable- in-fact water and carrying only minor watervolumes towards it. . ." Rapanos, 547 U.S. at 781-82.

watervolumes towards it. . .” Rapanos, 547 U.S. at 781-82. 15 Rapanos, 547 U.S. at 780 (emphasis added). Justice Kennedy was clearly concerned that remote streams and ditches could be considered navigable waters under the Corps’ standards for determining jurisdiction. He expressly stated that a case by case analysis “is necessary to avoid unreasonable applications of the statute” given the breadth of the Corps’ assertion of jurisdiction. Id., at 782. The Agencies disregard these admonitions of Justice Kennedy, as well as the stronger limitations of the plurality opinion, in selectively quoting Rapanos and SWANCC to attempt to validate the Proposed Rule. To further illustrate his concerns about an overly broad interpretation of CWA jurisdiction, Justice Kennedy went to great lengths to discuss the waters at issue in Rapanos and Indeed, in Rapanos, Justice Kennedy noted that “A state official testified that he observed carp spawning in a ditch just north of the property, indicating a direct surface-water connection from the ditch to the Saginaw Bay of Lake Huron.” Id., at 762. Similarly, in Carabell, Justice Kennedy noted that there was a surface-water connection from a ditch adjacent to the property that drained to a creek leading to Lake St. Clair. Id., at 764-765. Yet Justice Kennedy voted to vacate the judgment finding jurisdiction and remand “for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.” Id., at 787. The waters at issue in Rapanos and Carabell are not nearly as attenuated from navigable waters as the features the Agencies now seek to reach in the Proposed Rule, often without a case-by-case analysis. The Agencies’ Proposed Rule not only ignores the plurality opinion and disregards the admonitions limiting jurisdiction in the Rapanos concurrence, they have done away with Justice Kennedy’s demand for a case-by-case analysis of the specific surface water or feature. The result of the Agencies’ all encompassing interpretation of the scope of CWA jurisdiction and the Proposed Rule’s relaxed significant nexus test means that nearly all intermittent, ephemeral and remote waters will be subject to CWA jurisdiction. This is clearly not what Justice Kennedy envisioned, nor is it consistent with a proper interpretation of the holding in Rapanos or SWANCC. (p.13-17)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C. The agencies disagree that there was no consideration or analysis of factors such as the size, flow, structure, channel profile, proximity to the navigable water or the tributary at issue, surrounding geology, or other characteristics of those other tributaries. For the reasons articulated in the Preamble and the Technical Support Document, the agencies defined tributary based on physical indicators of flow, duration and frequency, represented by a bed and banks and another indicator of ordinary high water mark, and the region for purposes of the significant nexus analysis is determined by the closest traditional navigable water, interstate water, or the territorial seas.**

National Federation of Independent Business (Doc. #8319)

10.314 The courts have made clear that the test for “traditional navigable waters” must consider *both* the “physical characteristics” of the water body and “experimentation” with watercraft or other demonstrated “uses to which the [waters] have been put.” *FLP Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (citing *United States v. Utah*, 283 U.S. 64, 83 (1931)). While the Proposed Regulation suggests that the Agencies’ assessment must take into account physical characteristics of the waterway, it

ultimately provides that the water will be viewed as "traditional navigable waters" if there is any evidence that a watercraft can navigate the waterway. This would seemingly justify the Agencies treating any waterway as "traditional navigable water" if any party can succeed in a single downstream trip—an approach that we think far too attenuated to satisfy the standard recognized in *FLP Energy Marine Hydro LLC*. (p. 4)

Agency Response: **The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The 2008 attachment, the preamble to the proposed rule, and the Preamble and the Technical Support Document reflect the considerations the agencies will use when making traditional navigable waters determinations. When such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act.**

Environmental Defense Fund (Doc. #15352)

10.315 The draft rule provides much needed clarification of the scope of CWA jurisdiction over waters of the United States. The Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) and *Rapanos v. United States* have created substantial confusion for the public, the regulated community, and state and federal agencies over the scope of regulated waters. Further, they rolled back protection for many wetlands and seasonal or headwater streams that play a vital role in maintaining and protecting the chemical, physical and biological integrity of the Nation's waters. The draft rule does not restore jurisdiction over all waters formerly protected by the CWA; rather, it restores jurisdiction over some formerly protected waters based on an extensive record of peer reviewed science that is consistent with the Clean Water Act and the case law.[509]

Agency Response: **The agencies agree.**

Guardians of the Range (Doc. #14960)

10.316 Traditional Navigable Waters:…the rule purports to retain its existing definition of "traditional navigable waters" as those waters that "are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce or could be possibly be used in commercial navigation. The court in SWANCC, 531 U.S. 159, wherein the High Court held that the Corps could not regulate isolated water bodies and that through the Clean Water Act, Congress intended to exert nothing "more than its commerce power over navigation. (p. 1-2)

Agency Response: **The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C.**

[509] The Farm Bill conservation compliance provisions ("Swampbuster") and Farm Bill conservation programs demonstrate a national interest in and continuing commitment to restore and protect different kinds of small wetland systems, including wetland buffers along small streams, ditches that drain agricultural lands, and small, so-called isolated, intrastate waters such as prairie pothole wetlands. Over the life of the 2014 Farm Bill, American taxpayers will invest millions of dollars in these wetland restoration and in their long-term or permanent protection. 7 CFR Part 12; National Wildlife Federation, 2014 Farm Bill Conference Report Analysis 4 (2014).

Hackensack Riverkeeper et al. (Doc. #15360)

10.317 It is common sense that that statutory term "Navigable Waters" includes traditionally navigable waters, and it is also common sense that has clearly been adopted by the United States Supreme Court.

In *Riverside Bayview Homes*, the Court found that the Act applied to wetlands adjacent to navigable waterways. The court stated that "(i)n adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 133, 106 S. Ct. 455, 462, 88 L. Ed. 2d 419 (1985). The Court based its conclusion on the proximity of the wetlands to the traditionally navigable Lake St. Clair; Lake St. Clair effectively lent its jurisdiction to the near–by wetlands and it had that jurisdiction to lend because it was, itself, navigable.

In *SWANCC*, the Court found that the Act could not be construed to cover isolated abandoned quarries based on the presence of migratory birds because it lacked "the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC* at 121. The Court would not allow the Corps to simply eliminate the word "navigable" from the Act. "We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the 5 of 16 term 'navigable waters' out of the statute." *SWANCC* at 172, and "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. *Id*. (p.4-5)

Agency Response: The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C.

10.318 Finally, in *Rapanos*, all of the opinions found that the question of navigability was important to the Act's jurisdiction. According to Justice Scalia, the Court has "twice stated that the meaning of "navigable Waters' in the Act is broader than the traditional understanding of the term. We have also emphasized, however, that the qualifier 'navigable' is not devoid of significance." *Rapanos* at 731. Justice Kennedy noted that "(c)onsistent with *SWANNCC* and *Riverside Bayview* and with the need to give the term navigable some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Rapnaos* at 779. Justice Stevens stated his view that "The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed with the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of statutory provision." *Rapanos* at 788. (p. 5)

Agency Response: The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The 2008 attachment, the

preamble to the proposed rule, and the Preamble and the Technical Support Document reflect the considerations the agencies will use when making traditional navigable waters determinations. When such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act. The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C.

10.1.2. Interstate Waters

Agency Summary Response:

The agencies' rule makes no change to the interstate waters section of the existing regulations and the agencies would continue to assert jurisdiction over interstate waters, including interstate wetlands. The language of the CWA is clear that Congress intended the term "navigable waters" to include interstate waters, and the agencies' interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history. The Supreme Court's decisions in *SWANCC* and *Rapanos* did not address the interstate waters provision of the existing regulation.

Specific Comments

Hon. Marcia H. Armstrong ,Supervisor District 5, Siskiyou County (Doc. #3099.1)

10.319 Justice Gray provided a review of "sovereign lands" in *Shively v. Bowlby,* 152 U.S. 1 (1894):

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign, for the benefit of the whole people. At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the constitution to the United States.
>
> Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory. The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

> The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union. Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States."

As stated by Justice Kennedy in *Idaho et al. v. Coeur d'Alene Tribe of Idaho et al.* certiorari to the united states court of appeals for the ninth circuit No. 94-1474. Argued October 16, 1996. Decided June 23, 1997:

> "As we stressed in *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-198 (1987), lands underlying navigable waters have historically been considered 'sovereign lands.' State ownership of them has been 'considered an essential attribute of sovereignty. The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence 'became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842. Then, in *Lessee of Pollard v. Hagan*, 3 How. 212 (1845), the Court concluded that States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these 'sovereign lands. *Id*., at 228-229. In consequence of this rule, a State's title to these sovereign lands arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself.' *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). The importance of these lands to state soverignty explains our longstanding commitment to the principle that the United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States and 'that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)."

Upon statehood, the individual states, and not the United States, owns sovereign title to tide lands (to high water mark) and lands underlying navigable streams (to low water mark.) (p. 11-12)

In accordance with the English common law, most states adopted the rule whereby the bed and banks of tidal navigable waterbodies (influenced by the ebb and flow of the

tides) to the high water mark; and bed and banks on nontidal navigable streams to the low water mark, were retained in ownership by the State and held as a public trust. Ownership of the bed and banks of non-navigable streams[1] fell to (public or private) riparian owners to the "thread" of the stream. Not all States adopted the system, however, California was among those that did.

As stated by Justice Van DeVanter in *Scott v. Lattig*, 227 U.S. 229 (1913):

> "…it was said in *St. Paul & P. R. Co. v. Schurmeir*, Wall. 272, 288, 19 L. ed. 74, 78, 'the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways.'
>
> Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *St. Clair County v. Lovingston*, 23 Wall. 46, 68, 23 L. ed. 59, 63; *Barney v. Keokuk*, 94 U.S. 324, 338, 24 S. L. ed. 224, 228; *Illinois C. R. Co. Illinois*, 146 U.S. 387, 434-437, 36 L. ed. 1018, 1035-1037, 13 Sup. Ct. Rep. 110; *Shively v. Bowlby*, 152 U.S. 1, 48-50, 58, 38 L. ed. 331, 349, 350, 352, 14 Sup. Ct. Rep. 548; *McGilvra v. Ross*, 215 U.S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27.

In his review of matters applying to the "sea and its arms," Justice Gray in *Shively v. Bowlby*, 152 U.S. 1 (1894), states:

> 'The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea.' Harg. Law Tracts, pp. 11, 12. And he afterwards explains: 'Yet they may belong to the subject in point of propriety, not only by charter or grant whereof there can be but little doubt, but also by prescription or usage.' 'But, though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz.: ... That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances;' 'for the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.' *Id*. pp. 25, 36.

Stated Justice Baldwin in his assenting opinion in Proprietors of *Charles River Bridge v. Proprietors of*, 36 U.S. 420 (1837) 36 U.S. 420 (Pet.):

> "By the common law, it is clear, that all arms of the sea, coves, creeks, etc. where the tide ebbs and flows, are the property of the sovereign, unless appropriated by some subject, in virtue of a grant, or prescriptive right which is founded on the supposition of a grant (6 Pick. 182); 'the principles of the common law were well understood by the colonial legislature.' 'Those who acquired the property on the shore, were restricted from such a use of it, as would impair the public right of passing over the water.' 'None but the sovereign power can authorize the interruption of such passages, because this power alone has the right to judge whether the public convenience may be better served by suffering bridges to be thrown over the water, than by suffering the natural passages to remain free.' *Ibid*. 184. By the common law, and the immemorial usage of this government, all navigable waters are public property, for the use of all the citizens, and there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them.' 'A navigable river is, of common right, a public highway, and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway, already in the use of the public.' *Ibid*. 185, 187. (p. 12-14)

The common law rights of a riparian owner below the high water mark of navigable streams and the bed and banks of non-navigable streams are called "littoral" rights. The Commerce Clause extends to keeping clear the water channels of interstate and foreign commerce, as well as to the power to improve and enlarge their navigational capacity. The riparian navigational servitude extends to the bed of a public navigable waterbody, defined as the area of the channel below "high water mark" or the level of bank adequate to contain the flow at its average and mean stage during the entire year. It does not extend above the "high water mark." Navigational improvements that result in increases in flow that damage riparian structures within the bed of a navigable waterbody are not subject to compensation. Riparians on non-navigable waterbodies, who hold title to the thread of the stream, are not subject to a navigational servitude and damages occurring to their property as a result of improvements are compensable.

Littoral or riparian rights in "navigable waters" are subordinate to the public's common right of navigation. This is called a "navigational servitude." Structures placed within or over navigable waters by riparian owners are subject to blockage by public works and uncompensated removal if determined to cause an obstruction to navigation. (p. 14)

The navigational servitude is specific to legitimate purposes of protecting and improving public navigation and does not extend to other matters, even those pertaining to the Commerce Clause. As stated by Justice Barndeis in *Port of Seattle v. Oregon & W. R. CO*., 255 U.S. 56 (1921):

> "First. The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became upon its organization as a state the owner of the navigable waters within its boundaries and of the land under the same. *Weber v. Board of Harbor Commissioners*, 18 Wall. 57."

In *State of Wisconsin V. State of Illinois*, Justice Taft stated: 278 U.S. 367 (1929), 9) "…It is further argued by complainants that while the power of Congress extends to the protection and improvement of navigation, it does not extend to its destruction or to the creation of obstructions to navigable capacity. This court has said that while Congress, in the exercise of its power, may adopt any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, (*United States v. Chandler-Dunbar Co*., 229 U.S. 53, 62, 33 S. Ct. 667) it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." (United States v. River Rouge Improvement Co., 269 U.S. 411, 419, 46 S. Ct. 144; Port of Seattle v. Oregon & Washington R. R., 255 U.S. 56, 63, 41 S. Ct. 237)."

Justice Sanford in *United States v. River Rouge Improvement Co*., 69 U.S. 411 (1926) stated:

> "This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right. And it is of no avail against the exercise of the absolute power of Congress over the improvement of navigable rivers, but must suffer the consequences of the improvement of navigation, if Congress determines that its continuance is detrimental to the public interest in the navigation of the river. *United States v. Chandler-Dunbar Co*., supra, 62, 70 (33 S. Ct. 667).
>
> The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for purposes of navigation.' *Port of Seattle v. Oregon Railroad,* 255 U.S. 56, 63, 41 S. Ct. 237, 239 (65 L. Ed. 500). And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co*., supra, 62 (33 S. Ct. 667), it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. In *Yates v. Milwaukee*, supra, 504, it was said in reference to the right of a riparian owner of a navigable stream:
>
> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.'

Stated Justice Douglas, in *United States v. Twin City Power Co*., 350 U.S. 222 (1956):

> "The Court of Appeals concluded that the improvement of navigation was not the purpose of the taking but that the Clark Hill project was designed to serve flood control and water-power development. It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. See *Arizona v. California,* 283 U.S. 423, 455-457.The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. See *Berman v. Parker*, 348 U.S. 26, 32; *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552. The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should

> respect that decision until and unless it is shown "to involve an impossibility," as Mr. Justice Holmes expressed it in *Old Dominion Co. v. United States*, 269 U.S. 55, 66. **'**If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced**.** *United States v. Appalachian Power Co*., 311 U.S. 377, 426; *Oklahoma ex rel. Phillips v. Atkinson Co*., 313 U.S. 508, 525, 533-534. As we said in the *Appalachian Power Co*. case, 'Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.' 311 U.S., at 426." (p. 14-16)

Justice Field in *The Daniel Ball*, 77 U.S. 557 (1870) describes Congress' powers under the "Commerce Clause" as had developed to that point in time:

> "That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment..."

Justice Strong in the *State of South Carolina v. State of Georgia*, 93 U.S. 4 (1876) further clarified:

> "...It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over inter-State and foreign commerce is concerned, this is not to be doubted..."
>
> Upon this subject the case *of Pennsylvania v. The Wheeling and Belmont Bridge Co*., 18 How. 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation. It was, therefore, decided that an act of Congress declaring a bridge over the Ohio River, which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce.
>
> It was further ruled that the act was not in conflict with the provision of the Constitution, which declares that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the

> Constitution. It was there said that the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce. 'It will not do,' said the court, 'to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power.' The case of The Clinton Bridge, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream."

Stated Justice Roberts in *U.S. v. Chicago*, M., ST. P. & P. R. CO., 312 U.S. 592 (1941):

> "...The power of Congress extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions located by the riparian owner, or others, but comprehends as well the power to improve and enlarge their navigability. (p. 16-17)

In 1890, Congress enacted the first Rivers & Harbors Appropriation Act. Explained Justice Brown in *Covington & C. Bridge Co, v. Com. of Kentucky*, 154 U.S. 204 (1894):

> "... Of recent years it has been the custom to obtain the consent of congress for the construction of bridges over navigable waters, and by the seventh section of the act of September 19, 1890 (26 Stat. 426, 454), it is made unlawful to begin the construction of any bridge over navigable waters until the location and plan of such bridge have been approved by the secretary of war, who has also been in frequent instances authorized to regulate the tolls upon such bridges where they connected two states...."

In *Lake Shore & M S R Co. v. State of Ohio*, 165 U.S 365 (1897), Justice White reviewed the provisions of the Act referring to section 7 which included prohibitions on channel changes:

> 'And it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the secretary of war, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the secretary of war: provided, that this section shall not apply to any bridge, bridgedraw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any state, over on in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state.' [See also Justice Harlan, Cummings v. City of Chicago, 188 U.S. 410 (1903).]

As described by Justice Shiras Leovy v. U S, 177 U.S. 621 (1900), amendments in 1892 were as follows:

> ..."In the river and harbor act of 1892 (27 Stat. at L. pp. 88, 110, chap. 158), section 7 of the act of 1890 was amended and re-enacted as follows":
>
> "... or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War: "

Stated Justice Roberts in *U.S. v. Chicago, M., ST. P. & P. R. CO.*, 312 U.S. 592 (1941):

> "Commerce, the regulation of which between the states is committed by the Constitution to Congress, article 1, 8, cl. 3, includes navigation.' The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone. Whether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or, as in this case, to low water mark, the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation. The power of Congress extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions located by the riparian owner, or others, but comprehends as well the power to improve and enlarge their navigability."

In *United States v. Republic Steel Corp*., 362 U.S 482 (1960), it was determined that a steel mill had discharged industrial solid wastes into the Calumet River without obtaining a permit from the Army Corps. of Engineers. The suspended solid waste had settled out and reduced the depth of the channel creating an obstruction to the navigable capacity of the river – prohibited under the Rivers and Harbors Act of 1899.

Stated Justice Douglas:

> "This is a suit by the United States to enjoin respondent companies from depositing industrial solids in the Calumet River (which flows out of Lake Michigan and connects eventually with the Mississippi) without first obtaining a permit from the Chief of Engineers of the Army providing conditions for the removal of the deposits and to order and direct them to restore the depth of the channel to 21 feet by removing portions of existing deposits.
>
> The District Court found that the Calumet was used by vessels requiring a 21-foot draft, and that that depth has been maintained by the Corps of Engineers. Respondents, who operate mills on the banks of the river for the production of iron and related products, use large quantities of the water from the river, returning it through numerous sewers. The processes they use create industrial

waste containing various solids. A substantial quantity of these solids is recovered in settling basins but, according to the findings, many fine particles are discharged into the river and they flocculate into larger units and are deposited in the river bottom. Soundings show a progressive decrease in the depth of the river in the vicinity of respondents' mills. But respondents have refused, since 1951, the demand of the Corps of Engineers that they dredge that portion of the river. The shoaling conditions being created in the vicinity of these plants were found by the District Court to be created by the waste discharged from the mills of respondents. This shoaling was found to have reduced the depth of the channel to 17 feet in some places and to 12 feet in others. The District Court made findings which credited respondents with 81.5% of the waste deposited in the channel, and it allocated that in various proportions among the three respondents." See 155 F. Supp. 442.

"Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1121, 1151, as amended, 33 U.S.C. 403, provides in part: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; . . .

The section goes on to outlaw various structures "in" any navigable waters except those initiated by plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Section 10 then states that "it shall not be lawful to excavate or fill, or in any manner to alter or modify the . . . capacity of . . . the channel of any navigable water of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Section 13 forbids the discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing there from in a liquid state, into any navigable water of the United States"; but 13 grants authority to the Secretary of the Army to permit such deposits under conditions prescribed by him.

"Our conclusions are that the industrial deposits placed by respondents in the Calumet have, on the findings of the District Court, created an "obstruction" within the meaning of 10 of the Act and are discharges not exempt under 13. We also conclude that the District Court was authorized to grant the relief.

The history of federal control over obstructions to the navigable capacity of our rivers and harbors goes back to *Willamette Iron Bridge Co. v. Hatch*, where the Court held "there is no common law of the United States" which prohibits "obstructions" in our navigable rivers. Congress acted promptly, forbidding by 10 of the Rivers and Harbors Act of 1890, "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity" of any waters of the United States. The 1899 Act followed a report to Congress by the Secretary of War, which at the direction of Congress, contained a compilation and revision of existing laws relating to navigable waters. The 1899 Act was said to contain "no essential changes in the existing law." Certainly so far as outlawry of any

> "obstructions" in navigable rivers is concerned there was no change relevant to our present problem.
>
> It is argued that "obstruction" means some kind of structure. The design of 10 should be enough to refute that argument, since the ban of "any obstruction," unless approved by Congress, appears in the first part of 10, followed by a semicolon and another provision which bans various kinds of structures unless authorized by the Secretary of the Army.
>
> The reach of 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected "in" any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify "the course, location, condition, or capacity of" a navigable river be made unless "the work" has been approved by the Secretary of the Army. There is, apart from these particularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which prohibits "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity" of such rivers. We can only conclude that Congress planned to ban any type of "obstruction," not merely those specifically made subject to approval by the Secretary of the Army. It seems, moreover, that the first clause being specifically aimed at "navigable capacity" serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, falling short of adversely affecting navigable capacity. And navigable capacity of a waterway may conceivably be affected by means other than the excavations and fills mentioned in the third clause. We would need to strain hard to conclude that the only obstructions banned by 10 are those enumerated in the second and third clauses. In short, the first clause is aimed at protecting "navigable capacity," though it is adversely affected in ways other than those specified in the other clauses.

There is an argument that 10 of the 1890 Act, 26 Sta. 454, which was the predecessor of the section with which we are now concerned, used the words "any obstruction" in the narrow sense, embracing only the prior enumeration of obstructions in the preceding sections of the Act. The argument is a labored one which we do not stop to refute step by step. It is unnecessary to do so, for the Court in *United States v. Rio Grande Irrigation Co*., decided not long after the 1890 Act became effective, gave the concept of "obstruction," as used in 10, a broad sweep: "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition." This broad construction given 10 of the 1890 Act was carried over to 10 of the 1899 Act in *Sanitary District v. United States*, 66 U.S. 405, 429 the Court citing *United States v. Rio Grande Irrigation Co*., supra, with approval and saying that 10 of the 1899 Act was "a broad expression of policy in unmistakable terms, advancing upon" 10 of the 1890 Act."

> The teaching of those cases is that the term "obstruction" as used in 10 is broad enough to include diminution of the navigable capacity of a waterway by means

> not included in the second or third clauses. In the Sanitary District case it was caused by lowering the water level. Here it is caused by clogging the channel with deposits of inorganic solids. Each affected the navigable "capacity" of the river. The concept of "obstruction" which was broad enough to include the former seems to us plainly adequate to include the latter.

California v. Sierra Club, 451 U.S. 287 (1981); Footnote 2: "Section 10 of the Rivers and Harbors Appropriation Act of 1899 provides:

> 'The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 30 Stat. 1151, 33 U.S.C. 403.

In conclusion, it is clear that the Commerce Clause will not sustain regulation of non-navigable streams. Please provide your Constitutional delegation of authority to do so. (p. 17-21)

Agency Response: **No Justice of the Supreme Court in the three recent CWA jurisdiction cases has concluded that the Commerce Clause will not sustain regulation of non-navigable streams. In addition, no Justice of the Supreme Court in the three recent CWA jurisdiction cases has concluded the CWA is so limited. The final rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A and C.**

Florida Department of Agriculture and Consumer Services (Doc. #10260)

10.320 The Commerce Clause is generally held to be the source of federal authority to regulate the nation's waters under the CWA, but neither *SWANCC* nor *Rapanos* establishes the scope of Congress's constitutional authority. Those decisions were reached on statutory grounds, solely looking to language in the Act itself to come to conclusions regarding the meaning and extent of "navigable waters" and "waters of the US." But the Court has danced around this issue, providing dicta which indicates that the Court perceives a limit to the CWA's reach under the Commerce Clause and that the Court expects agencies to reasonably establish what that limit is by regulation. Chief Justice Roberts expressed his view that at the time of *SWANCC*, the Corps supposed its authority under the CWA to be "essentially limitless," but "such a boundless view was inconsistent with the limiting terms" Congress used in the CWA. *Rapanos*, 547 U.S. at 757 (citing *SWANCC*, 531 U.S. at 167-174). He goes on to recognize the Corps's 2003 rulemaking effort as an opportunity for the agency to "refine its view of its authority" in response to *SWANCC*,

which would provide guidance meriting Chevron deference, and expresses disappointment that the Corps chose instead to "adhere to its essentially boundless view of the scope of its power." *Id*. at 758.

There are two ways federal authority can be implicated under the Commerce Clause, by regulation of the "channels" of interstate or foreign commerce or by regulation of an activity that "substantially affects" interstate or foreign commerce. Proponents have used both sources to support federal authority under the CWA. The "channels" reasoning derives its support for expansive jurisdiction based upon ecological connectivity, which, as discussed above, the Court has already rejected as overly broad when used as a single sufficient criteria. *Rapanos*, 547 U.S. at 742, 784. Arguments using the "substantially affects" basis seem to favor an even broader scope of federal authority based upon the sources of pollution being "commercial" by-products, the uses of the land being typically commercial, and degradation of any water affecting interstate and foreign commerce. (p. 76)

Agency Response: The agencies are not asserting federal authority under the CWA based on the substantially affects basis. The final rule is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A and C.

Barona Band of Mission Indians (Doc. #10966)

10.321 Even if *de minimis* effects on interstate commerce can be aggregated, such aggregation is not appropriate here. The above discussion assumes that the *de minimis* effect on interstate commerce of an intra state activity can be aggregated to produce a cumulatively significant effect.[510] The Supreme Court has held in *Lopez* and *Morrison, supra,* that possession of a firearm in a school zone and a civil remedy for violence against women are non-economic activities and their effect on interstate commerce is simply to attenuated to support such legislation under the Commerce Clause. In doing so, the Supreme Court held that, without more, the *de* minimis effects of an intrastate non-economic activity cannot be aggregated to produce a cumulative significant effect:

> "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *U.S. v. Morrison,* 529 U.S. 598, 617 (2000).

While the Supreme Court has not identified what else might be needed to aggregate such *de minimus* effects, the Firth Circuit has. After a lengthy and thorough analysis, it held that the Endangered Species Act ("ESA") was economic in nature, so that *de minimus* intrastate effects on interstate commerce could be aggregated to produce the required significant economic effect:

> "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other Cave Species takes. . . . In sum, application of ESA's take provision to the Cave Species is a constitutional exercise of the Commerce

[510] *U.S. v. Lopez*, 514 U.S. 549, 559 (1995). "We conclude . . . that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."

power." *GDF Realty Investments, Ltd v. Norton*, 326 F.3d 622, 640-641 (5th Cir., 2003)

GDF is the leading analysis of this point regarding the ESA. The opinion fully considers *Lopez* and *Morrison, supra.* In reaching its conclusion that the ESA is economic in nature regarding the take provisions, the Fifth Circuit considered several factors. The relevant factor for present purposes is the requirement that the *de minimis* intrastate activity must be an "essential" part of the overall regulatory scheme. *Id*, 326 F.3d at 639, quoting *Lopez, supra.*[511] Aggregation of the *de mnimis* intrastate effects of federal regulation was appropriate in *Lopez* and *GDF* because the activity was determined in both cases to be economic and essential to the larger regulatory scheme. The CWA is certainly a comprehensive regulatory scheme but defining "tributary" as the EPA now proposes is not essential to that regulatory scheme. The point at which a flow of water becomes a regulated "tributary" could be identified at any number of points, e.g., where a bed, banks, and OHWM first appears irrespective of any breaks; where a bed *or* banks, plus an OHWM appears; where some minimal volume of flow first occurs; where a stated frequency of flow occurs; where the flow first joins a navigable water, where a certain level of pollutant is first carried, etc. Naming the point where a "tributary" first acquires a bed, banks, and OHWM, not counting breaks, is just the choice made by the EPA in the proposed regulation. Any of these other points would equally suffice. Therefore, the choice posited by the EPA is not *essential* to the overall CWA regulatory scheme. Because it is not *essential* under *Lopez*, aggregation of *de minimis* intrastate effects to produce a significant effect cannot occur. (p. 5-6)

Agency Response: **The agencies analyze similarly situated waters in combination consistent with Justice Kennedy's standard. Technical Support Document, I.C.**

10.322 The rule needlessly pushes the outer limits of Congressional power under the Commerce Clause without express authorization. One bedrock principle of the Supreme Court's jurisprudence regarding the CWA is that the Court will not accept an administrative interpretation of the statute that pushes the outer limits of Congressional power under the Commerce Clause without at least an express statement that such is truly the intent of Congress.

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alter the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *SWANCC v. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001).

[511]514 U.S. at 561. "Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."

Relying on this holding from *SWAANC,* the Fifth Circuit has refused to uphold a *pre-Rapanos* effort to regulate all "tributaries", holding that *SWANCC* controls and does not permit an administrative reading of the Clean Water Act that pushes the outer limits of Congressional power under the Commerce Clause. *In re Needham,* 354 F.3d 345, n. 8 (5th Cir., 2003).

The broad definition of "tributary" advanced by the proposed rule would similarly and impermissibly vastly expand the regulatory jurisdiction of the EPA, again pushing the outer limits of the Commerce Clause power without Congressional sanction. The current proposal extends "waters of the United States" to untold areas of land that are completely dry virtually always, and carry water sometimes only once in several years, and then only in small quantities for brief periods if a bed, bank, and OHWM can be found at even the most remote upgradient location. Such a slender reed is insufficient to support the exercise of the outer limits of Congressional power under the Commerce Clause.

This Constitutional infirmity, identified by SWANCC, is compounded by its intersection with another Constitutional infirmity. Such agency jurisdiction over land that is almost always dry amounts to federal control over local land use, a traditionally state and local function.[512] The CWA itself disclaims any intent to divest local governments (such as the Tribe in this case[513]) of their authority over the use and development of land. In the CWA Congress declared its intent to "recognize, preserve, and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources" (33 U.S.C. §1251(b)). The current proposed post-*Rapanos* expansion of federal regulatory jurisdiction into local control of the use and development of dry land on which rain only rarely falls and flows similarly pushes the outer limits of Congressional power under the Commerce Clause, again without express Congressional sanction. It is particularly and needlessly abrasive in the federal scheme due to the special nature of the land in question. The beds of tributaries are the sovereign property of states. The current strained effort to regulate the use of such land "implicates special [state] sovereignty interests*". Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 281 (1997). A state's control over such lands is of Constitutional dimensions:

In consequence of this rule, a state's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the Constitution itself." *Id*., 512 U.S at 283.

Certainly, any valid exercise of Congressional power under the Commerce Clause overcomes whatever effect it may have on this local retained power over land use. Similarly, the United States certainly has a navigational servitude over all such state lands within the beds of navigable rivers and other navigable waters. *Kaiser Aetna v. US*., 444 U.S. 164, 175 (1979). Such state-owned lands below this servitude are subject to it. Tributaries that actually flow in some quantity for an appreciable time are certainly subject to the federal commerce power, although not to the navigational servitude. But,

[512] . *Hess v. Port AuthorityTrans-Hudson Corp.,* 513 U.S. 30, 44 (1994) "…regulation of land use [is] a function traditionally performed by local government."

[513] *SantaRosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir., 1975) "…Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state …"

under *SWANCC*, neither the Commerce Clause nor the navigational servitude overcomes the above Constitutionally-based right of local governments to control land use when such federal control pushes the outer limits of the Commerce Clause based solely on administrative interpretation, rather than express Congressional directive. As the Supreme Court has summarized this limitation on the Commerce Power: "The Constitution requires a distinction between what is truly national and what is truly local." *US. v. Morrison*, 529 U.S. 598, 617 (2000). The proposed rule regarding tributaries obliterates this distinction by its overbreadth and thus is forbidden under *SWANCC*. As in *SWANCC*, there is no need here to strain to expand the definition of "tributary" to the point where it raises the same kinds of constitutional issues, especially when a less needlessly aggressive and more objective definition would avoid such issues. (p. 7-8)

Agency Response: The final rule is consistent with the statute, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and C.

Whitman County Commissioners, Colfax, WA (Doc. #12860)

10.323 The proposed changes to the definition of "Waters of the United States" exceeds the limits on regulation of waters linked and adjacent to navigable waters as set forth by the United States Supreme Court in both *Solid Waste Agency of Northern Cook County v United States Army Corp of Engineers* and *Rapanos v. U.S*. The Congress of the United States has also clearly stated the Clean Water Act applies to Navigable waters and adjacent wetlands. The Courts have stated there must be a significant nexus between the Navigable waters and other waters in order for those other waters to fall under regulations prescribed in the Clean Water Act. The proposed rule extends CWA regulation to waters that do not fit this definition and should thus be rescinded. (p. 1)

Agency Response: The final rule is consistent with the statute, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and C. The agencies have determined that the waters that are categorically jurisdictional have a significant nexus. Preamble, III and IV, Technical Support Document, II, VI.

Delta Board of County Commissioners (Doc. #14405)

10.324 Delta County Commissioners are also disappointed in the proposed rule's lack of clarity due to ambiguous or undefined terms and phrases. As it stands, it is extremely unclear how far the agencies intend federal jurisdiction to extend and if taken to the maximum extent possible the proposed rule wraps in virtually every feature across the nation, which contravenes not only the CWA itself but also the Commerce Clause of the U.S. Constitution. This is very troublesome for Colorado and those states downstream, that rely on water originating in Colorado. (p. 4)

Agency Response: The final rule clearly establishes categories of waters that are jurisdictional, categories that are not jurisdictional, and limited waters that are subject to a case-specific significant nexus analysis. Preamble, IV. The final rule is consistent with the statute, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and C.

Utah Association of Counties (Doc. #14756)

10.325 33 CFR 328.3 Current Rule: (2) All interstate waters including interstate wetlands;

Proposed Change to 33 CFR 328.3: All interstate waters, and (b) ~~including~~ **all interstate wetlands that (i) are immediately adjacent to the interstate waters, and (ii) have a significant nexus to the interstate waters.** (p. 8)

Agency Response: The existing regulation speaks for itself.

Waters Advocacy Coalition (Doc. #19721.1)

10.326 The Proposed Rule inappropriately allows for waters to be jurisdictional based on their relationships to interstate waters. The proposed rule accords new status to interstate waters, equating them with TNWs and allowing for features to be jurisdictional based on a relationship to interstate waters. As discussed in more detail in section III.E., under the proposed rule, for example, "other waters" can now be jurisdictional if they have a significant nexus to a non-navigable interstate water. See 79 Fed. Reg. at 22,200. There is no support for this interpretation in *Riverside Bayview Homes*, *SWANCC*, or *Rapanos*, because those decisions did not concern interstate waters – they dealt solely with TNWs. The significant nexus principles that originated in *SWANCC* and *Rapanos* are tied to TNWs – not interstate waters. And interstate waters differ from TNWs because they are sometimes non-navigable and may not qualify as highways for commerce. See *infra* section II.J.1.

The proposed rule does not provide a definition of "interstate waters," but a significant portion of the preamble's Appendix B (Legal Analysis) is devoted to supporting the notion that interstate waters need not be navigable. See generally 79 Fed. Reg. 22,254-59. But the case law relied upon by the agencies does not provide support for asserting jurisdiction over waters based on their relationship to non-navigable interstate waters.[514] Indeed, minor, non-navigable waters that happen to cross state borders but are located far from TNWs should not be accorded the same treatment as TNWs. Therefore, it simply makes no sense, and there is no scientific or legal authority, to equate the two and allow for waters to be jurisdictional based on their relationship to interstate waters. (p. 100-101)

Agency Response: For the reasons articulated in the Technical Support Document, III, the agencies assert jurisdiction over interstate waters and waters the agencies have determined have a significant nexus to them.

[514] In the proposed rule, the agencies cite to *Illinois v. Milwaukee*, 406 U.S. 91 (1972), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1984), and claim that in these cases, the Supreme Court "recognized the Federal interest in interstate water quality pollution" and "recognized that CWA jurisdiction extends to interstate waters without regard to navigability." 79 Fed. Reg. at 22,256. The agencies' argument is essentially that since the CWA replaced federal common law nuisance with regard to interstate water pollution, and since federal common law nuisance applied to both navigable and non-navigable waters, the CWA jurisdiction must extend to both navigable and non-navigable interstate waters. The Supreme Court, however, cautioned in City of Milwaukee that this sort of analysis is flawed: "The appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law." *City of Milwaukee*, 451 U.S. at 316. The Court further explained, "it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." *Id*. at 317. Thus, to discern whether federal law governing interstate water pollution applies to non-navigable waters, one must look to Congress and the language of the CWA.

Woodlands Development Company (Doc. #12259)

10.327 The proposed rule reaches too broadly and exceeds the reach of the Commerce Clause of the U.S. Constitution. The current regulation defining "Waters of the United States" clearly recognizes the Commerce Clause in defining the reach of the federal authority 33 C.F.R 328. 3(a). The proposed definition divorces itself from any basis in the Commerce Clause. As such the proposed rule, if adopted, would be arbitrary and capricious and not otherwise in accordance with law pursuant to the Administrative Procedures Act. Simply put, the proposed rule exceeds the authority given the United States and is not a reasoned interpretation of the CWA. (p. 1)

Agency Response: The final rule is consistent with the statute, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and C.

Montana Wool Growers Association (Doc. #5843.1)

The Agencies derive their authority under the CWA from the Commerce Clause. The Commerce Clause gives Congress authority "to regulate commerce ... among the several states, and with the Indian tribes." U.S. Const. art. I,§ 8, cl. 3. In the "interstate waters" section of the Preamble, the Agencies assert that "Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of Federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of Federal regulation under the Commerce Clause." 79 Fed. Reg. 222188, 22200 (Apr. 21, 2014). The statement suggests the Agencies misunderstand their authority under the CWA; it implies Congress could grant more authority to the Agencies under the CWA than the Commerce Clause allows. Ironically, the Agencies thoroughly examine their authority to regulate navigable waters pursuant to the Commerce Clause under the previous section of the Preamble ("traditional navigable waters"), but neglect the constitutional restraints under the remaining sections of the Proposed Rule. *Id*.

The Agencies imply their authority under the CWA works backward (i.e. if the Agencies have jurisdiction over a navigable water pursuant to the Commerce Clause, they also have authority over any waters that feed, or lands that feed waters, into the navigable water, or waters that otherwise have a significant nexus to the navigable water). Under the Proposed Rule, waters have a significant nexus if they, "either alone or in combination with other similarly situated waters in the region ... significantly affect the chemical, physical, or biological integrity" of an (a)(1) through (a)(3) water. According to the Agencies, however, whether a navigable water is suitable for interstate commerce is irrelevant in deciding if an effect is significant. Instead, the standard is that the effect (presumably on the chemical, physical, and biological integrity of the navigable water) be "more than speculative or insubstantial." This does not meet the standard set forth in United States v. Darby that Congress may only regulate intrastate activity where the activity has a "substantial effect" on interstate commerce. 312 U.S. 100, 119-20 (1941). (p. 3)

Agency Response: The final rule is consistent with the statute, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and C., III.

Ducks Unlimited (Doc. #11014)

10.328 The touchstone for the final "Waters of the U.S." rule and future administration of jurisdiction must be the primary purpose of the Clean Water Act – "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The "legal analysis" contained within Appendix B of the proposed rule, as well as references throughout the document, cite and highlight the primary purpose of the Act. Needless to say, it is critically important to the issue of assessing jurisdictional limits to keep in mind the purposes of the Act and the intent of Congress. The overarching intent of the Act, as expressly articulated by Congress, was "to establish a comprehensive long-range policy for the elimination of water pollution." The Act's well-known primary purpose, cited above, underscores their intention. In addition, Congress directed the agencies to "develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters."

The legislative history of the Act makes clear that the 1972 Act was intended to curb and eliminate pollution of the Nation's waters. Congress also clearly understood that achieving their objective would require broadly protecting the inter-connected waters of the U.S., including its wetland resources. This goal has been shared by the states, who cooperatively administer the Act. In contexts as recent as comments to the 2003 Advance Notice of Proposed Rulemaking and an amicus brief from states' attorneys general and the District of Columbia in the *Rapanos /Carabell* case, at least 42 states expressed support for broad, federal jurisdiction of wetlands and other waters under provisions of the Clean Water Act.

Thus, while a new rule is clearly necessary to appropriately interpret the findings of the Supreme Court and formally incorporate them into the regulations that are used to administer the Act, it is important to promulgate the new rule with the purpose of the Act as expressed by Congress at the forefront - "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." We believe that Justice Kennedy's language in his *Rapanos* opinion provides a strong legal foundation for doing that and, in essence, includes a mandate to develop the new rule based on the related science. We recognize and accept that Justice Kennedy's language imposes limits that will have the effect of limiting jurisdiction of "waters of the U.S." under the new final rule to fewer waters than are jurisdictional under the existing rule. However, we believe, and will attempt to demonstrate through the synthesis of existing and emerging science, that protection by rule of some additional subcategories of "other waters" is consistent with the science and with the Supreme Court's rulings, and would in turn help achieve other important goals and objectives of the rule, most notably including the nearly universal desire for clarity, certainty, and predictability on the part of the regulated community as well as the regulating agencies. (p. 4)

Agency Response: The agencies agree that the rule is consistent with the statute and Supreme Court decisions. Technical Support Document, I.A. and C. The rule provides that five subcategories of waters are "similarly situated" for purposes of a significant nexus analysis and commenters' synthesis of existing and emerging

science about those subcategories provides additional support for the agencies' conclusions.

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

10.329 The CWA was enacted pursuant to Congressional authority to regulate interstate commerce under Article I, section 8, clause 3 of the United States Constitution—i.e. the "Commerce Clause," which states that Congress may "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." See *Riverside Bayview Homes*, 474 U.S. at 133 ("In adopting th[e] definition of navigable waters, Congress evidently intended to repudiate the limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause."). Accordingly, the scope of jurisdictional authority under the CWA is limited to the scope of federal authority under the Commerce Clause.

Supreme Court precedents concerning the scope of authority under the Commerce Clause read, collectively, to mean that "Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebellius*, 132 S. Ct. 2566, 2578 (2012) (citing *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Historically, the power over the latter category has been read expansively and held to authorize "federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop." *Id*. at 2578–79 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971)).

It does remain, however, that to regulate local, intrastate and isolated activities (or waters) the activity (or waters) must have a "substantial effect" on interstate commerce. See *United States v. Darby*, 312 U.S. 100, 119–20 (1941). Additionally, more recent examinations concerning the outer limits of Congress's authority to regulate interstate commerce make clear that the authority is not unlimited. See *Nat'l Fed'n of Indep. Bus*., 132 S. Ct. at 2589 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968); *Goudy-Bachman v. U.S. Dept. of Health and Human Services*, 811 F.Supp.2d 1086, 1105 (M.D. Penn. 2011) (the Supreme Court's recent opinions "caution that 'the scope of interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and so remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'") (internal citations omitted). Finally, the Supreme Court's analysis in *SWANCC* and *Rapanos*—the most recent opinions analyzing the meaning of the "waters of the United States"—stand out for their resolve to reign in federal authority and curtail the continued expansion of federal jurisdiction under the CWA. See *SWANCC*, 531 U.S. at 171–72 (declining the expansion of the Corps' authority under § 404(a)'s definition of "navigable waters" to "isolated ponds, some only seasonal, [and] wholly located within two Illinois counties"); *Rapanos*, 547 U.S. at 757, 787 (where both the plurality opinion and Justice Kennedy's concurring opinion make clear that the Corps' determination of jurisdiction over certain wetlands was vacated and remanded with instruction for more restrictive interpretations).

In spite of the continuing trend toward a more limited view of the Commerce Clause and two consecutive repudiations of their expanded interpretations of authority, the agencies now come forward with arguably their most expansive definition of the "waters of the United States." For example, the Proposed Rule now defines "tributary," a category jurisdictional by rule, to mean anything with a bed, banks and ordinary high water mark that contributes flow either directly or through a series of other waters to a more traditional waters. See 79 Fed. Reg. 22,202 ("As the definition makes clear, the water may contribute flow directly or may contribute flow to another water or waters which eventually flow into an (a)(1) through (a)(4) water")). The same is jurisdictional water regardless of whether it flows once a year or maintains a continuous surface connection, if only because it is presumed to have a significant nexus to the traditional "water." Similarly, an isolated pond with no connection to traditional "waters" will automatically fall under the agencies' jurisdiction, if only because it sits in the floodplain a tributary of a traditional "waters." Again, the presumption is that it maintains a significant nexus, even if the nexus is not investigated, established and substantiated with documentation. (p. 8-10)

Agency Response: **The rule is narrower in scope than the existing regulation, and is consistent with the statute, the caselaw, and the Constitution. Technical Support Document, I.A., B. and C. With this rule, the agencies interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court caselaw, the relevant and available science, and the agencies' technical expertise and experience. Preamble, III and IV, Technical Support Document, II and VI.**

Guardians of the Range (Doc. #14960)

10.330 The Corps and the EPA are incorrect in asserting that they have authority under the Clean Water Act to categorically regulate all interstate waters as though they were "traditional navigable waters," even when they are not. This is a misinterpretation by not recognizing that the CWA is NOT a congressional or general mandate to regulate all waters. Congress does not have such a power. CWA's legal traction is in its Congress' constitutional power to regulate interstate commerce. Refer to *Rapanos* and to *SWANCC*. The Supreme Court has limited that power to the regulation of channels of interstate commerce (such as navigable in- fact waters), things in interstate commerce (such as commodities that are purchased and sold), and activities that substantially affect interstate commerce. See *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). It is abundantly clear that by definition, anything regulated under the CWA must have a substantial connection to interstate commerce. Tributaries: The proposed rule asserts that the Corps and EPA have jurisdiction to ALL tributaries. This is boundless in its arrogance and overreach. There is no hydrological connection that could be sustained with such an assertion. In *Rapanos* there was a opinion of the plurality as well as one by Justice Kennedy where this ALL concept was rejected . In the plurality opinion the court limited federal jurisdiction to a limited subset of nonnavigable tributaries and Justice Kennedy did not apply his "significant nexus"ntest to tributaries, ONLY to wetlands. This rejection also was applied to drainage ditches and the like. (p. 2)

Agency Response: **The final rule is consistent with the statute, the Supreme Court decisions, and the Constitution. Technical Support Document, I.A and C.**

10.1.2.1 Legal Rationale for Jurisdiction Over Interstate Waters

Agency Summary Response:

The agencies' rule makes no change to the interstate waters section of the existing regulations and the agencies will continue to assert jurisdiction over interstate waters, including interstate wetlands. The language of the CWA is clear that Congress intended the term "navigable waters" to include interstate waters, and the agencies' interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history. The Supreme Court's decisions in *SWANCC* and *Rapanos* did not address the interstate waters provision of the existing regulation. Technical Support Document, IV.

Specific Comments

Coalition of Local Governments (Doc. #15516)

10.331 To the extent that the Supreme Court has recognized that EPA and the Corps can regulate some waters that would not be considered traditionally navigable, the Supreme Court has not stated what types of other waters this includes. The EPA and Corps attempt to rely on the two Supreme Court cases regarding the CWA's jurisdiction over interstate waters as the basis for their conclusion that interstate waters need not be navigable. See 79 Fed. Reg. at 22256-22257. However, these two cases never addressed whether interstate waters must be navigable, but instead dealt with the elimination of common law nuisance claims with respect to interstate water pollution after the passage of the CWA. *Id*. The Supreme Court has interpreted "waters of the United States" to include only those wetlands that are adjacent and connected to traditional navigable waterways or that have a significant nexus to such waters that are navigable in fact. *Riverside Bayview Homes, Inc*., 474 U.S. at 135; *Rapanos*, 547 U.S. at 742, 759, 767, 779. Therefore, the Proposed Rule also conflicts with Supreme Court precedent and its authority under the CWA as it attempts to regulate jurisdiction over tributaries, adjacent wetlands and "other waters" that have a significant nexus to interstate waters that are not navigable in fact. See 79 Fed. Reg. at 22200. (p. 7)

Agency Response: The rule does not conflict with Supreme Court precedent and the assertion of jurisdiction over interstate waters is consistent with the statute. Technical Support Document, IV.

Greater Houston Builders Association (Doc. #15465)

10.332 The proposed rule reaches too broadly and exceeds the reach of the Commerce Clause of the U.S. Constitution. The current regulation defining "Waters of the United States" clearly recognizes the Commerce Clause in defining the reach of the federal authority 33 C.F.R. 328.3(a). The proposed definition divorces itself from any basis in the Commerce Clause. As such, the proposed rule, if adopted, would be arbitrary and capricious and not otherwise in accordance with law pursuant to the Administrative Procedures Act. Simply put, the proposed rule exceeds the authority given the United States and is not a reasoned interpretation of the CWA. (p. 2)

Agency Response: **The rule is consistent with the statute and the Constitution. Technical Support Document, I.A. and C.**

Western Growers Association (Doc. #14130)

10.333 Beginning in 1995, the U.S. Supreme Court imposed more limits on the breadth of the Act and interpretation of "waters of the United States" both constitutionally and, more importantly, as a matter of statutory interpretation. In 1995, in *United States v. Lopez*, the Court invalidated federal legislation for the first time in almost 60 years on the grounds that Congress had exceeded its authority under the Interstate Commerce Clause.[515]

Following this decision, the U.S. Supreme Court in reviewing the Seventh Circuit's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[516] began to read statutory limitations into the scope of the Act's "waters of the United States." The *SWANCC* Court acknowledged the Riverside Bayview decision but emphasized that "[i]t was the significant nexus between wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[517] In addition, it gave new import to Congress's decision to use the word "navigable" in the Clean Water Act:

> "But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[518]

Western Growers agrees with and supports the Supreme Court's line of jurisprudence that sets limits on the reach and scope of the Act. We acknowledge that the EPA's and Army Corps' proposed new "waters of the United States" strives to respond to the U.S. Supreme Court's 2006 split decision in *Rapanos v. United States*. In that case, the Justices split three ways regarding the proper test to determine the limits of the Act and whether wetlands and tributaries should be considered "waters of the United States." (p. 3-4)

Agency Response: **The rule is consistent with the statute and the Constitution. Technical Support Document, I.A. and C.**

Jensen Livestock and Land LLC (Doc. #15540)

10.334 As it stands, it is extremely unclear how far the agencies intend federal jurisdiction to extend and if taken to the maximum extent possible the proposed rule wraps in virtually every feature across the nation, which contravenes not only the CWA itself but also the Commerce Clause of the U.S. Constitution. (p.15)

Agency Response: **The rule is consistent with the statute and the Constitution. Technical Support Document, I.A. and C. The rule establishes clear limits on the scope of federal jurisdiction. Preamble, IV.**

[515] 514 U.S. 549, 557 (1995).
[516] 531 U.S. 159 (2001).
[517] *Id*. At 166-167.
[518] *Id*. At 172.

Hackensack Riverkeeper et al. (Doc. #15360)

10.335 Congress meant Waters of the United States to include all of our country's waters that Congress' power over commerce could reach; Congress made the definition simple because it intended to be clear and not because it intended to be cryptic. For example, the House Public Works Committee wrote, "The Committee fully intends that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. Rep. No. 92-91 at 131 (1972), 1972 Legislative History at 818. Article 1, section 8 of the United State Constitution lists Congress' enumerated powers. Congress' most potent power is "To regulate commerce with foreign nations and among the several states and with the Indian tribes." This, if Congress intended to have its broadest possible interpretation, Waters of the United States must include all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce , or with Indian Tribes. (p. 6)

Agency Response: The agencies agree that the rule is consistent with the statute and the Constitution. Technical Support Document, I.A. and C. In *SWANCC*, the Supreme Court held that the word "navigable" means that Congress was utilizing its authority over traditional navigable waters.

10.1.2.2 Legal Rationale for Protecting Waters with a SN to Interstate Waters

Agency Summary Response

Since the Supreme Court's decision in *SWANCC*, and Justice Kennedy's opinion in *Rapanos* identified a significant nexus to the waters clearly covered by the CWA – in those cases, the traditional navigable waters – as the basis for CWA jurisdiction, the agencies promulgated a rule that similarly protects the interstate waters that the agencies concluded were similarly clearly covered by the CWA. Preamble, IV and Technical Support Document, IV.

Specific Comments

Attorney General of Texas (Doc. #5143.2)

10.336 Despite the *Rapanos* plurality's clear warning that expansive interpretations of Clean Water Act jurisdiction "stretch[] the outer limits of Congress's commerce power," this proposed rulemaking assumes—incorrectly-- that its broad view of the Clean Water Act raises no constitutional concerns. *Id*. at 724. As we stated in our letter to the EPA regarding its 2011 Draft Guidance, under the system of dual sovereignty established by the Constitution, the federal government lacks a general police power and may only exercise the powers expressly granted to it by the Constitution. See *United States v. Lopez*, 514 U.S. 549, 566 (1995); U.S. Const., amend. X.

The Clean Water Act was enacted pursuant to Congress's authority to regulate interstate commerce under Article 1, section 8 of the Constitution. As a result, regulatory agencies violate the Constitution when their enforcement of the Act extends beyond the regulation of interstate commerce. Yet, it is by no means clear that all waters with a significant

nexus to navigable waters also have a substantial effect on interstate commerce. See *United States v Darby*, 312 U.S. 100, 119-20 (1941) (holding that Congress may regulate intrastate activity only where the activity has a 'substantial effect" on interstate commerce). In other words, there are likely waters—not to mention dry ditches—that the proposed rulemaking purports to subject to Clean Water Act jurisdiction, but that, under a proper commerce clause analysis, would not be subject to federal authority. Regulating these waters falls outside the scope of Congress's—and therefore federal agencies'—constitutional authority. The proposed rulemaking, however, completely fails to take into account the Constitution's limits on federal regulatory authority. A primary inquiry into the constitutional basis for the exercise of federal jurisdiction should be resolved before the secondary question of statutory authority under the Clean Water Act is reached.

The federal government asks for our trust that this proposed rule will provide predictability, clarity, and consistency in the way it asserts its jurisdiction. The federal government asserts, further, that this proposed rulemaking will in no way broaden its jurisdiction or change its Clean Water Act practices. Nothing could be further from the truth. The rulemaking relies chiefly on the last two U.S. Supreme Court cases—*Rapanos* and *SWANCC'*—that confronted the meaning of 'waters of the United States." Lost in the agencies' analysis, however, is that in both cases, the Supreme Court attempted to reign in the federal government's perceived jurisdiction under the Act. (p. 6-7).

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Wyoming Wool Growers Association (Doc. #15037)

10.337 The understanding of the Commerce Clause of the U.S. Constitution as outlined in the proposed rule is convoluted and essentially obliterates the distinction between "national" and "local". The assertion that "Congress clearly intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of Federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of Federal regulation under the Commerce Clause" 79 Fed. Reg. at 222188, 22200 (April 21, 2014) reveals a lack of understanding of the Agencies' authority under the CWA and implies that Congress could grant more authority to the Agencies under the CWA than the Constitution allows. (p. 1-2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.1.3. Territorial Seas

The agencies did not identify substantive comments that addressed this topic.

10.1.4. Impoundments

The agencies did not identify substantive comments that addressed this topic.

10.2. ADJACENT WATERS

Agency Summary Response

Based on a review of the scientific literature and the agencies' expertise and experience, the agencies determined that adjacent waters as defined in the rule are integrally linked to the chemical, physical, or biological functions of waters to which they are adjacent and downstream to the traditional navigable waters, interstate waters or the territorial seas. Therefore, the agencies determined that the waters defined as adjacent have a significant nexus with traditional navigable waters, interstate waters or the territorial seas and are thus "waters of the United States." Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a significant impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. In addition, waters adjacent to tributaries serve many important functions that directly influence the integrity of downstream waters including traditional navigable waters, interstate waters, and the territorial seas. Adjacent waters store water, which can reduce flooding of downstream waters, and the loss of adjacent waters has been shown, in some circumstances, to increase downstream flooding. Adjacent waters maintain water quality and quantity, trap sediments, store and modify potential pollutants, and provide habitat for plants and animals, thereby sustaining the biological productivity of downstream rivers, lakes and estuaries, which may be traditional navigable waters, interstate waters, or the territorial seas. The rule is consistent with the statute, caselaw, and Constitution. Preamble IV, Technical Support Document,I, II and VI, Adjacent Waters Compendium.

Specific Comments

Offices of the Attorney Generals of Oklahoma, West Virginia and Nebraska (Doc. #7988)

10.338 The Proposed Rule declares that all geographically-related "adjacent" waters are always and per se covered by the CWA. *Id*. § 230.3(s)(6). The Proposed Rule defines "adjacent" waters as-among other features-those waters "within the riparian area or floodplain of' core waters, impoundments, or tributaries. *Id*. § 230.3(u)(l)-(2). "Riparian area" and "floodplain" are broad, poorly defined concepts that sweep up large portions of water, wetlands, and lands usually dry for most of the year. *Id*. § 230.3(u)(3)-(4). (p. 5)

Agency Response: In response to comments, the rule provides specificity by utilizing the 100 year floodplain for determining "adjacent waters" and does not define "floodplain" or "riparian area." Preamble, VI.

Florida Department of Agriculture and Consumer Services (Doc. #10260)

10.339 The current regulations also define the following terms:

> *Wetlands* – those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 C.F.R §328.3(b).

> *Adjacent* – bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." 33 C.F.R §328.3(c).

At issue in the *Rapanos* case was the inclusion of wetlands adjacent to or near ditches and manmade drains that eventually, through assorted other ditches, drains, creeks, and surface connections, link to waters susceptible to use in interstate commerce per the definition of "waters of the United States." 33 C.F.R. § 328.3(a)(1), (5), (7) (2005). The Corps viewed these wetlands "adjacent" to tributaries as within its jurisdiction if they carried a perceptible ordinary high water mark (OHWM). 33 C.F.R. § 328.4(c); Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,8 18, 12,823 (March 9, 2000). The Corps also viewed the upstream limit of "waters of the U.S." to be where the OHWM is no longer perceptible. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217(November 13, 1986) (to be codified at 33 C.F.R. pts. 320, 321 , 322, 323, 324, 325, 326, 327, 328, 329, 330). The current regulations also include a definition of OHWM at 33 C.F.R. § 328.3(e). Under the Corps's regulations, wetlands are adjacent to tributaries, and thus covered by the Act, even if they are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. § 328.3(c). (p. 63-64)

Agency Response: **The existing regulations speak for themselves.**

10.340 Only a wetland with a continuous surface connection to bodies that are "waters of the U.S." in their own right, such that there is no clear demarcation between "waters" and wetland, is itself a part of those "waters" and therefore adjacent to such "waters" and covered by the Act. *Id*. at 742. The inclusion of wetlands abutting such a "hydrographic feature" is legally pe1missible due primarily to the difficultly of drawing any clear boundary on the continuum between land and water. *Id*. at 724-725; *Riverside Bayview*, 474 U.S. at 132. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the U.S." do not implicate the boundary drawing problem and lack the necessary connection to covered waters that the Court described as a "significant nexus." *SWANCC*, 531 U.S. at 167. In expanding its definition of "waters of the U.S." to include ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the *Rapanos* plurality held that the Corps had stretched the term beyond the plain language of the statute to an impermissible "Land Is Waters" approach. *Rapanos*, 547 U.S. at 734. (p. 65-66)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C.**

West Virginia Department of Environmental Protection (Doc. # 15415)

10.341 Another category of waters the proposed regulation establishes as per se jurisdictional is those waters that are "adjacent" to waters that are deemed jurisdictional under any of the other five categories of per se jurisdictional waters. The WVDEP's first objection to the proposed per se jurisdiction based on adjacency is in the category of those insignificant, isolated waters that qualify as jurisdictional only by virtue of the fact that they straddle a border between states. Any waters that are adjacent to such interstate waters that cannot

otherwise qualify as per se jurisdictional (i.e., traditional navigable waters, a direct tributary of traditional navigable waters, impoundments of such or territorial seas) cannot meet the test of either group of Justices under *Rapanos* and should not be considered jurisdictional on either a case-by-case or a per se basis.

The WVDEP also objects to the proposal to confer per se jurisdiction over waters that are "adjacent" to the sub-class of "tributaries" that consists of ditches and ephemeral drains. As discussed above, this sub-class of tributaries cannot meet the test of either group of Justices under *Rapanos*. Accordingly, the proposed regulation's classification of waters adjacent to this sub-class of tributaries as jurisdictional cannot pass muster under *Rapanos*, either. Such waters cannot be considered jurisdictional even on a case-by-case basis, much less on a per se basis.

Another problem with the proposed regulation's per se jurisdiction over adjacent waters is how "adjacent" is defined. The EPA's proposed definition of what is "adjacent" is sweepingly overbroad. It includes bordering, contiguous, and "neighboring" waters. "Neighboring" waters are newly defined to include all waters related to one of the first five categories of per se jurisdictional waters by virtue of: (1) being located in the riparian area of such waters; (2) being located in the floodplain of such waters; (3) having a shallow subsurface hydrological connection to such waters; or (4) having a confined surface hydrological connection to such waters. With the "neighboring" definition, the EPA completely parts company with both of the majority opinions in *Rapanos* and charts its own course. Each of the four elements of this definition would establish per se CWA jurisdiction notwithstanding the lack of significance of the "neighboring" feature to any other jurisdictional water and the absence of any continuous surface connection with any other jurisdictional water.

The "floodplain" element of the "neighboring" definition, for example, has the potential to extend per se CWA jurisdiction to many areas that neither of the majority opinions in *Rapanos* would support. Consider that, in places, the geographic feature comprising the floodplain of the Ohio River at Huntington, West Virginia, is nearly two miles wide on just one side of the river. Any accumulation of water, damp spot or pothole filled with rain across this expansive floodplain is established as a per se jurisdictional water by this definition, regardless of its lack of impact on the river or any tributary thereto. Thus, the regulation can be interpreted to require at least a jurisdictional determination, if not a CWA Section 404 permit, for nearly all construction in that floodplain because of the likelihood that it will encounter "jurisdictional waters." This federal overreach poses a very real problem for West Virginia, because West Virginia suffers a dearth of flat land outside of its "floodplains." As a result, most of our larger communities are built in floodplains. Although "floodplain" is also a defined term, the definition does nothing to limit its reach in order to avoid this problem.

Another problem with floodplain-based adjacency jurisdiction is that the regulation applies it broadly to hydrologic features that generally do not have a floodplain, e.g., impoundments and the higher gradient upland tributaries that are found in the Appalachian region. This brings us to another problem with the proposed regulation that is peculiar to West Virginia and the Appalachian region: while our larger communities tend to be located in floodplains, many of our smaller communities are strung along tributaries. As one proceeds upstream in such areas, the area that might be considered a

"floodplain" narrows to the point that there is no real geographic feature that can be considered a floodplain. The portions of our smaller communities that are not in a "floodplain" are likely in what would be considered a "riparian area" under the proposed regulation. As with floodplain-based jurisdiction, any of OW citizens who have built homes or businesses in such riparian areas may be considered to be in violation of the permit requirements of Section 404 of the CWA. Those who wish to build in such areas will do so at their peril, if they do not first obtain a jurisdictional determination and a Section 404 permit. This puts a severe burden on our citizens, who want or need to use what little flat land there is available in parts of West Virginia.

The shallow subsurface connection element of the "neighboring" waters definition also has particularly far reaching implications in the Appalachian region. The topography in the region consists of one ridgeline after another, each with steep mountainsides, which are separated by narrow hollows in which small streams flow. The local hydrology in nearly every hollow in Appalachia is characterized by the presence of a shallow stress-relief fracture system. See, Wyrick, G., and J. Borchers, 1981, Hydrologic Effects of Stress-Relief Fracturing in an Appalachian Valley, US Geological Survey Water Supply Paper 21 77, 5 1 p. Laterally along a stream, this subsurface fracture system extends far up steep mountain sides. Longitudinally with the stream, it can be expected to extend virtually to the ridge top. Through the stress-relief fracture system, ground and surface water located high on steep mountainsides is connected to intermittent and perennial streams in the bottom below. Through the "shallow subsurface connection" provision, the proposed definition would include in its sweep nearly all damp spots on the ground in the Appalachian region, again, without regard to their significance or surface connection to other waters. The WVDEP believes that the use of groundwater flow regimes in determining the jurisdiction of the CWA could reach a wide variety of upland damp features that no version of the *Rapanos* majority opinions would authorize. Further, the WVDEP believes, as a general matter, that "neighboring" waters must be examined on a case-by-case basis to assure that they bear some level of significance to traditional navigable waters and that the federal government's "land is waters" approach that was specifically condemned by the *Rapanos* plurality is not repeated.

In addition to the elements of the definition of "neighboring," the definition of "adjacent" deems waters (including wetlands) that are separated from other waters by "man-made dikes or barriers, natural river berms, beach dunes and the like" to be "adjacent" and, thereby, per se jurisdictional waters. 79 Fed. Reg. 22,263 (April 21, 2014). Like the elements of the "neighboring" definition, this is done without regard to any nexus between such waters and the more permanent waters from which they are separated. Thus, this element of the "adjacent" definition fails Justice Kennedy's significant nexus test. Of course, without any connection to relatively permanent waters, neither can these separated waters qualify as jurisdictional under the *Rapanos* plurality's opinion.[519] (p. 9-11)

[519] The jurisdiction the federal government would claim through the combination of the proposed regulation's designation of ditches as jurisdictional waters and its further assertion of jurisdiction over wetlands separated from other waters by man-made barriers is remarkably similar to the factual scenario in which it claimed jurisdiction in *Carabell v. United States Army Corps of Engineers*, the companion case that the Supreme Court considered in its

Agency Response: **For the reasons articulated in Section IV of the Technical Support Document, interstate waters, including interstate wetlands remain "waters of the United States" in the rule. The rule excludes certain ditches and ephemeral drainages from "waters of the United States," and waters would not be jurisdictional due to adjacency to any such excluded waters. Preamble, VI. In response to comments, the agencies have changed the definition of neighboring. Preamble, VI. The agencies determined that the waters defined as adjacent, including those separated by a berm, have a significant nexus with traditional navigable waters, interstate waters or the territorial seas and are thus "waters of the United States." Preamble III and IV, Technical Support Document, II and VI.**

South Carolina Department of Health and Environmental Control (Doc. #16491)

10.342 The new definitions of neighboring, riparian area, and floodplain expand jurisdiction beyond current practices. "Adjacent" is defined in the Proposed Rule as meaning, ".., - bordering contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."[520] This definition is essentially unchanged from the existing regulation with the exception that the new definition refers to "adjacent waters" as opposed to "adjacent wetlands." The more significant change to the definition of adjacency comes as a result of the newly proposed definitions for "neighboring," "riparian area" and "floodplain" which further define adjacency. As a result of these new definitions, all neighboring, riparian and floodplain waters would now be considered to be adjacent and, thus, per se jurisdictional. To further highlight the fact that all adjacent waters are considered to be per se jurisdictional in the Proposed Rule, the Agencies have deleted the parenthetical statement in the existing regulation that excludes the adjacency of a wetland to another jurisdictional wetland as a means for determining jurisdiction.[521]

This again represents a significant departure from current practices. In accordance with the post- *Rapanos* guidance, not all adjacent waters are per se jurisdictional. The post-*Rapanos* guidance declares only those wetlands adjacent to traditional navigable waters to be automatically jurisdictional. Wetlands adjacent to non-navigable tributaries that are not relatively permanent and wetlands adjacent to, but not directly abutting, relatively permanent non-navigable tributaries require a significant nexus analysis under the guidance.[522]

As support for this new, and expanded, approach, the Agencies again refer to the fact that their review of the scientific evidence has led them to conclude that, "all waters that meet the proposed definition of "adjacent" are similarly situated for purposes of analyzing whether they, in the majority of cases, have a significant nexus to an (a)(1) through (a)(3)

Rapanos decision. Having met with the Court's disapproval in *Carabell*, the federal government appears to be poised to attempt to write its result out of existence through this proposed regulation.

[520] 79 Fed. Reg. at 22269.

[521] 40 C.F.R. Section 230.3(s)(7). (2014).

[522] U.S. Environmental Protection Agency, Memorandum on Clean Water Act Jurisdiction Following the US. Supreme Court's Decision in Rapanos v United States & Carabell v. United States (Dec.2, 2008), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

water."[523] Further, as the Agencies note in the Proposed Rule, based on their review of the scientific literature, "...we have concluded that these waters, when bordering, contiguous or located in the floodplain or riparian area, or when otherwise meeting the definition of "adjacent," provide many similar functions that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas."[524]

SCDHEC is concerned that this expands the scope of CWA jurisdiction and is clearly an expansion of jurisdiction when compared to current practices in accordance with the post-*Rapanos* guidance. (p. 3-4)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the caselaw. Technical Support Document, I.B. and C.

New Mexico Environment Department (Doc. #16552)

10.343 The Agencies propose to expand and redefine "adjacent wetlands" to become "adjacent waters." 79 Fed. Reg. 22,180, 22,206. "Adjacent waters" is then defined as "[a]ll waters, including wetlands, adjacent to" jurisdictional waters. "Proposed 'Definition of 'Waters of the United States' Under the Clean Water Act' 40 CFR 230.3," (s)(5). 12 "Adjacent" is defined as "bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters." *Id*., (u)(1) (emphasis added). "Neighboring" is defined "for purposes of the term 'adjacent' [to include] waters located within the riparian area or floodplain of a [jurisdictional water] or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." *Id*., (u)(2). Subsequently, both "riparian area" and "floodplain" are defined but "shallow subsurface" waters and "confined surface" connections are not. *Id*., (u)(3)-(4).

The Department, combining these various terms, finds that the proposed redefinition of "adjacent wetlands" will expand federal jurisdiction to include the following:

1) All waters that are adjacent, i.e., neighboring, contiguous, or bordering a jurisdictional water;
2) All upstream tributaries and waters that are connected by an observable high water mark;
3) All waters that are in the floodplain of the existing or proposed jurisdictional water;
4) All waters that are in the riparian area of the existing or proposed jurisdictional water (including isolated tributaries and waters);
5) All waters that have a shallow hydrologic connection to a jurisdictional water; and/or

[523] 79 Fed. Reg. at 22260.
[524] *Id*.

6) All waters that have a confined surface hydrologic connection to jurisdictional water.[525]

The Department is gravely concerned that this series of definitions, expanding at each subsequent level, exceeds the scope of "adjacent" jurisdictional determinations as contemplated by Congress in the enactment of the CWA and is contrary to both the plurality and concurring opinions in *Rapanos*. In the plurality opinion, the justices stated that for adjacent wetlands to be jurisdictional, they must first be "relatively permanent, standing or flowing bodies of water," 547 U.S. at 732-33, and secondly they must have a continuous surface connection to the bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the waters and adjacent wetlands. *Id*. at 742. In his concurrence, Kennedy stated that any wetland that is adjacent to a navigable water is jurisdictional since there is a reasonable inference of ecologic interconnection. *Id*. at 780. However, if "isolated" from the jurisdictional water, or if adjacent to a "non-navigable tributary," the water must meet the "significant nexus" test, i.e., the water or area must exert a substantial or significant impact on the ultimate jurisdictional water. *Id*. at 782. Currently, the determination of "adjacency" of waters is performed through a case-by-case review of the subject area[526], whereas the proposed rule would make all adjacent waters jurisdictional by rule. See generally 79 Fed. Reg. 22,180,22,195.

The Agencies' expansion and redefinition of "adjacent wetlands" will inevitably capture areas and waters that are currently and traditionally regulated by the State, e.g., ground water discharges and permits, irrigation waters, ditches, acequias, etc. Secondly, the inclusion of "adjacent waters" via "shallow subsurface hydrologic connections" will interfere with, cloud, or legally impair established ground water pumping rights close to jurisdictional waters, contrary to the CWA's preamble and congressional intent in Section 1251 (b) of Title 33 of the United States Code, noted above. 33 U.S.C. §1251(b) (2006).

The Department acknowledges that some "adjacent waters" have a physical, chemical, or biological impact on federal jurisdictional waters, however, this is not always true and can vary from one region, stream, riparian area, floodplain, or watershed. See generally "Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act" (Sept. 30, 2014) (SAB recommends that the EPA should consider the relationship between waters in "gradients" not as a "binary" relationship); see also 79 Fed. Reg. 22,180, 22,193. Here, the Agencies are proposing that if waters are "adjacent" to existing or newly created federal jurisdictional water, it will necessarily and implicitly have a substantial nexus irrespective of its permanency or actual surface or hydrological connection to the adjacent jurisdictional water. *Id*. at

[525] It is important to note that "adjacent waters" can apply equally to waters adjacent to the traditional CWA jurisdictions (navigable waters, interstate waters, or territorial seas) and to the newly expanded definitions of "tributaries." See 79 Fed. Reg. 22,180, 22,206-07.

[526] See EPA, Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008). Available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_FollowingRapanos120208.pdf.

22,206-07. This interpretation simply fails to consider the holding of the U.S. Supreme Court in *Rapanos*, and in fact is opposite to the findings of both the plurality and Justice Kennedy. See *Rapanos*, 547 U.S. at 780.

Establishing jurisdiction over "neighboring" waters by rule in either the "riparian area" or "floodplain" is problematic. "Riparian area" is defined as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." 79 Fed. Reg. 22,180, 22,207. This definition is overly expansive as compared to current practice and will undoubtedly include lands and waters that have little or no nexus to the jurisdictional water. The Agencies are supplanting federal legal jurisdictional authority with scientific reasoning. This method of jurisdictional application simply by location is contrary to the limitations placed on the analysis of a "significant nexus" by Justice Kennedy and is too speculative to establish the necessary jurisdictional basis. In fact, the definition itself seems to require a factual analysis to determine if the "surface or subsurface hydrology" of the "adjacent" or "neighboring" water will have an impact to ecological processes and [the] plant and animal community structure in that area." *Id*. at 22,207. Such a wide- reaching presumption that any adjacent water in the floodplain or riparian area has the requisite impact on "ecological processes" is contrary to and goes beyond any rational reading of the Court's past holdings. See generally *Rapanos*, 547 U.S. at 780.

The Agencies define "floodplain" as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows." 79 Fed. Reg. 22,180, 22,207. This definition differs significantly from other statutory definitions and may be overly expansive. See e.g., 44 C.F.R. § 9.4 (Base Floodplain means the 100-year floodplain (one percent chance floodplain)); see also 42 U.S.C. § 4004(a)(l)-(2) (2011) (National Flood Insurance definitions of 100-year and 500-year floodplain). The Agencies fail to clarify what is intended by inclusion of the words "under present climatic conditions." Simply put, the addition and use of "riparian area" and "floodplain" to establish federal jurisdiction only complicates the present case-by-case factual review and analysis determination. The Agencies should reevaluate and consult with the State on this section of the proposed rule.

Finally, the Agencies' use of the term "shallow ground water" in establishing jurisdiction over "adjacent waters" and lands is problematic for two reasons. First, the definition gives the perception that ground water in close proximity to a jurisdictional water such as a ditch, tributary, acequias, or wetland, could be considered jurisdictional water and subject to regulation under the CWA. As indicated above, such regulation could impair and legally cloud established State water rights. Second, the Agencies have failed to define or clarify what constitutes "shallow." It could be found that all waters with any level of ground water connection are "adjacent" and therefore subject to federal permitting and regulation. This would again impair established State water resources. The Department recommends that this language be removed and that the Agencies work with the Department to develop an acceptable "adjacency" test. (p. 15-17)

Agency Response: **The final rule does not define “adjacent waters” based on shallow subsurface flow or the riparian area. Preamble, IV. The agencies determined that the waters defined as adjacent have a significant nexus with**

traditional navigable waters, interstate waters or the territorial seas and are thus "waters of the United States." Preamble, III and IV, Technical Support Document, II and VI. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

County of Butler Board of Commissioners (Doc. #6918.1)

10.344 In the *Rapanos* consolidated case of *June Carabell, et. al. v. United States Army Corps of Engineers*, the issue addressed by the Supreme Court was whether a wetland may be considered adjacent to remote "waters of the U.S.," because of a mere hydrological connection to them. In *Carabell*,...the Court addressed whether a wetland may be considered 'adjacent to' remote 'waters of the United States,' because of a mere hydrologic connection to them." More specifically, the Court reasoned as follows:

> In *Riverside Bayview*, we noted the textual difficulty in including 'wetlands" as a subset of "waters': 'On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as waters.' We acknowledged, however, that there was an inherent ambiguity in drawing the boundaries of any 'waters':
>
> > '[T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs-in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where, on this continuum to find the limit of 'waters,' is far from obvious.'

Because of this inherent ambiguity, we deferred to the agency's inclusion of wetlands 'actually abut[ting]' traditional navigable waters: 'Faced with such a problem of defining the bounds of its regulatory authority,' we held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: 'In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.'

When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: 'It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*. In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*-and upon which the dissent repeatedly relies today, provided an independent basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin, permitting the Corps' reliance on ecological considerations only to resolve that ambiguity in favor of treating all abutting

wetlands as waters. Isolated ponds were not 'waters of the United States' in their own right, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*. Thus, establishing that wetlands such as those at the *Rapanos* and *Carabell* sites are covered by the Act requires two findings: First, that the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.

The *Rapanos* Court indicated that an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. A logical extension to this reasoning would be the reasonableness of the agency's implementation of its interpretation of the statute under the directives of the Court-especially the Supreme Court. After reviewing the applicable Supreme Court cases and the proposed rule set forth by the EPA and the Corps, it is beyond reasonable comprehension that the Sixth Circuit remanded tile case to a party opponent (the Corps) who was found to over extend its authority in the initial instance requiring Court intervention. The Supreme Court was clear in its remand to the Sixth Circuit when it provided" because of the paucity of the record in both of these cases, the lower courts should determine ... whether the ditches or drains near each wetland are 'water' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that created the boundary-drawing problem we addressed in *Riverside Bayview*." Sometimes federal regulation goes too far in the daily operations of business, agriculture and individual land ownership. Federal regulation mandates what States have to oversee and the actual "dollar buck" is passed onto local county and municipal governments who are the service providers. This particular proposed rule by the EPA and the Corps is one of regulators gone rogue. The Supreme Court was clear that these agencies exceeded authority by an objective reading of case precedent in *Rapanos*. It's time to stop wasting taxpayer dollars for expansion of an agency's regulatory authority viewed as absolute power not within their jurisdiction. This proposed rule should be withdrawn. Why it was not brought back to the Eastern District Court of Michigan for decision as set forth in the *Rapanos* ' Court Remand Order is without explanation.

Although the broadest possible constitutional interpretation of "waters of the U.S." appears to be the goal of the EPA and the Corps in this proposed rule expansion, one must remember that the constitutional constriction is to interstate commerce. Both the EPA and the Corps overstepped Congress' Constitutional authority regarding interstate commerce limitations established by the Supreme Court. The proposed rule over

dissected Supreme Court case analysis and specific interpretations of the CW A to violate all Constitutional parameters of interstate commerce and federalism despite the *Rapanos* Court's sweeping clarifications regarding both the concurring and the dissenting opinions. Consistent with the "separation of powers," the proposed rule should be withdrawn and if necessary, forwarded to Congress for full consideration and discussion of the Supreme Court's actual and accurate interpretation of statutory terms and construction. This would allow the true intent of Congress and our legislative system of checks and balances to prevail. The *Rapanos* Court's final statement should put this proposed rule to an abrupt end. "Clean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that significantly affect the chemical, physical, and biological integrity of 'waters of the U.S. It did not do that, but instead explicitly limited jurisdiction to 'waters of t/1e U.S.'" Clearly, this proposed rule by the EPA and the Corps both exceeds constitutional, statutory and judicial authority. (p. 10-12)

Agency Response: **The rule is consistent with the statute, caselaw, and the Constitution. Technical Support Document, I.A. and C.**

10.345 Proposed legislation HR 5078- Waters of the United States Regulatory Overreach Protection Act of 2014 passed the House on September 9, 2014. Hopefully HR 5078 will also pass the Senate to immediately stop the actions of the EPA and Corps regarding their proposed rule. It is a positive action that the proposed legislation stops the EPA and the Corps from "developing, finalizing, adopting, implementing, applying, administering, or enforcing the proposed rule entitled, "Definition of 'Waters of the United States' Under the Clean Water Act," issued on April 21, 2014, or the proposed guidance entitled, "Guidance on Identifying Waters Protected By the Clean Water Act," dated February 17, 20 12;" or " using the proposed rule or proposed guidance, ally successor document, or any substantially similar proposed rule or guidance as the basis for any rulemaking or decision regarding the scope or enforcement of the Federal Water Pollution Control Act (commonly known as the Clean Water Act)."

It is especially positive that HR 5078 requires the EPA and the Corps withdraw their jointly proposed interpretive rule entitled, "Notice of Availability Regarding the Exemption from Permitting Under Section 404(f) (1) (A) of the Clean Water Act to Certain Agricultural Conservation Practices," issued on April 21, 2014. Under HR 5078, both Supreme Court and federalism mandates must be followed requiring the EPA and the Corps to consult with relevant state and local officials to develop recommendations for proposed regulations identifying both the scope of covered and non-covered waters under the Clean Water Act. Hopefully, more streamlined internal methodologies will be applied by the EPA and the Corps pursuant to HR 5078 or from all comments received pertaining to the proposed rule. Voluntary withdrawal of the proposed rule would be the prudent action by the EPA and Corps at this time. (p. 13)

Agency Response: **The agencies have complied with all applicable laws.**

Murray County, Minnesota, Board of Commissioners (Doc. #7528.1)

10.346 The newly proposed rule offers new language and terms that depart from the nomenclature used in the Clean Water Act, historical regulations, and existing case-law

precedence. The proposed rule therefore is challenging to synthesize with existing case law. (p. 2)

Agency Response: The agencies have used the structure and text of the existing rule to the extent possible.

10.347 We oppose the replacement of "adjacent wetlands" with "adjacent waters" and believe that this proposal is not legally supported by the Clean Water Act and its case law. As proposed, this section of the rule represents the largest expansion of jurisdiction by the agencies over regulated waters.

In *Riverside Bayview Homes*, the Supreme Court explained that Congress's concerns over restoring the integrity of navigable waters could reasonably conclude that "regulation of at least some discharges into wetlands" adjacent to navigable waters is permitted by the Clean Water Act. *See Us.* v. *Riverside Bayview Homes. Inc.,* 474 U.S. 121, 137 (1985). In *SWANCC,* the Court rejected extension of jurisdiction to wetlands not adjacent to navigable waters, stating, " It was the significant nexus between wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview Homes*." *Solid Waste Agency of N. Cook Cnty.* v, *Us. Army Corps ofEng'rs,* 53] U.S. 159,]67 (2001). In *Rapanos,* Justice Kennedy recognized that the limit of the agencies' powers over adjacent wetlands is set by a determination of the wetlands significant nexus to navigable water. *Rapanos* v. *U.S.,* 547 U.S. 7] 5,759 (2006). (p. 6)

Agency Response: The rule is consistent with the CWA and the caselaw. Technical Support Document, I.A. and C.

Rio Grande Water Conservation District (Doc. #15124)

10.348 Setting aside the devastating impact to the agricultural community, asserting regulatory authority over small water features that alone bear no meaningful connection to major waterways would violate both the letter and spirit of the U.S. Supreme Court's decisions in *Rapanos*, *SWANCC*, and *Riverside*. As discussed below, these decisions make clear that the EPA's and Corps' jurisdiction under the CWA has limits. For example, Justice Kennedy cautioned in *Rapanos* that the relationship between a particular water feature and navigable waters must be more than "speculative or insubstantial." Aggregating similarly situated features in a region could easily nullify this and other important jurisdictional limitations found in the Act and in U.S. Supreme Court jurisprudence.

The revisions to the existing definition of "adjacent wetlands" further highlight the expanded scope of federal jurisdiction under the proposed rule. The proposal is to change "adjacent wetlands" to "adjacent waters" so that the term also includes bodies of water like ponds and oxbow lakes. Only adjacent wetlands are classified as "waters of the U.S." under the current rule. On its face, therefore, the new definition is broader than the existing definition. This is confirmed by EPA and Corps' admission in the preamble that only some of the adjacent non-wetland water features that will now be jurisdictional by rule have been historically subject to federal CWA regulation. Proposed Rule at 22207. It is difficult for the RGWCD to understand how the contemplated revisions would work to narrow federal jurisdiction under the CWA. (p. 3)

The United States Supreme Court has ruled on three separate occasions that federal jurisdiction under the CWA has limits. In the first of the three cases, *US. v. Riverside*

Bayview Homes, Inc. , 474 U.S. 121 (1985), the court was faced with the question of whether the Corps had properly concluded that certain wetlands abutting traditionally navigable waters could be regulated as "waters of the U.S." The *Riverside* court upheld the agency's jurisdictional determination under the highly deferential *Chevron* standard. But in doing so, Justice White placed great emphasis on the fact that the wetlands in question were found to have a direct, immediate, and continuous hydrologic connection to downstream navigable waters. Because the wetlands were "inseparably bound up" with waters clearly subject to CWA regulation, the court could not conclude that the agency had acted unreasonably in asserting jurisdiction. *Id*. at 133- 135.

Riverside stands only for the proposition that it is not unreasonable for the EPA and Corps to assert jurisdiction under the CW A over wetlands that bear a direct and uninterrupted surface connection to a downstream navigable waterway. Justice White was careful to limit the scope of his ruling to such "adjacent wetlands." E.g., *id*. at 131, fn8 ("We are not called upon to address the question of authority of the Corps to regulate discharges of fill materials into wetlands that are not adjacent to bodies of open waters, and we do not express any opinion on that question."). In discussing the scope of "waters of the U.S." under the Act, the court held that "waters" refers primarily to "rivers, streams, and other hydrographic features." *Id*. at 131.

The Supreme Court was more definitive in its pronouncements on the scope of "waters of the U.S." 15 years later in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531U.S.159 (2001). *SWANCC* involved a challenge to the Corps exercise of jurisdiction over a "scattering of permanent and seasonal ponds of varying sizes" located on an abandoned mining site. The Corps had asserted jurisdiction over the ponds under its Migratory Bird Rule, which deemed waterways jurisdictional if they "are or could be used" by migratory birds. The *Solid Waste Agency of Northern Cook County* challenged the scope of the Corps' jurisdiction under the "clarifying" Migratory Bird Rule. The Waste Agency argued, among other things, that the rule, which attempted to assert jurisdiction to the full extent allowed by the Commerce Clause, was inconsistent with the text of the CWA as well as its legislative history.

The *SWANCC* court sided with the Waste Agency and struck down the Migratory Bird Rule as an unreasonable exercise of agency discretion; finding it unreasonable even under the agency-friendly *Chevron* standard. In doing so, the court soundly rejected the Corps' expansive interpretation of its own jurisdiction. E.g., *Id*. at 172-173 ("We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under Sec 404(a)'s definition of 'navigable waters' because they serve as habit for migratory birds."); 172 ("But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."); 174 ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use.").

The statements in *SWANCC* regarding the limits of federal jurisdiction under the Act are unequivocal and have broad application. In writing for the dissent, Justice Stevens

recognized that the majority opinion had established a new jurisdictional line. He characterized the decision as "one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." *Id*. at 176-177.

The Supreme Court revisited the issue of the scope of federal jurisdiction under the CWA for a third time in *Rapanos, et al. v. United States*, 547 U.S. 715 (2006). Mr. Rapanos backfilled several fields with "sometimes-saturated soil conditions" located on his Michigan property. The fields, which the Corps deemed wetlands, were in the vicinity of man-made drains that eventually emptied into navigable waters 11 to 20 miles downstream. The United States brought civil and criminal enforcement proceedings against Mr. Rapanos, claiming that the wetlands were "waters of the U.S." and that the backfilling was done without the required Section 404 permit. The issue before the Supreme Court was whether the Corps had properly asserted jurisdiction over the wetlands.

The Supreme Court overturned the 6th Circuit's ruling upholding the Corps' exercise of jurisdiction and remanded the case to the trial court to make further factual determinations regarding the relationship of the wetlands to the drainages and downstream navigable waterways in light of the Court's ruling in Riverside. While none of the opinions penned in *Rapanos* garnered the support of a majority of the Justices, all nine Justices approved of the court's ruling in *SWANCC*. The majority opinion in *SWANCC* therefore continues to represent binding authority. In further support of the limitations set forth in *SWANCC*, the plurality opinion and each of the concurrences in *Rapanos* make clear that courts cannot uphold an interpretation of "waters of the U.S." that seeks to confer unlimited, or nearly unlimited, federal jurisdiction on the EPA and the Corps:

Justice Scalia's Plurality Opinion, 547 U.S. 715, 731-732 ("The only natural definition of the term 'waters,' our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that 'the waters of the United States' in Section 1362(7) cannot bear the expansive meaning that the Corps would give it."); *id*. at 734 ("In addition, the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water.").

Justice Roberts' Concurrence, 547 U.S. 715, 758 ("Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power [under the CW A]. The upshot today is another defeat for the agency.").

Justice Kennedy's Concurrence, 547 U.S. 715, 780 ("When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters'").

The United States Supreme Court has established the following framework for interpreting and applying plurality opinions: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in

the judgments on the narrowest grounds…" *'Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 (1976). The *Marks* Rule applies when "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position." *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (emphasis in original). The *Mark* Rule plainly applies to the *Rapanos* decision. Justice Scalia concurred in the judgment on the narrowest grounds. And only his test identifies bodies of waters which each of the other four Justices concurring in the judgment would agree are jurisdictional under the Act. Yet, inexplicably, the EPA acknowledges that the proposed rule is based on the broadest test set forth in any of the concurring opinions, Justice Kennedy's "Significant Nexus" test.

When read together, *Riverside*, *SWANCC* and *Rapanos* require a much narrower interpretation of federal jurisdiction under the CW A than the one EPA and Corps now advance. This is especially true given that the agencies appear to give nearly unlimited breadth to "waters of the U.S." in the proposed rule. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. 159, 172. The only clear indication that exists is that Congress did not intend such a result. (p. 3-6)

Agency Response: **The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C.**

10.349 Congress enacted the CW A to establish a comprehensive long-range policy for the elimination of water pollution in the United States. In structuring the Act to achieve this goal, Congress was careful not to disturb the traditional balance of federal-state power. This is best illustrated in Section 1251(b), which provides, "it is the policy of Congress to recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution." This spirit of "cooperative federalism" permeates the Act and its legislative history, and represents an understanding by Congress that the states are best situated to effectively regulate pollution occurring within their borders. (p. 6)

Agency Response: **The rule is consistent with the statute. Technical Support Document, I.A.**

10.350 Finally, the Court made clear that the physical evidence can be either quantitative or qualitative and that it did not intend to place an unreasonable burden on the Corps. However, it held that the Corps should provide sufficient documentation "which need not take the form of any particular measurements but should include some comparative information that allows us to meaningfully review the significance of the wetlands impacts on downstream water quality."[527] The *Precon* decision demonstrates that the

[527] The court cited to the decisions of the Ninth and Sixth Circuits as "good examples of the types of evidence -- either quantitative or qualitative -- that could be sufficient to establish significance. *Northern California River Watch v. City of Healdsburg*, 496 F.3d. 993 (9th Cir. 2007) (significant nexus test met after district court found "increased chloride levers in the relevant navigable water form 5.9 parts per million to 18 parts per million due to chlorine seepage from the wetlands in question into the navigable river.") Id. at 1001, *United States v. Cundiff*, 555 F.3d. 200 (6th Cir. 2009) (Sixth Circuit's opinion rested on evidence that the wetlands acid mine drainage storage capabilities and flood storage capabilities had a direct and significant impacts on the [Green River]."

agencies cannot rely exclusively on broad watershed desktop studies and data to establish "significant nexus". However, the proposed rule allows field personnel to use broad desktop information without conducting the kind of analysis that the *Precon* case found is required to satisfy the legal determination of significant nexus. NSSGA's members fear that, under the proposed rule, field personnel will simply aggregate the cumulative functions and values of all wetlands adjacent to a tributary without providing sufficient specific evidence comparing these aggregated wetlands to the functions performed by the TNW to conclude that they have a significant nexus with the functions and values of the TNW.[528] The agencies may argue that such site-specific analysis will create an undue evidential burden on field personnel and may leave important aquatic areas unprotected if sufficient evidence is not gathered. Yet, they ignore an over-riding truth. Relying on the broad connectivity theory, is no substitute for meeting their burden as a legal matter to faithfully apply the significant nexus test as envisioned by Justice Kennedy in *Rapanos*. (p. 39-40)

Agency Response: The Fourth Circuit in *Precon II* upheld the Corps' jurisdictional determination. Technical Support Document, I.C. With this action, the agencies are exercising their rulemaking authority under the CWA, consistent with Justice Kennedy's opinion, and the rule is consistent with the caselaw and the science. Technical Support Document, I.C, II and VI.

Utah Association of Counties (Doc. #14756)

10.351 EPA/Army Corps Clean Water Act (CWA) jurisdiction extends only to "navigable waters." 33 U.S.C. §§ 1311(a), 1342(a). Navigable waters are defined as "the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7).

The *Rapanos* four justice plurality ruled that the lands at issue are per se not included in "the waters of the U.S." In so ruling the plurality held:

- CWA jurisdiction extends only over "waters" and not just waters in general;
- CWA jurisdiction extends even more narrowly to relatively permanent bodies of water as found in streams and forming geographical features such as streams, oceans, rivers and lakes, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Thus,
- Isolated ponds are not "waters of the United States" in their own right;-- Intermittent and ephemeral streams are not "waters of the United States" in their own right; but

[528] Some courts apply a somewhat more lenient evidentiary standard for determining significant nexus than *Precon*. E.g. *Wis. Resources Protection Council v. Flambeau Mining Co*., 903 F. Supp. 2d. 690, 715 (W.D. Wis., 2012) ("Plaintiffs have adduced evidence showing that the stream contributes its flow to the River, delivers water containing pollutants to the river and provides habitat for at least six species of fish…" [Without supplying data regarding stream flow, duration or measurable impact of the copper and zinc] the court cited Justice Kennedy's statement in *Rapanos* that "significant nexus test does not require quantitative, physical evidence or laboratory analysis of soil samples, water samples or…other tests." 547 U.S. at 779- 80. Even this more lenient standard is a far cry from the proposed rule's categorical inclusion of all tributaries and adjacent wetlands and aggregation approach to other waters.

- Seasonal streams that carry water continuously except during dry months are "waters of the United States" in their own right.
- Defining where the water of a water body ends and where the water body's abutting wetland begins is inherently ambiguous. Thus looking to *Riverside Bayview*, the *Rapanos* plurality resolved the ambiguity in favor of treating all abutting wetlands as "jurisdictional" but only if there is a continuous surface connection to bodies of water that are "waters of the U.S. in their own right." Thus,
- A wetland may not be considered "adjacent to" remote water bodies that are waters of the U.S. in their own right, based on a mere hydrological connection.

A broader reading of "the waters of the U.S." is hard stopped by this pillar of CWA Congressional stated policy objective, namely "to recognize, preserve, and protect the primary responsibilities and rights of the States ….to plan the development and use…of land and water resources…" 33 U.S.C. § 1251(b). This CWA policy objective is equally prominent and controlling as that of § 1251(a), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and actually more so given the fact that Congress in the CWA chose to achieve these objectives only by expressly regulating "the waters" of the U.S., as opposed to other waters and lands.

Concurring in the judgment, Justice Kennedy opined that all wetlands should be subject to a "significant nexus" test to determine if they are jurisdictional. Yet multiple reads of the *Rapanos* concurrence leave us to conclude that it is practically impossible to capture in the form of a workable rule, what Justice Kennedy believes all the elements are in a "significant nexus" inquiry. Based on portions of the concurrence in the judgment, Justice Kennedy arguably would be the first to admit that he himself would not know how a rule could capture such a test and all its potentially endless permutations. In fact at least once in the concurrence Justice Kennedy indicates that the nexus test to some extent must be ascertained on a case by case basis, eschewing both the plurality and the dissent for trying to solidify bright line tests for which wetlands may or may not be jurisdictional, the one he regards as too rigidly narrow and excluding and the other he regards as rigidly broad and over-including.

10.352 It is odd that in the shadow of this 4-1-1 decision with a swing concurrence that defies rational rule-type categorization, the EPA/Army Corps would propose a rule with the kind of rigid overreach and intrusion that Kennedy eschewed. The EPA/Arm Corps proposed rule is a sitting duck for lawsuits for violating the intersection of the *Rapanos* plurality and concurrence, not to mention *SWANCC* and *Riverside Bayview* holdings which the *Rapanos* plurality and concurrence acknowledged. (p. 2-4)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

10.353 To try to fashion another rule, one could bounce back and forth between the *Rapanos* plurality's restrictive narrow standard and the *Rapanos* dissent's strict intrusive overreach.

But there is a better way.

The first step is to be willing as an agency to recognize and identify the significant elements of the *Rapanos* concurrence that overlap with portions of the *Rapanos* plurality and that repudiate portions of the dissent, thus giving rise to an inferred five-- justice supported rule (bounded by the extent of that overlap and repudiation), workable enough to give the public some certainty in at least some of the wetlands cases.

The next step is be willing to accept from the confusion of the rest of Kennedy's concurrence that many wetland issues will just have to be handled on a case-by-case basis, and stop worrying about doing a rule wonderful enough to handle all cases, and stop obsessing about pushing your jurisdictional reach further and further in ways that you know will result in Supreme Court repudiation and possibly Congressional censure in the form of new laws and de-funding enforcement of the rule.

Here from the soup of Justice Kennedy's *Rapanos* concurrence are five discrete points of inquiry, which could be intersected with compatible parts of the plurality opinion and backstopped against incompatible parts of the dissent, to find common elements sufficient to fashion a workable rule for some but not all wetlands issues, if EPA/Army Corps must have a new rule. But these cannot support a rule broad enough to handle all cases, so again, you're going to have to adopt mindset of readiness to do case by case determinations. To the identifiable elements of the *Rapanos* concurrence:

This would be a step by step cumulative inquiry, requiring satisfactory responses to all five questions to find a "significant nexus" between the subject water, including wetland, and the undisputed navigable water:

The threshold inquiry into the existence of a significant nexus is whether the subject wetland is adjacent to a navigable water body regardless of whether there is continuous surface flow between the subject wetland and the navigable water body. Indeed Kennedy devotes a large share of his opinion trying to beat back the plurality's dual requirement of adjacency plus continuous surface flow. See, e.g., this quote from 547 U.S. 780:

> "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*."

Next question: Does including the subject wetland in "the waters of the U.S." significantly affect the first CWA policy objective, namely "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), and at the same time does it no harm to the equally valid and weighty second CWA policy objective to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use…of land and water resources," 33 U. S. C. § 1251(b). Only if the answers are satisfactory on both objectives, i.e., only if including of the subject wetland advances the first objective without harming the second objective, would this prong of the "significant nexus" test be satisfied.

Next, because mere hydrologic connection alone is not enough, the pertinent inquiry is whether the connection is substantial enough that the subject wetland is inundated or

saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." If not, then the "significant nexus" test is over. Sub-questions under this question should inquire about:

a) the prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands;

b) the existence of hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and

a. the presence of wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years.

Because the concept of "navigable" in the statutory term "navigable waters" must be given some importance, the connection between the subject wetland and an adjacent navigable body of water must be readily apparent. Under this common man common sense test, non-adjacent wetlands that lay alongside non-navigable ditches or drains, isolated ponds and mudflats are non-jurisdictional, even if water from these features may eventually one day flow into a traditional navigable water body.

a) (a) The concept of "navigable" supports Justice Kennedy's requiring a tributary to bear an ordinary highwater mark on its banks or shores. This is one more reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act.

(b) But as Justice Kennedy notes, the mere presence of an ordinary highwater mark may not be enough, because ordinary high water marks may occur on tributaries that do not otherwise qualify for inclusion in "the waters of the United States," such as drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it. This precludes adoption of an "ordinary high water mark" as a determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the CWA's scope in *SWANCC*.

The upshot of this is that absent an ordinary highwater mark, a tributary per se should not be regarded as jurisdictional, but even with the presence of an ordinary highwater mark, the tributary should not be jurisdictional if merely a drain, ditch, or stream remote from any navigable-in-fact water and carrying only minor water volumes toward it. (p. 4-7)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C. The definition of "tributary" in the rule requires a bed and banks and other indicator of ordinary high water mark. Preamble, IV and Technical Support Document, VI.**

10.354 33 CFR 328.3 Current Rule: (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section;

UAC Proposed Change to 33 CFR 328.3: **(6) ~~All waters, including wetlands, adjacent to a water identified in paragraphs~~ Wetlands that abut waters (other than waters that are themselves wetlands) identified in** (a)(1) through (5) of this section; and

(7) ~~On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.~~ All other waters such as intrastate lakes, rivers and streams that have a significant nexus to a water (other than waters that are themselves wetlands) identified in paragraphs a(1) through (3) of this section. (p. 10)

Agency Response: In response to comments, the agencies modified this provision of the rule. Preamble VI.

10.355 UAC Proposed Change to 33 CFR 328.3: (c) Definitions— (1) Adjacent. The term adjacent means **abuting**, bordering, contiguous or **immediately neighboring**. ~~Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent waters.'' ~~(p. 13)

Agency Response: The rule is based on the agencies' careful examination of the science and the law to determine that adjacent waters seperated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like have a significant nexus with traditionally navigable waters, interstate waters, or the territorial seas. Preamble IV.

10.356 UAC Proposed Change to 33 CFR 328.3**: ~~(2)~~ (3)** Neighboring. The term neighboring, for purposes of the term ''adjacent'' in this section, **means immediately next to. ~~includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.~~**

(3) ~~Riparian area. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.~~

~~(4) Floodplain. The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.~~ (p. 16-17)

Agency Response: The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now

provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. Preamble, IV.

Atlantic Legal Foundation (Doc. #15253)

10.357 A prime example of the proposed rule's increased ambiguity is how the category of "adjacent wetlands" for per se jurisdiction will be replaced with the term "adjacent waters." It will define "adjacent waters" as "wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas."[529] The highlighted terms are malleable and will accord the agencies greater discretion while providing little clarity for property owners. Similarly, the proposed rule will expand the modifier "adjacent," originally codified as meaning "bordering, contiguous, or neighboring."[530] The proposed rule will broaden this definition by interpreting "neighboring" to include waters with a shallow subsurface hydrologic connection to a traditionally navigable water, within "reasonable proximity."[531] It will be difficult and costly for property owners to ascertain whether an isolated water body on their land contains a shallow subsurface hydrologic connection to a jurisdictional water, much less whether it is within "reasonable proximity." (p. 3)

Agency Response: In response to comments, the agencies did not define "adjacent waters" to include waters with a shallow subsurface hydrologic connection. Preamble, VI.

Without explanation, the proposed rule unceremoniously, and without sufficient basis, disposes of Justice Scalia's plurality opinion in *Rapanos v. United States* and *Carabell v. United States* ("*Rapanos*") in favor of the nebulous "significant nexus" test found in Justice Kennedy's concurrence. In *Rapanos,*[532] the plurality opinion held that "waters of the United States" covered relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters, in addition to adjacent wetlands with a continuous surface connection to such water bodies.[533] The proposed regulation substitutes the amorphous term "adjacent waters" for the phrase "adjacent wetlands." This skews the plurality's definition, giving the agencies vast discretion to interpret what constitutes an "adjacent water." Further, under the proposed rule theseadjacent waters may be connected via subsurface hydrologic connections, completely at odds with the plurality's "continuous surface" connection requirement.[534] Not only does the proposed rule contradict the plurality's definition, but the agencies fail to explain why Justice Kennedy's amorphous definition should supplant Justice Scalia's more concrete and certain test. At a minimum, we believe the agencies should be required to give a detailed rationale for this decision. (p. 4-5)

[529] *Id*. at 22207.
[530] 33 C.F.R. § 328.3(c) (1993).
[531] See Definition, *supra* note 1, at 22207.
[532] *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006).
[533] *Id*. at 739, 742.
[534] See Definition, supra note 1, at 22188

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C. In response to comments, the agencies did not define "adjacent waters" to include waters with a shallow subsurface hydrologic connection. Preamble, VI.**

National Association of Manufacturers (Doc. #15410)

10.358 The proposed rule defines "waters of the United States" to include "[a]ll waters, including wetlands, adjacent to" traditional navigable waters and their tributaries. Proposed 33 C.F.R. § 328.3(a)(6), 79 Fed. Reg. at 22263. "Adjacent" is defined as "bordering, contiguous, or neighboring," and "neighboring" includes waters located within the "riparian area" or "floodplain," or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Proposed 33 C.F.R. § 328.3(c)(1)-(4), 79 Fed. Reg. at 22263. "Waters, including wetlands, separated from other waters of the United States by man-made dykes or barriers, natural river berms, beach dunes and the like" are still considered "adjacent waters." Proposed 33 C.F.R. § 328.3(c)(1), 79 Fed. Reg. at 22273. Given the breadth of the definition of "adjacency" (and the incorporated term "neighboring"), the proposed rule will result in waters being jurisdictional even when they have no hydrological connection to a traditional navigable water or when they are remote from a traditional navigable water and are only indirectly connected to that traditional navigable water through ephemeral streams or ditches with intermittent flow.[535] Thus, the proposed definition of "adjacency" is grossly overbroad, contrary to the statute and controlling Supreme Court precedents, and arbitrary and capricious.

The proposed rule does not, and cannot, claim that the proposed definition of "adjacency" comports with the plurality's opinion in *Rapanos*. As noted, the four-justice plurality held that "the waters of the United States" includes "only relatively permanent, standing or flowing bodies of water," such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features." 547 U.S. at 732-33 (internal quotation marks omitted). The proposed rule, however, proposes to include as "adjacent" waters those without any hydrological connection to a traditional navigable water as well as those with only "intermittent or ephemeral surface connections" to a "tributary" of a traditional navigable water. 79 Fed. Reg. at 22207-08, 22210.[536] This is clearly in direct conflict with the *Rapanos* plurality opinion.

While the proposed rule purports to follow Justice Kennedy's concurrence in *Rapanos*, the proposed definition of "adjacency" is also contrary to Justice Kennedy's analysis.

[535] More specifically, included in the "definition" of "adjacency" are "neighboring" bodies of water, which are defined to include any body of water within the floodplain or the riparian area of a traditional navigable water, regardless of hydrological connection. See Proposed 33 C.F.R. § 328.(c)(1)-(4), 79 Fed. Reg. at 22263. The proposed rule also treats any water "bordering" a traditional navigable water as jurisdictional regardless of the presence of any barriers, including "river berms, beach dunes and the like." Proposed § 328.3(c)(1), 79 Fed. Reg. at 22263. Finally, the proposed rule applies the "adjacency" definition to waters that border even ephemeral streams and ditches, as all "tributaries" are deemed jurisdictional and all ephemeral streams and ditches are considered "tributaries." Proposed 33 C.F.R. § 328.3(a)(5), (c)(5), 79 Fed. Reg. at 22263.

[536] As explained above, this error is further compounded by the proposed definition of "tributary," which includes streams and ditches that carry water intermittently and includes streams with natural breaks that ultimately do not have a hydrological connection to a traditional navigable water. 79 Fed. Reg. at 22201-02, 22206.

Justice Kennedy's opinion in *Rapanos* required evidence of a "significant nexus" between the particular waters at issue and the navigable water to which they were connected. At most, he suggested in dicta that "[w]here an adequate nexus is established for a particular wetland, it might be permissible, as a matter of administrative convenience or necessity," for the Corps "to presume covered status for other comparable wetlands in the region." 547 U.S. at 782. Dicta must be considered "in connection with the case in which those expressions are used," and while dicta can be "respected," it "ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

Justice Kennedy expressly did not decide the issue of presuming status for any "water." See 547 U.S. at 782 (the issue "is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here"). Justice Kennedy also did not suggest that the agencies could make an across-the-board determination that all wetlands "adjacent to" all tributaries have a significant nexus to traditional navigable waters, without regard to such factors as whether they are separated by berms, whether they are far from the navigable water, and whether their flow is small and intermittent. Cf. *Rapanos* Guidance at 7 & n.29 (treating wetlands as "per se" jurisdictional only when they are "not separated by uplands, a berm, dike, or similar feature" from a traditional navigable water).

Indeed, in *Rapanos*, Justice Kennedy voted to reverse the two court of appeals decisions holding that the "adjacent" wetlands were jurisdictional. 547 U.S. at 783-86. He expressly acknowledged that not all "adjacent" wetlands would be "waters of the United States." *Id*. Justice Kennedy stated that in some instances wetlands might be adjacent to "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes to it," so they would be "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC." *Id*. at 781-82.

Further, for the same reasons discussed above with respect to the proposed definition of "tributary," the proposed definition of "adjacency" is also arbitrary because it is fundamentally inconsistent with the proposed rule's definition of "significant nexus." As is the case with the proposed definition of tributaries, the case-specific factors found by the proposed rule to be relevant to determining whether there is a "significant nexus" for "other waters" are entirely ignored when it comes to defining "adjacency" even though the agencies purport to make "significant nexus" the "touchstone" for jurisdiction. 79 Fed. Reg. at 22192. All waters in an arbitrarily defined area are simply deemed to be "navigable waters" even when they would not, in fact, satisfy the very "significant nexus" definition that the agencies are now proposing. See Business Roundtable, 647 F.3d at 1153 (vacating agency action as "arbitrary" because it was "internally inconsistent"); Gen. Chem. Corp., 817 F.2d at 846 (vacating agency action as "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

The proposed rule provides no valid evidentiary basis for categorically considering all bodies of water "adjacent" to traditional navigable water to always have a substantial impact on the water quality of the distant traditional navigable waters. Cf. 79 Fed. Reg. at 22210. As noted, included within the definition of "adjacency" are both isolated bodies of water with no hydrological connection to any traditional navigable water as well as

waters that are only indirectly and tenuously connected to traditional navigable waters through ephemeral streams or ditches with intermittent, negligible flow. These are the precisely the type of waters that Justice Kennedy concluded were the paradigm examples of waters having no "significant nexus" to traditional navigable waters. 547 U.S. at 781-82.

Not only does the definition of "adjacency" run afoul of *Rapanos*, it also runs afoul of *SWANCC*. The definition of "adjacency" is based on a theory of "biological connectivity" that was squarely rejected in *SWANCC*.[537] As noted, the proposed sweeping definition of "adjacency" includes even isolated waters with no direct hydrological connection to a traditional navigable water. The primary justification offered by the proposed rule for finding a "significant nexus" in this situation is that the "uplands separating two waters may not act as a barrier to species that rely on and that regularly move between the two waters." 79 Fed. Reg. at 22210. This is little more than a reformulation of the "Migratory Bird Rule" rejected in SWANCC. Indeed, in important respects, it is even broader that the "Migratory Bird Rule" because it would permit jurisdiction to be asserted on the basis of the travel patterns of any species and does not even consider whether disruption of those travel patterns has any impact on interstate commerce. *Cf. SWANCC*, 531 U.S. at 163-67.

Even where "adjacency" is more appropriately established by hydrological connections (rather than definitional fiat), the proposed rule fails to provide reasonable notice of the type of "subsurface hydrologic connection or confined surface hydrologic connection," 79 Fed. Reg. at 22207, with a tributary that will render a water "adjacent" to the tributary and therefore jurisdictional. The proposed rule says the agencies will "also assess the distance between the water body and tributary in determining whether or not the water body is adjacent." *Id*. However, the proposed rule provides no indication of how much distance is required to establish a jurisdictional connection; it simply acknowledges that "in specific circumstances, the distance" may be "sufficiently far that even the presence of a hydrologic connection may not support an agency determination." *Id*. at 22208. Again, this fails to provide the meaningful guidance required for a valid exercise of agency rulemaking authority.

At the end of the day, "adjacency" would be determined on an ad hoc basis by the agencies using their "best professional judgment." *Id*. at 22208. But this is no standard at all—let alone a standard that provides "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 US 104, 108-09 (1972).

Likewise, the proposed rule is arbitrary and capricious, and violates due process, because the agency has failed to identify key aspects of the proposed definition of "adjacency" with necessary specificity, and because, the proposed rule is in direct contradiction to Supreme Court holdings that are specifically on point. (p. 17-21)

<u>Agency Response:</u> The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies have determined that

[537] Indeed, it would go even further than the invalidated Migratory Bird Rule by considering whether isolated waters were relevant to the life cycle of a variety of animal species. See 77 Fed. Reg. at 22214.

adjacent waters have a significant nexus and that determination was based physical functions and chemical functions, and on biological functions, only to the extent there are significant effects on the biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. Preamble, III and Technical Support Document, II and VIII.

10.359 As noted, areas within a "floodplain" are included within the definition of "adjacency." Proposed 33 C.F.R. § 328.3(c)(1)-(2), (4), 79 Fed. Reg. at 22263. The proposed rule, however, does not specify which floodplain will be used. Indeed, the proposed rule specifically says that the agencies may use a "floodplain associated with a higher frequency flood when determining adjacency for a larger stream" and "a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream." 79 Fed. Reg. at 22209.[538]

Just as a police officer cannot set the speed limit when writing a ticket, whatever leeway the agencies have to determine adjacency on the basis of a floodplain, the agencies cannot establish the standard they will use to determine the relevant floodplain after seeking to enforce the Clean Water Act. Announcement of the controlling legal standard after-the-fact is the quintessential violation of due process, and also violates the principles of notice and comment rulemaking.[539]

Regardless, there is no basis for the proposed rule's broad conclusion that all waters in a floodplain must be jurisdictional. To the contrary, the fact that a body of water has a hydrological connection with a traditional navigable water only every few decades, once a century, or even less frequently is powerful evidence that there is no "significant nexus." (p. 21-22)

Agency Response: **In response to comments, the rule specifies a specific floodplain interval.**

10.360 Similarly flawed is the proposed definition of "riparian area." Although a key term in the proposed definitions—all waters in a "riparian area" of a traditional navigable water or tributary are ultimately considered to be "adjacent" and therefore "jurisdictional"—the definition is opaque: "The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between the ecosystems." Proposed Rule 33 C.F.R. § 328.3(c)(3), 79 Fed. Reg. at 26663. No meaningful guidance in the proposed rule is given to what it means to "influence" the "ecological process and plant and animal community structure in the area" or when there would be an "exchange of energy and materials between . . . ecosystems." Id. These vague terms have no well-established meanings, but were crafted by the agencies for the

[538] The potential breadth of this definition is extraordinary. For example, the flooding of the Mississippi and Missouri rivers in 1993 inundated more than 20 million acres in nine states. USGS, The Great Flood of 1993, http://mo.water.usgs.gov/Reports/1993-Flood/.

[539] This is particularly true given the agencies' acknowledgement that "there is no scientific consensus" on how to "define floodplain." EPA, Questions and Answers—Waters of the U.S. Proposal 5, http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf.

proposed rule. As such, they are not an appropriate exercise of rulemaking authority, and any enforcement action based on the Act's purported coverage of "riparian" waters would violate due process.

Certainly, there is no basis for finding that all waters in a riparian area have a "significant nexus" to a traditional navigable water. By treating all waters in a riparian area as "adjacent," the proposed definition would sweep in isolated waters with no hydrological connection to any traditional navigable water as well as waters that are only indirectly and tenuously connected to a traditional navigable water through ephemeral streams or ditches with intermittent, negligible flow. Cf. 547 U.S. at 781-82 (Kennedy, J., concurring) (providing these type of waters as examples of waters having no "significant nexus" to traditional navigable waters). Indeed, in this regard, the proposed definition is foreclosed by the Ninth Circuit's decision in *San Francisco Baykeeper* that held that a pond 125 feet from a tributary of the San Francisco Bay—and thus certainly within the "riparian area' of the tributary (and possibly its floodplain as well)[540]— had no "significant nexus" to navigable waters because there was no evidence of a connection that permitted water from the pond to travel to the navigable water. 481 F.3d at 708. (p. 22-23)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provide that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII.**

Waters Advocacy Coalition (Doc. #17921.1)

10.361 The proposed rule's regulation of adjacent waters expands CWA jurisdiction in contravention of the *Rapanos* plurality and Justice Kennedy's opinion. The *Riverside Bayview Homes* Court recognized that the agencies may assert jurisdiction over wetlands actually abutting on a navigable-in-fact waterway, 474 U.S. at 135,[541] and the current regulations provide for jurisdiction over adjacent wetlands. But the proposed rule, for the first time, extends jurisdiction to adjacent non-wetland waters, and expands the concept of adjacency beyond reason.

The proposed rule extends jurisdiction to "[a]ll waters, including wetlands," adjacent to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,263. The proposed rule does not explain what is considered a "water" that could be adjacent under this provision, but the preamble states that the term "water" is

[540] In fact, the evidence indicated that at high tide there was occasional flow of water from the navigable water into the pond (although not vice-versa). 481 F.3d at 708.

[541] The *Riverside Bayview Homes* Court explicitly did not address "wetlands that are not adjacent to bodies of open water." 474 U.S. at 131 n.8.

used "in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems." *Id*. at 22,191 n.3. The preamble further explains that the term "water" "do[es] not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features." *Id*. This explanation indicates that the agencies intend to treat essentially any feature that is wet as a "water" that could be jurisdictional by virtue of its adjacency.

The term "adjacent" means "bordering, contiguous, or neighboring." *Id*. at 22,263. This definition has not changed from the current regulations, but the proposed rule vastly expands the concept of "neighboring." Under the proposed rule, waters and wetlands are "neighboring" (and therefore regulable under (a)(6)) if they are "located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have "a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." *Id*. The proposed rule does not provide a limit for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval. *Id*. at 22,208. The proposal also leaves the application of the term "shallow subsurface hydrologic connection" to the best professional judgment of the agencies. *Id*. Building on this expansive concept of "neighboring," the proposed rule determines, categorically, that all "adjacent waters" have a significant nexus, and allows for jurisdiction over all waters and wetlands in undefined floodplain and riparian areas or that have a subsurface connection to jurisdictional waters. This interpretation is a blatant departure from the plain meaning of "adjacent"[542] and is a far cry from the actually abutting wetlands found to be adjacent in *Riverside Bayview Homes*.[543]

The proposed rule's inclusion of non-wetlands in this "adjacent waters" category is an impermissible expansion of agency jurisdiction. Justice Kennedy's *Rapanos* opinion applied only to wetlands. And in *Baykeeper*, the U.S. Court of Appeals for the Ninth Circuit held that adjacent non-wetlands are not subject to CWA regulation. 481 F.3d at 709. At issue in *Baykeeper* was whether the agencies had CWA jurisdiction over a non-navigable pond that *Baykeeper* argued was "adjacent" to the Mowry Slough, a navigable tributary of the San Francisco Bay. *Id*. at 706. The court rejected the agencies' assertion of jurisdiction over the non-navigable pond, explaining that nothing in *SWANCC* or *Rapanos* supports the assertion of jurisdiction over non-wetlands based on adjacency to navigable waters. *Id*. at 707. With their proposed category of "adjacent waters," the agencies again attempt to extend the concept of jurisdiction based on adjacency to non-wetlands. The agencies justify the assertion of jurisdiction over "adjacent" non-wetlands by claiming that, "Prior to *SWANCC*, adjacent nonwetland waters were often jurisdictional *under* the 'other waters'" provision. 79 Fed. Reg. at 22,207. Although this may be true, the SWANCC Court rejected such a practice and held that regulation of

[542] See Summit Petroleum Corp., 690 F.3d 733, 744 (6th Cir. 2010) (rejecting EPA's position that "activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them" because that position "undermines the plain meaning of the text ['adjacent'], which demands, by definition, that would-be aggregated facilities have physical proximity").

[543] See *Rapanos*, 547 U.S. at 748 (plurality) ("'[A]djacent' as used in *Riverside Bayview* is not ambiguous between "physically abutting" and merely "nearby.").

these isolated waters was beyond the scope of the agencies' authority under the Act. *SWANCC,* 531 U.S. at 168. The agencies may not use this rulemaking to recapture waters that the Supreme Court has ruled to be outside CWA jurisdiction.

In addition, the agencies' adjacent waters standard is problematic because it allows for jurisdiction based on "adjacency" to drains, ditches, and streams remote from navigable waters and carrying only minor volumes of flow. Justice Kennedy's opinion does not allow for jurisdiction based on "adjacency" to features that are not "major tributaries." *Rapanos,* 547 U.S. at 780. Justice Kennedy explicitly rejected "the Corps' theory of jurisdiction in these consolidated cases – adjacency to tributaries, however remote and insubstantial . . ." *Id*. With respect to the non-navigable ditch at issue in *Carabell*, Justice Kennedy's concurrence stated, "mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it." *Id*. at 786. In such situations, he found that "a more specific inquiry" was necessary. *Id*. Under the proposed rule, wetlands (and non-wetlands) that are adjacent to such remote and insubstantial tributaries (including jurisdictional ditches) would be per se jurisdictional. Asserting per se jurisdiction over any water or wetland within the floodplain or riparian area of a water of the United States directly contradicts Justice Kennedy's opinion.

Nor does the *Rapanos* plurality allow for such an expansive assertion of jurisdiction over "adjacent waters." The plurality found that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 742. Thus, the plurality explained, "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." *Id*. Moreover, the agencies do not state what floodplain interval is intended in their proposed standard, but a commonly defined floodplain mapped by FEMA is the 100-year floodplain. If that is what is intended, this goes far beyond the ruling in *Rapanos*. In criticizing the overbreadth of the Corps' jurisdictional determinations, as an example, the *Rapanos* plurality specifically cited the practice of some Corps districts to assert jurisdiction over wetlands "if they lie within the '100-year floodplain' of a body of water – that is, they are connected to the navigable water by flooding, on average, once every 100 years." *Id*. at 728. Ignoring these limits imposed by the *Rapanos* plurality, the proposed rule would allow for jurisdiction over waters, including wetlands, based on location within the same floodplain or riparian area as nonnavigable, remote features now classified as tributaries. This goes well beyond what the *Rapanos* plurality allowed and would codify practices specifically rejected by the *Rapanos* Justices.

With the proposed rule's new definition of "neighboring" and extension of the adjacency concept to non-wetlands, the agencies are attempting to broaden their CWA jurisdiction in a manner that is wholly inconsistent with the *Rapanos* plurality's and Justice Kennedy's opinions, which squarely rejected the agencies' "any hydrological connection" standard and the agencies' attempts to regulate wetlands based on adjacency to non-navigable tributaries. Although the proposed regulation of "adjacent waters" may

result in more certainty (because it automatically covers all waters in a floodplain or riparian area or with a shallow subsurface hydrologic connection to jurisdictional waters), the agencies cannot regulate in conflict with *Rapanos* and beyond the scope of their CWA authority in order to gain certainty. (p. 103-105)

Agency Response: **The agencies disagree with the commenter's assertion that by changing "adjacent wetlands" to "adjacent waters," they have expanded the scope of the definition of "waters of the United States." Technical Support Document, I. The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provide that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. Preamble, IV. While the plurality questioned the use of the 100 year floodplain, the dissent did not, and for purposes of adjacency the agencies have established that a water must be located in the 100 year flood plain and within 1500 foot of the ordinary high water mark. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

National Association of Home Builders (Doc. #19540)

10.362 The concept of "adjacent" has been unlawfully modified and expanded to include all waters. The Agencies state that the term adjacent means "bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters,'"[544] and that "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundments or tributaries"[545] are jurisdictional by rule. The concept of "adjacent waters" is new and represents an unlawful modification and expansion of the term "waters of the United States."

Operating under the 2008 *Rapanos* Guidance, the Corps currently asserts jurisdiction over wetlands adjacent to traditional navigable waters in accordance with 1986 Corps regulations.[546] Jurisdictional authority over adjacent wetlands stems from *Riverside Bayview* and *Rapanos*, in which the jurisdictional status of wetlands adjacent to traditional navigable waters and tributaries of traditional navigable waters was in question. At issue in *Riverside Bayview* was the jurisdictional status of wetlands that actually abut Black Creek, a traditional navigable water and tributary of Lake St. Clair in Macomb County, Michigan. The Court ruled unanimously that the Corps has authority to "require permits for the discharge of fill material into wetlands adjacent to 'waters of the United States.'"[547] Additionally, all Justices agreed that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [Clean Water] Act."[548]

[544] 79 Fed. Reg. at 22,268.
[545] *Id*. at 22,193.
[546] 2008 *Rapanos* Guidance at 1; 33 C.F.R. 328.3(c).
[547] *Riverside Bayview*, 474 U.S. at 139.
[548] *Id*. at 135.

Whereas the Supreme Court considered the jurisdictional status of wetlands adjacent to navigable waters in *Riverside Bayview*, it was not until *Rapanos* that the Court opined on the jurisdictional status of wetlands adjacent to non-navigable waters. Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands. However, the plurality concluded that the Agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water"[549] connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.[550]

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals. Justice Kennedy agreed with the plurality that the term "waters of the United States" extends beyond waterbodies that are traditionally considered navigable, but found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and instead proposed a different standard for evaluating CWA jurisdiction over wetlands.[551] Justice Kennedy concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[552]

Clearly, at issue in both *Riverside Bayview* and *Rapanos* was the jurisdiction of adjacent wetlands – not adjacent rivers, not adjacent streams, not adjacent seeps, not adjacent ponds, not adjacent lakes, not adjacent puddles, not adjacent swales…not adjacent waters. More recently, in *San Francisco Baykeeper v. Cargill Salt Division* the U.S. Court of Appeals for the Ninth Circuit held that adjacent non-wetlands are not subject to CWA regulation.[553] In fact, since 1986 "wetlands [not waters] adjacent to waters" have been defined as "waters of the United States."[554] And yet, in the proposed rule, the Agencies have disregarded critical case law and defined "all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5)" as "waters of the United States."[555] This is an unlawful and expansive modification of the jurisdictional scope of the CWA and not supported by case law. The Agencies must rewrite (a)(6) to read "All wetlands adjacent to a water identified in paragraph (a)(1) through (5) of this section." (p. 74-75)

Agency Response: **The rule is consistent with caselaw. Technical Support Document, I.C.**

[549] *Rapanos*, 547 U.S. at 739.
[550] *Id*. at 742.
[551] See *id*. at 779; Id. at 776.
[552] *Id*. at 780.
[553] *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007).
[554] 33 C.F.R. § 328.3(c).
[555] 79 Fed. Reg. at 22263.

10.363 The concept of "adjacent" has been unlawfully modified and expanded with the addition of the over broad definition of "neighboring." Under the existing 2008 *Rapanos* Guidance, the term "adjacent" means "bordering, contiguous, or neighboring."[556] Indeed, this definition has remained unchanged since regulations were penned in 1986. With the proposed rule, however, the Agencies have modified and expanded the definition of adjacent by subsequently defining the term "neighboring" within the adjacent definition. According to the proposed rule the term neighboring "for purposes of the term 'adjacent'…includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5)…or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[557]

This expanded definition of "adjacent" was never contemplated in the CWA and is not permitted by prior case law. In *Riverside Bayview*, the respondents' property was "part of a wetland that actually abuts a navigable waterway."[558] The Supreme Court "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States" and unanimously agreed the respondent in *Riverside Bayview* was required to have a permit.[559] At issue in *SWANCC* was the jurisdictional status of isolated ponds, and the Court, recounting *Riverside Bayview* stated, "[t]he Court expressed no opinion on the question of the Corps' authority to regulate wetlands not adjacent to open water [in *Riverside Bayview*], and the statute's text will not allow extension of the Corps' jurisdiction to such wetlands here."[560] Indeed, the Court recognized that the wetlands in *Riverside Bayview* "actually abut[ted]" and were "inseparably bound up with" Black Creek and were thus adjacent and jurisdictional. However, the Court held that the isolated ponds in *SWANCC* were not adjacent to a traditional navigable water and not jurisdictional, stating, "In order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this."[561] Clearly, *SWANCC* revealed that the jurisdictional scope of the CWA is not without limit.

What's more, in *Rapanos* the plurality noted, "because *SWANCC* did not overrule *Riverside Bayview*, the Corps continues to assert jurisdiction over waters 'neighboring' traditional navigable waters and their tributaries."[562] Here, the *Rapanos* plurality characterized the wetlands that "actually abut" and were "inseparably bound up with the 'waters' of the United States" in *Riverside Bayview* with the term "navigable." Indeed, to extend the meaning of "adjacent" by expanding the definition of "navigable" to include all waters in vaguely defined floodplains and riparian areas as well as those waters connected to any (a)(1) through (5) water by the slightest shallow subsurface hydrologic connection or confined surface hydrologic connection would stretch the definition of

[556] 2008 *Rapanos* Guidance at 5.
[557] 79 Fed. Reg. at 22,263.
[558] *Riverside Bayview*, 474 U.S. at 135.
[559] *SWANCC*, 531 U.S. at 167, citing *Riverside Bayview*, 474 U.S. at 134.
[560] *Id*. at 160.
[561] *Id*. at 168.
[562] *Rapanos*, 547 U.S. at 726.

"adjacent" beyond parody. The Supreme Court has already shut down such sweeping assertion of federal authority in *SWANCC* and *Rapanos*. That the Agencies would now try to assert categorical jurisdiction over so-called "neighboring" waters shows their complete disregard for the highest court in the land. (p. 75-76)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provide that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule provides specific distance limits for "neighboring" waters. Preamble, IV. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII.**

10.364 Under the proposed definition of "adjacent waters," all waters, including wetlands, that happen to fall within vaguely defined riparian areas and floodplains of all (a)(1) through (5) waters are per se jurisdictional. This will result in a dramatic expansion of waters under the Agencies' control. Additionally, vague definitions of "riparian area" and "floodplain" will result in unpredictable and inconsistent application of the Act, leading to increased regulatory confusion. Finally, the science to support categorical jurisdiction over all waters and wetlands within ripari**a**n areas and floodplains of (a)(1) through (5) waters is sorely lacking.

Even though the Agencies have not defined the floodplain parameters they will use to assert jurisdiction, it is clear that millions of acres of land could be affected. In addition to the regulatory uncertainty associated with the definitions, floodplains can be massive, extending miles from the banks of large rivers and coastlines. For instance, the floodplain of the Mississippi River south of St. Louis, Missouri, widens to a distance of nearly 50 miles.[563] Further south, the Lower Mississippi Alluvial Valley (Fig. 9) covers some 24 million acres (roughly the size of the state of Indiana) of relatively flat, weakly dissected alluvial plain, comprised of natural levees, basins and flats, point bar formations, terraces, tributary floodplains, and depressional wetlands.[564] Even the 100-year floodplains mapped by FEMA illustrate that wetlands, ponds, lakes, and headwater streams that could be considered "adjacent" to traditional navigable waters can be separated from one another by tens of miles (Fig. 10). By categorically defining all waters that lie within the floodplain as "neighboring" and "adjacent," the Agencies have significantly expanded the definition of "waters of the United States." This is absurd and unlawfully and inexplicably expands the concept of "adjacent" as it pertains to CWA case law (e.g., *Riverside Bayview* and *Rapanos*).

Additionally, the proposed rule defines any water within the riparian area of an (a)(1) through (5) water as jurisdictional by rule. Yet, because riparian area refers to land –

[563] Fremling, C. R., J. L. Rasmussen, R. E. Sparks, S. P. Cobb, C. F. Bryan, and T. O. Claflin. 1989. Mississippi River fisheries: A case history. Pages 309–351 in D. P. Dodge, editor. Proceedings of the International Large River Symposium. Canadian Special Publication of Fisheries and Aquatic Sciences 106, Ottawa, Ontario.
[564] Stanturf, J.A., E.S. Gardiner, P.B. Hamel, M.S. Devall, T.D. Leininger, and M.E. Warren. 2000. Restoring bottomland hardwood ecosystems in the Lower Mississippi Alluvial Valley. Journal of Forestry. 98(8):10-16.

"[r]iparian areas are transitional areas between aquatic and terrestrial ecosystems…"[565] – it is not clear what areas are being targeted. Of particular concern is the reasoning within the draft Connectivity Report, which goes so far as to cite studies of soil water in the riparian zone. For example, work by Dr. Tracie-Lynn Nadeau and Dr. Mark Rains notes "much of the temporal [hydrologic] storage [in stream networks] is in upland [riparian] soils."[566] Do the Agencies intend to assert jurisdiction over riparian areas based on soil water found therein? Is water within riparian area soils, or floodplain soils for that matter, a water of the United States? NAHB thinks not, but the Agencies' direction is not so clear.

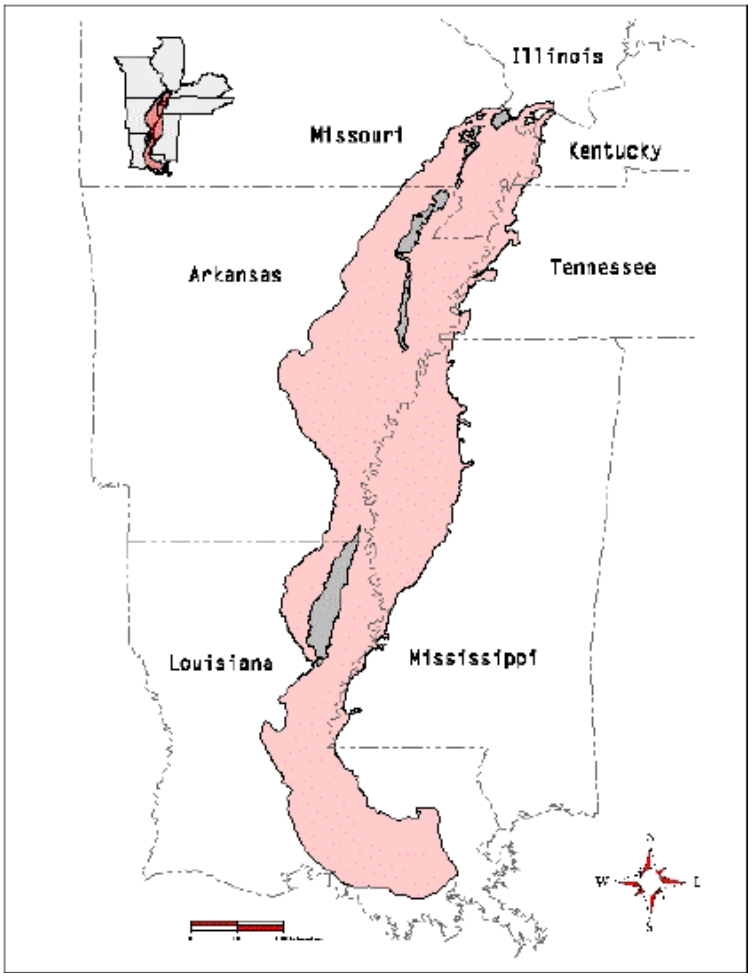

Figure 9: Geographic extent of Mississippi alluvial valley.[567]

[565] 79 Fed. Reg. at 22,263.
[566] Nadeau, T-L, and M.C. Rains. 2007. Hydrological connectivity between headwater streams and downstream waters: how science can inform policy. Journal of the American Water Resources Association. Vol. 43: 118-133.
[567] Source: Twedt, D., D. Pashley, C. Hunter, A. Mueller, C. Brown, B. Ford. September 1999. Partners in Flight: Bird Conservation Plan for the Mississippi Alluvial Valley, available at http://www.partnersinflight.org/bcps/plan/MAV_plan.html.

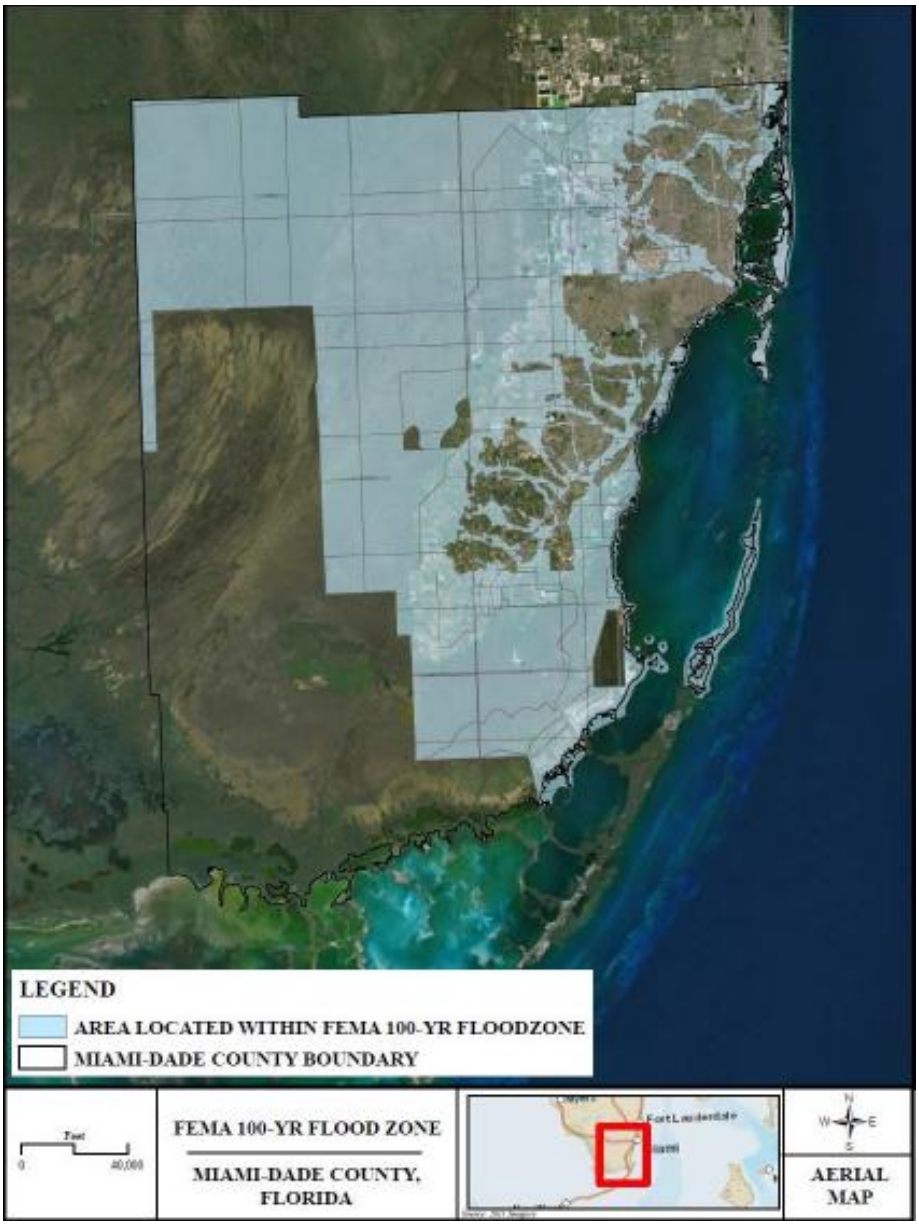

Figure 10: FEMA 100-yr Flood Zone, Miami-Dade County, Florida (p. 76-79)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provide that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV.**

10.365 Under the proposed rule, the Agencies will assert categorical jurisdiction over all waters located within the riparian area or floodplain of any traditional navigable water, interstate water, territorial sea, impoundment, or tributary. For the first time, the Agencies provide regulatory definitions for "riparian area" and "floodplain." According to the proposed

rule, riparian area means "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."[568] Floodplain is defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."[569]

The new definitions for "riparian area" and "floodplain" will create confusion and increase regulatory uncertainty because they are purely scientific in nature and will be applied based on the Agencies' "best professional judgment."[570] What's more, key terms within the riparian area and floodplain definitions, including "ecological processes," "plant and animal community structure," "exchange of energy and materials," "present climatic conditions" and "moderate to high water flows" are left undefined. A landowner will not be able to look at a map and objectively know the extent of the "riparian area" or "floodplain" on his property or a property he is considering purchasing. Rather, he will have to wait until a field inspector from the Corps walks the property and subjectively determines the reach of the riparian area and/or floodplain. Definitions based on science rather than engineering and maps will lead to increased uncertainty about what waters are and are not "neighboring" and, in turn, are considered "adjacent waters" subject to CWA jurisdiction.

Adding to the confusion, the Agencies cannot seem to make up their minds. At one point in the preamble, the Agencies appear to embrace the flood frequency interval as a basis for identifying the floodplain:

> There is, however, variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone). The agencies request comment on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water.[571]

But then reject the use of a flood interval, stating it is not ecologically based:

[568] 79 Fed. Reg. at 22,263.
[569] *Id*. at 22,263.
[570] *Id*. at 22,208.
[571] *Id*. at 22,209.

> It should be noted that 'floodplain' as defined in today's proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule. Flood insurance rate maps are based on the probability of a flood event occurring (e.g., 100-year floods have a 1% probability of occurring in a given year or 500 year-floods have a 0.2% probability of occurring in a particular year). Flood insurance rate maps are not based on an ecological definition of the term 'floodplain,' and therefore may not be appropriate for identifying adjacent wetlands and waters for the purposes of CWA jurisdiction."[572]

The definitions of "riparian area" and "floodplain" should be based on engineering standards and include measurable parameters, both spatial and temporal, in order for these terms to have meaning in a practical sense and to be applied as consistently as possible.

EPA's SAB has voiced concerns about the vague floodplain definition as well. SAB panel member Dr. Emily Bernhardt commented that the Agencies should be "more explicit about how a floodplain . . . [is] defined" as this would "allow for more consistent application of the rule."[573] Dr. Michael Josselyn also voiced concerns about the floodplain definition:

> By definition, all wetlands within the floodplain would be considered jurisdictional under the Proposed Rule. However, there is ambiguity in the definition of floodplain within the Draft Science Report and the Proposed Rule—both of which state that it is an area of sediment deposition and subject to flooding during moderate to high flood events. However, at present, there is no definition of what that flooding frequency means except the brief statement in the Proposed Rule that the agencies will use Best Professional Judgment and generally use something between a 10 and 20 year flood event. In another section, the Proposed Rule also states that 'floodplain as defined in today's proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule.' Thus, there is considerable confusion over what the Proposed Rule is stating would be included within the category of floodplain wetlands subject to jurisdiction.[574]

NAHB agrees.

Adding to the challenge of identifying the extent of any given floodplain, beyond the active floodplain may exist abandoned terraces. These abandoned terraces, typically at higher elevations, are a consequence of channel gradient changes resulting from either decreases or increases in sediment loads. These changes isolate previous channels and floodplains above the newly established channel. In arid stream systems, abandoned

[572] *Id*. at 22,236.
[573] 8/14/14 SAB Comments on the Proposed Rule at 15.
[574] *Id*. at 27.

terraces sometimes are easy to distinguish since they are high above the active channel. However, in systems with limited relief it may be difficult to distinguish the active floodplain.[575] In these cases, Corps staff could improperly delineate the floodplain well beyond its true extent, thereby erroneously classifying any waters that happen to fall within the expanded limits as "waters of the United States."

The vague definitions of riparian area and floodplain do not increase clarity of the jurisdictional scope of the CWA. As written, these definitions are inadequate and will lead to regulatory confusion. The Agencies are urged to remove the definition of "neighboring" and the associated "floodplain," "riparian area," "shallow subsurface hydrologic connection," and "confined surface hydrologic connection" terms and definitions from the proposed rule and maintain the existing definition of "adjacent." This will reduce regulatory uncertainty while simultaneously complying with congressional intent, case law, and existing guidance.

The Agencies claim the proposed rule is supported by conclusions from the draft Connectivity Report. Although the proposed rule would assert categorical jurisdiction over "waters located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, the portion of the draft Connectivity Report addressing the impact of riparian areas and floodplains on downstream waters is incomplete, as it highlights findings from studies of riparian areas and floodplains, not necessarily wetlands or waters therein. Indeed, the authors of the draft Connectivity Report admit, "Although ample literature is available on riparian and floodplain wetlands…most papers on riparian areas and floodplains do not specify whether the area is a wetland…This situation creates a dilemma, because limiting our literature review to papers that explicitly describe the area as a wetland would exclude a major portion of this body of literature and greatly restrict our discussion of wetland science. Alternatively, if we include papers that do not explicitly classify the area as a wetland, we could mistakenly incorporate results that are relevant only to upland riparian areas. Our response to this dilemma was to survey the riparian literature broadly and include any results and conclusions that we judged were pertinent to riparian/floodplain wetlands."[576] This is problematic for two reasons. First, the draft Connectivity Report draws conclusions about the ecological and hydrological importance of wetlands within the riparian area and floodplain on downstream waters when the studies claimed to support these conclusions may or may not even include wetlands. Relying on such studies is irresponsible and fails to meet even basic requirements of scientific integrity.

Second, the proposed rule will assert categorical jurisdiction over waters, including wetlands, in the riparian areas and floodplains of traditional navigable waters, interstate waters, territorial seas and impoundments and tributaries of those waters when the draft Connectivity Report only presents conclusions from studies of riparian areas and floodplains that may have included wetlands, not waters. This is similarly suspect and even SAB members have voiced concerns over the categorical assertion of jurisdiction over all waters in the riparian area and floodplain. SAB panel member Dr. Mazeika

[575] Dunne, T., and L.B. Leopold. Water in Environmental Planning. New York: W.H. Freeman and Co., 1978. Print.
[576] Draft Connectivity Report at 5-3, 5-5.

Sullivan commented, "Inasmuch as I understand that the agencies are seeking to reduce the burden of many case-specific situations, caution is warranted in some cases when the science may not be available to adequately determine where jurisdiction should or should not be asserted . . . I do not believe that current scientific evidence supports asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone."[577] Clearly, the scientific evidence to support the categorical jurisdiction of all waters within riparian areas and floodplains of (a)(1) through (5) waters is insufficient.

Furthermore, although hydrologic connectivity between wetlands within the floodplain and riparian area varies as a function of distance, the Agencies propose to assert jurisdiction over all waters within these vaguely defined zones without regard to their distance to an (a)(1) through (5) water. The draft Connectivity Report, indeed, states, "connectivity with the river will generally be higher for riparian/floodplain wetlands located near the river's edge compared with riparian/floodplain wetlands occurring near the floodplain edge."[578] While this would appear to be fairly straight forward, the Agencies disregard this simple fact by treating all waters in the riparian area and floodplain the same: categorically jurisdictional. (p. 77-83)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provide that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. The Preamble discusses the tools the agencies will use to identify the 100-year floodplain. While the definition does not include a provision defining "neighboring" based on a surface hydrologic connection, waters with a "confined surface hydrologic connection" may be adjacent where they are bordering, contiguous, or neighboring an (a)(1) through (a)(5) water and such a connection may be a factor considered in a case-specific significant nexus determination. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII.**

10.366 The Agencies define any water connected to an (a)(1) through (5) water by a "shallow subsurface hydrologic connection" or a "confined surface hydrologic connection" as "adjacent" and therefore per se jurisdictional. This assertion runs afoul of the Supreme Court decisions, will result in increased regulatory uncertainty, and is unsupported by science. Additionally, the Agencies fail to define any methods to identify or quantify a "shallow subsurface hydrologic connection." And, while the proposed rule states that shallow subsurface hydrologic connections are themselves not "waters of the United States," they can be used to assert jurisdiction over those waters they connect. This is, indeed, a significant overreach.

[577] 8/14/14 SAB Comments on the Proposed Rule at 87.
[578] Draft Connectivity Report at 3-42, 3-43.

Regulating "adjacent waters" based upon the mere presence of a "shallow subsurface hydrologic connection" or "confined surface hydrologic connection" to an (a)(1) through (5) water is inconsistent with *Rapanos*. In its review of the draft Connectivity Report, EPA's SAB notes the large spatial and temporal variability in hydrologic flow paths, including subsurface flows.[579] According to the SAB, spatial and temporal scales are "critical aspects of connectivity and its role in maintaining the chemical, physical, and biological integrity of downgradient waters."[580] This sentiment rightly echoes Justice Kennedy's assertion that not all hydrologic connections are significant. Yet, the Agencies have ignored both the science and the case law that they argue support the proposed rule by requiring only the presence of a shallow subsurface or confined surface hydrologic connection between a water and an adjacent water to assert jurisdiction by rule.

While a subsurface or confined surface hydrologic connection may indeed occur between a wetland outside of the floodplain or riparian area and an (a)(1) through (5) water, the connection may be so "remote and insubstantial" as to fail Justice Kennedy's "significant nexus" test. Without defining critical subsurface or confined surface flow parameters, including those governed in part by topographic slope, distance between the waters in question, and – in the case of subsurface flows – the hydrologic connectivity of the soils through which the water passes, the Agencies' vague definitions of "shallow subsurface hydrologic connection" and "confined surface hydrologic connection" provide them jurisdiction over any water on the sole basis of a mere hydrologic connection. Both the plurality and Justice Kennedy demanded more in *Rapanos*.

The Agencies fail to adequately define the new "shallow subsurface hydrologic connection" and "confined surface hydrologic connection" concepts, thereby generating increased regulatory uncertainty. The Agencies assert that a water is "neighboring" and, in turn, "adjacent" and jurisdictional by rule if it is connected to a jurisdictional water via a "shallow subsurface hydrologic connection" or a "confined surface hydrologic connection." Although the preamble states "a shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found in steeply sloping areas with shallow soils and soils with a restrictive horizon that prevents vertical water flow, or in karst systems,"[581] a formal definition is not provided. Additionally, the proposal fails to adequately define "confined surface hydrologic connection," only stating "confined surface connections consist of permanent, intermittent, or ephemeral surface connections through directional flowpaths…A directional flowpath is a path where water flows repeatedly…"[582] If water flows downhill (i.e., along a flowpath) after every rainfall (i.e., repeatedly) and across any otherwise dry land surface to an (a)(1) through (5) water, would that flowpath be considered a "confined surface hydrologic connection" that could be used to assert jurisdiction over any wetland, pond, or stream? Indeed, the "confined surface hydrologic connection" definition is vague at best; the regulated community can only assume the term means something less than "tributary."

[579] SAB Final Review of the Draft Connectivity Report, Figure 1 at 22.
[580] *Id*. at 21.
[581] 79 Fed. Reg. at 22,242.
[582] *Id*. at 22,208.

Although the Agencies claim the proposed rule will clarify what waters are protected under the CWA, regulating waters based upon connections that cannot be seen does not provide clarity. Before NAHB's members purchase a parcel of land, they and/or their environmental consultant, engineer, or other team members walk the property to identify wetlands, streams, and other water features that may be subject to CWA Section 404 permits. In instances where a large percentage of a property falls under the jurisdiction of the CWA, a land developer or builder might not make the purchase. Most surface water features including wetlands, ponds, lakes, and streams can be spotted while walking a property. Subsurface water features, however, cannot be readily seen. If a property has unseen subsurface hydrologic connections that render additional waters on that site jurisdictional, the builder/developer might have taken on a financial burden due to the permit, mitigation, and project delay costs he had no ability to anticipate. NAHB members, as well as all other regulated industry personnel, cannot identify waters they can't see.

Beyond the lack of clarity regarding the very existence of shallow subsurface hydrologic connections, critical parameters associated with these out-of-sight flowpaths are left undefined thereby creating additional uncertainties. For example, the depth at which "shallow subsurface" hydrologic connections become "groundwater" connections is not defined. This is crucial because shallow subsurface hydrologic connections can be used to determine jurisdiction of an"adjacent" water whereas groundwater connections "do not satisfy the requirement for adjacency."[583] Currently, only a vague, qualitative distinction between shallow subsurface water and groundwater is provided: "Shallow subsurface connections are distinct from deeper groundwater connections…in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters."[584] Unfortunately, this fails to adequately or clearly distinguish the two and adds uncertainty to the definition of "waters of the United States." After all, deep groundwater can exhibit a direct connection to water found on the surface, as is the case with springs, groundwater seeps, and geysers, for instance.

Without defined parameters, how will the Agencies or property owners determine where shallow subsurface water stops and groundwater begins? This ambiguity presents a particularly interesting case in the surficial aquifer system of the Southeastern United States. Given the extent of the surficial aquifer underlying large portions of Florida, Georgia, and South Carolina (Fig. 11), the movement of water within the surface aquifer (Fig. 12), and the often minimal depth to ground water across the region (Fig. 13), will all waters in the entirety of the southern half of Florida meet the definition of "waters of the United States" based on "shallow subsurface hydrologic connections" to "adjacent" jurisdictional waters? NAHB believes not, as it is clearly unreasonable to interpret Justice Kennedy's "significant nexus" to such an extent. Yet, as the proposed rule is written, this would not be a stretch.

[583] *Id*. at 22,208.
[584] *Id*.

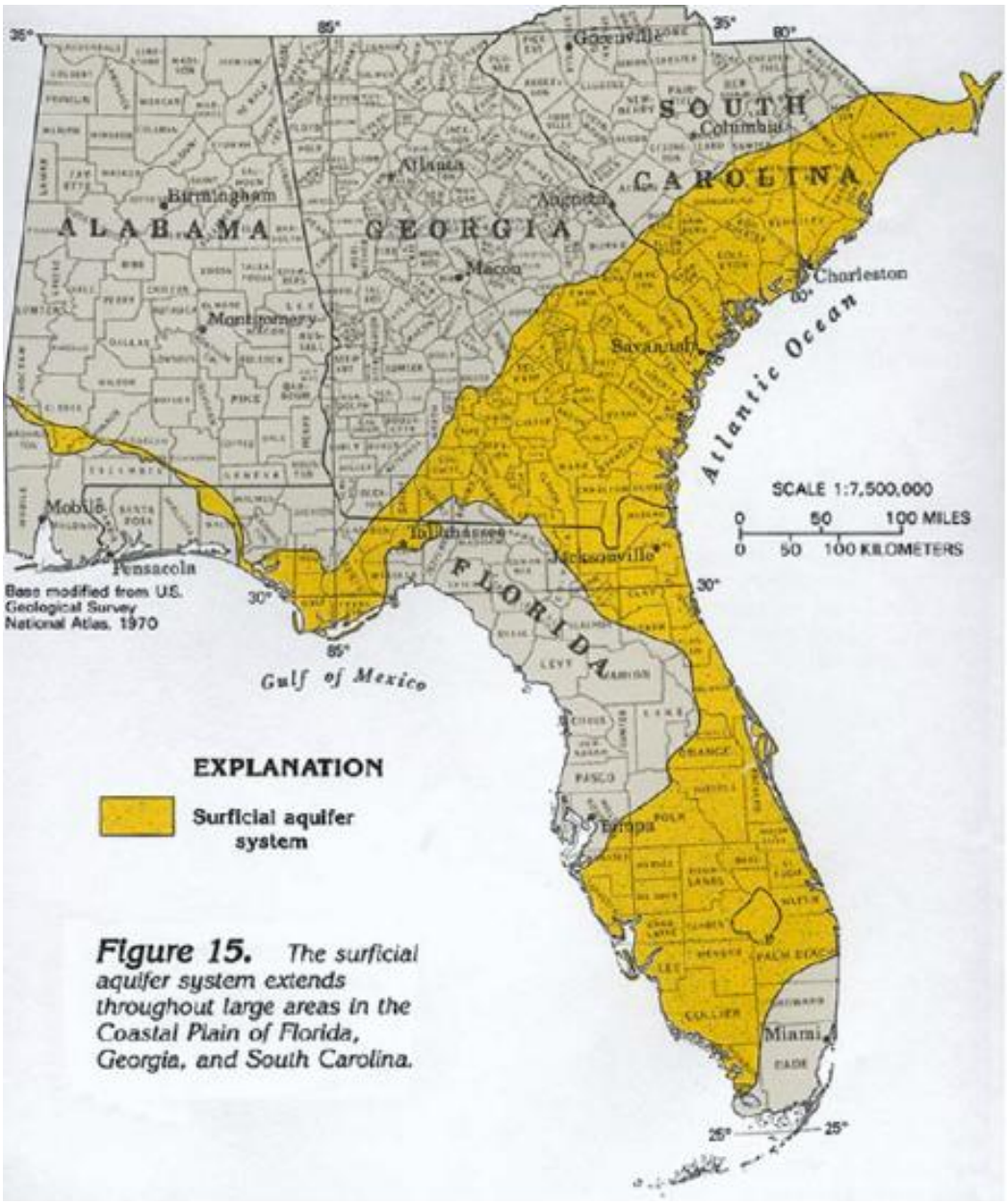

Figure 11: Extent of the surficial aquifer system of the Southeastern U.S.[585]

[585] Source: United States Geological Survey Ground Water Atlas of the US, Alabama, Florida, Georgia, and South Carolina - HA 730-G. J.A. Miller. 1990. Figure 15.

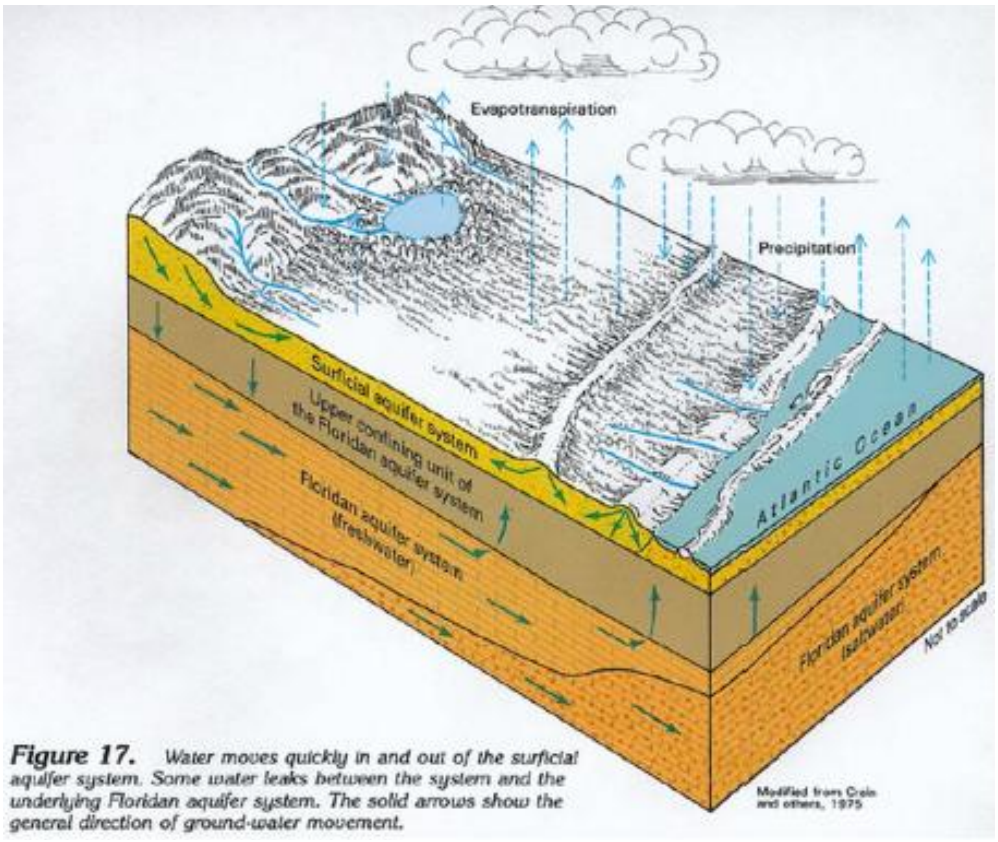

Figure 17. *Water moves quickly in and out of the surficial aquifer system. Some water leaks between the system and the underlying Floridan aquifer system. The solid arrows show the general direction of ground-water movement.*

Figure 12: Groundwater processes in the surficial aquifer system of the Southeastern U.S.[586]

[586] Source: *id*. Figure 17.

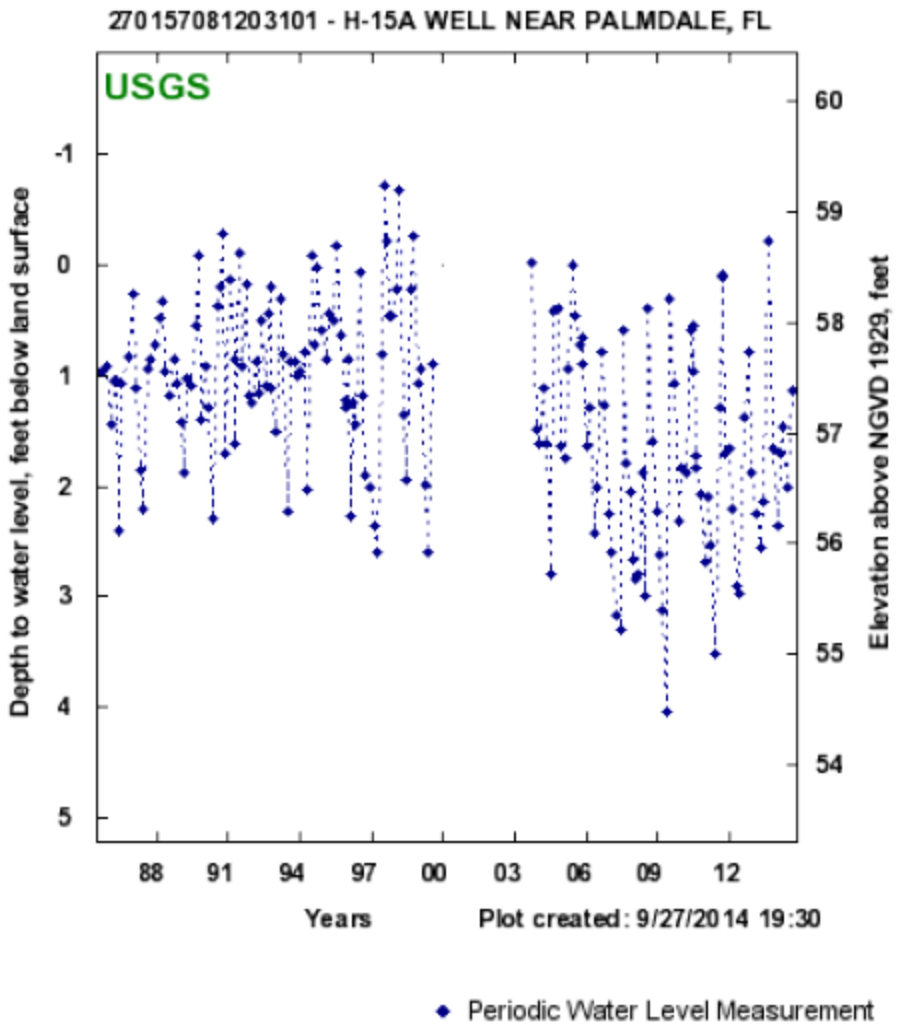

Figure 13: Periodic measurements of depth to water level at USGS well site 270157081203101 - H-15A near Palmdale, FL between 10/08/85 and 6/12/14. Latitude 27°02'02", Longitude 81°20'33".[587] (p. 83-88)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection. That said, waters with a "confined surface hydrologic connection" may be adjacent where they are bordering, contiguous, or neighboring an (a)(1) through (a)(5) water. Even if a water does not meet the definition of neighboring a "confined surface hydrologic connection" may be an important factor considered in a case-specific significant nexus determination. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII.**

[587] Source: United States Geological Survey well data from http://groundwaterwatch.usgs.gov/ site 270157081203101 – H-15A. Accessed 9/27/14.

10.367 Additionally, more challenges arise because the proposed rule fails to define critical flow parameters associated with "shallow subsurface hydrologic connections" or "confined surface hydrologic connections," including rate of shallow subsurface flow, travel distance along a shallow subsurface flowpath, volume of shallow subsurface flow, and duration of shallow subsurface flow. Each of these flow parameters is critical in determining the chemical, physical, and biological impact these "hydrologic connections" may have on an "adjacent" water (see Section VI. c. iv. 5. b.).

To illustrate the importance of defining these critical subsurface flow parameters, let us consider the impact of soil type on the rate of water flow through a soil matrix. Table 1, which has been modified from EPA Method 9100 to include the number of days required for water to travel a distance of 100 feet within each soil matrix type, provides soil hydraulic conductivity values in feet per day (ft d-1).[588] The values highlighted in yellow indicate the range of hydraulic conductivities from less than 0.001 ft d-1 (clay) to greater than 600 ft d-1 (well sorted coarse gravel).

To put these values in context, it would take a molecule of water more than 274 years to travel 100 feet through a clay confining layer underlying an isolated playa lake (see Fig. 14). As another example, a USGS study of the Delmarva Peninsula found that groundwater return times (the time required for recharge at the water table to return to a surface water through groundwater) can take from years to decades.[589] If an isolated Delmarva Bay wetland recharges shallow groundwater that only surfaces downstream some 60 years later, does this meet the "shallow subsurface hydrologic connection" that would constitute the wetland jurisdictional by rule?

The draft Connectivity Report acknowledges the "magnitude and transit time of groundwater flow from a wetland to other surface waters depends on the intervening distance and the properties of rock or unconsolidated sediments between the water bodies."[590] Nowhere in the proposed rule, however, is a spatial or temporal threshold provided by which shallow subsurface hydrologic connections or confined surface hydrologic connections can be used to define "neighboring." Lacking these critical thresholds, the Agencies have proposed to extend the jurisdiction of the CWA well beyond parody.

[588] Modified from EPA Method 9100: Saturated Hydraulic Conductivity, Saturated Leachate Conductivity, and Intrinsic Permeability (September 1986) at 28, 29.
[589] Sanford, W.E., and J.P Pope. 2013. Quantifying Groundwater's Role in Delaying Improvements to Chesapeake Bay Water Quality. Environ. Sci. Technol. 47:13330-13338.
[590] Draft Connectivity Report at 5-24.

Table 1: Hydraulic conductivities in feet per day estimated from grain size descriptions. Values in parenthesis indicate number of days required for water to travel 100 feet. Highlighted values indicate a range of hydraulic conductivities from clay to well sorted coarse gravel.

Grain-Size Class or Range	Degree of Sorting			Silt Content		
	Poor	Moderate	Well	Slight	Moderate	High
Fine-Grained Materials						
Clay	Less than 0.001 (> 100,000 days; > 274 years)					
Silt, clayey	1 to 4 (100 to 4)					
Silt, slightly sandy	5 (20)					
Silt, moderately sandy	7 to 8 (14.3 - 12.5)					
Silt, very sandy	9 to 11 (11.1 - 9.1)					
Sandy silt	11 (9.1)					
Silty sand	13 (7.7)					
Sands and gravels						
Very fine sand	13 (7.7)	20 (5)	27 (3.7)	23 (4.3)	19 (5.3)	13 (7.7)
Very fine to fine sand	27 (3.7)	27 (3.7)	-	24 (4.2)	20 (5)	13 (7.7)
Very fine to medium sand	36 (2.8)	41-47 (2.4 - 2.1)	-	32 (3.1)	27 (3.7)	21 (4.8)
Very fine to coarse sand	48 (2.1)	-	-	40 (2.5)	31 (3.2)	24 (4.2)
Very fine to very coarse sand	59 (1.7)	-	-	51 (2)	40 (2.5)	29 (3.4)
Very fine sand to fine gravel	76 (1.3)	-	-	67 (1.5)	52 (1.9)	38 (2.6)
Very fine sand to medium gravel	99 (1)	-	-	80 (1.3)	66 (1.5)	49 (2)
Very fine sand to coarse gravel	128 (0.8)	-	-	107 (0.9)	86 (1.2)	64 (1.6)
Fine sand	27 (3.7)	40 (2.5)	53 (1.9)	33 (3)	27 (3.7)	20 (5)
Fine to medium sand	53 (1.9)	67 (1.5)	-	48 (2.1)	39 (2.6)	30 (3.3)
Fine to coarse sand	57 (1.8)	65-72 (1.5 - 1.4)	-	53 (1.9)	43 (2.3)	32 (3.1)
Fine to very coarse sand	70 (1.4)	-	-	60 (1.7)	47 (2.1)	35 (2.9)
Fine sand to fine gravel	88 (1.1)	-	-	74 (1.4)	59 (1.7)	44 (2.3)
Fine sand to medium gravel	114 (0.9)	-	-	94 (1.1)	75 (1.3)	57 (1.8)
Fine sand to coarse gravel	145 (0.7)	-	-	107 (0.9)	87 (1.1)	72 (1.4)
Medium sand	67 (1.5)	80 (1.3)	94 (1.1)	64 (1.6)	51 (2)	40 (2.5)
Medium to coarse sand	74 (1.4)	94 (1.1)	-	72 (1.4)	57 (1.8)	42 (2.4)
Medium to very coarse sand	84 (1.2)	98-111 (1.0 - 0.9)	-	71 (1.4)	61 (1.6)	49 (2)
Medium sand to fine gravel	103 (1)	-	-	84 (1.2)	68 (1.5)	52 (1.9)
Medium sand to medium gravel	131 (0.8)	-	-	114 (0.9)	82 (1.2)	66 (1.5)
Medium sand to coarse gravel	164 (0.6)	-	-	134 (0.7)	108 (0.9)	82 (1.2)
Coarse sand	80 (1.3)	107 (0.9)	134 (0.7)	94 (1.1)	74 (1.4)	53 (1.9)
Coarse to very coarse sand	94 (1.1)	134 (0.7)	-	94 (1.1)	75 (1.3)	57 (1.8)
Coarse sand to fine gravel	116 (0.9)	136-166 (0.7)		107 (0.9)	88 (1.1)	68 (1.5)
Coarse sand to medium gravel	147 (0.7)	-	-	114 (0.9)	94 (1.1)	74 (1.4)
Coarse sand to coarse gravel	184 (0.5)	-	-	134 (0.7)	100 (1)	92 (1.1)
Very coarse sand	107 (0.9)	147 (0.7)	187 (0.5)	114 (0.9)	94 (1.1)	74 (1.4)
Very coarse sand to fine gravel	134 (0.7)	214 (0.5)	-	120 (0.8)	104 (1)	87 (1.1)
Very coarse sand to medium gravel	1270 (0.1)	199-227 (0.5 - 0.4)	-	147 (0.7)	123 (0.8)	99 (1)
Very coarse sand to coarse gravel	207 (0.5)	-	-	160 (0.6)	132 (0.8)	104 (1)
Fine gravel	160 (0.6)	214 (0.5)	267 (0.4)	227 (0.4)	140 (0.7)	107 (0.9)
Fine to medium gravel	201 (0.5)	334 (0.3)	-	201 (0.5)	167 (0.6)	134 (0.7)
Fine to coarse gravel	245 (0.4)	289-334 (0.3)	-	234 (0.4)	189 (0.5)	144 (0.7)
Medium gravel	241 (0.4)	231 (0.4)	401 (0.2)	241 (0.4)	201 (0.5)	160 (0.6)
Medium to coarse gravel	294 (0.3)	468 (0.2)	-	294 (0.3)	243 (0.4)	191 (0.5)
Coarse gravel	334 (0.3)	468 (0.2)	602 (0.2)	334 (0.3)	284 (0.4)	234 (0.4)

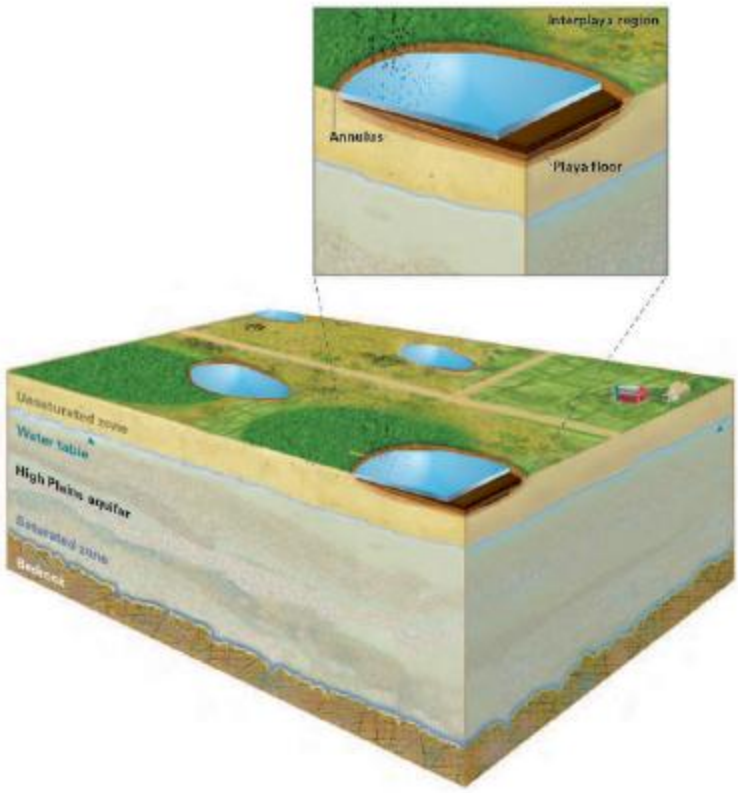

Figure 14: Playa characteristics include a clay rich floor and an annulus, the sloped surface at a playa's margin.[591] (p. 83-91)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection. That said, waters with a "confined surface hydrologic connection" may be adjacent where they are bordering, contiguous, or neighboring an (a)(1) through (a)(5) water. Even if a water does not meet the definition of neighboring a "confined surface hydrologic connection" may be an important factor considered in a case-specific significant nexus determination. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII.**

10.368 The science to support the inclusion of waters with shallow subsurface or confined surface hydrologic connections to (a)(1) through (5) waters categorically jurisdictional is lacking. Even if a water falls outside of the subjectively defined riparian area or floodplain, it can still meet the Agencies' definition of "neighboring" and, in turn, "adjacent" if it has a "shallow subsurface hydrologic connection" or "confined surface hydrologic connection" to an (a)(1) through (5) water. This assertion is problematic, in

[591] Gurdak, JJ, and Roe, CD, 2009, Recharge rates and chemistry beneath playas of the High Plains aquifer—A literature review and synthesis: U.S. Geological Survey Circular 1333, 39 p.

that the proposed rule is purported to be based on the conclusions of the draft Connectivity Report, yet the authors of the Report clearly state, "The literature we reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings."[592] In the SAB review of the draft Connectivity Report, the SAB recommends EPA use the term "non-floodplain wetlands" in place of "unidirectional wetlands."[593] Following this definitional change, the authors of the draft Connectivity Report, though they have reviewed more than 1,000 pieces of peer-reviewed literature on the connectivity of streams and wetlands on downstream waters, admit they do not have enough evidence to even generalize about connections between wetlands outside of the floodplain and (a)(1) through (5) waters.

Despite this dearth of evidence, the Agencies are proposing categorical jurisdiction over nonfloodplain waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (5) water and claim the proposed rule is supported "by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity of those downstream waters [i.e., the draft Connectivity Report]."[594] This is illogical and flies in the face of any attempt to justify the rule via sound science. What's even more surprising, the Agencies cite verbatim the draft Connectivity Report statement regarding the lack of sufficient information to generalize about the impact of non-floodplain wetlands on downstream waters in Appendix A of the proposed rule.[595] While the Agencies attest the proposed rule is grounded in science, they seem to be telling two different stories.

Furthermore, according to EPA's SAB, subsurface connectivity represents an on-going research need for EPA. In its review of the draft Connectivity Report, the SAB recommends that EPA "consider where along [a] gradient the [groundwater] connections are of sufficient magnitude to impact the integrity of downstream waters. This may represent an important research need for the agency. Past this threshold, groundwater connections will need to be evaluated on a case-by-case basis."[596] If subsurface connections are still an important research need for EPA, how do EPA and the Corps justify using "shallow subsurface hydrologic connections" to determine that an "adjacent" water significantly impacts the chemical, physical, and biological integrity of an (a)(1) through (5) water? Rather than amassing a smattering of 1,000 pieces of existing scientific literature to understand the potential of streams and wetlands to impact downstream waters, EPA's Office of Research and Development should have conducted new research to address the actual spatial and temporal variability associated with the point at which "adjacent" waters pass the "significant nexus" test. EPA has failed to

[592] *Id*. at 1-10, 1-11.
[593] SAB Final Review of the Draft Connectivity Report at 5.
[594] 79 Fed. Reg. at 22,190.
[595] *Id*. at 22,225.
[596] SAB Final Review of the Draft Connectivity Report at 55 (emphasis added) (Note, in SAB's June 5, 2014 draft review of the Draft Connectivity Report at 56, the panel originally stated "This represents an important research need for the agency." The word "may" has since been added to this sentence).

complete this critical task. Until the Agency does so, the science to support this proposed rule will remain deficient.

The Agencies explicitly state that "shallow subsurface flows are not 'waters of the United States,'" yet they "may provide the connection establishing jurisdiction."[597] Likewise, non-jurisdictional features such as rills, gullies, and non-wetland swales "may still serve as a confined surface hydrologic connection between an adjacent wetland or water" and an (a)(1) through (5) water.[598] And, finally, while riparian areas and floodplains are not, in and of themselves jurisdictional, they can be used to demonstrate adjacency.

The original intent of the CWA was to exercise Congress's traditional commerce power over navigation, not flight paths or flyways, not surface transportation routes, but navigable waterways. The use of non-jurisdictional connections to establish adjacency or a significant nexus not only turns that intent on its side, it also has no limits. The proposed rule essentially allows for all waters to be jurisdictional based on virtually any connections – whether or not those connections have anything to do with water or navigability or commerce. This amounts to the "any hydrologic connection" theory rejected in *Rapanos* and hardly clarifies jurisdiction. The agencies must eliminate the use of dry lands and excluded waters as a basis for jurisdiction. (p. 91-93)

Agency Response: **The rule does not include a provision defining "neighboring" based on a surface or subsurface hydrologic connection. That said, waters with a "confined surface hydrologic connection" may be adjacent where they are bordering, contiguous, or neighboring an (a)(1) through (a)(5) water. Even if a water does not meet the definition of neighboring a "confined surface hydrologic connection" may be an important factor considered in a case-specific significant nexus determination. Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII. The rule is consistent with decisions of the Supreme Court and the Constitution. Technical Support Document, I.C.**

10.369 The Agencies fail to establish critical spatial and temporal parameters under the "neighboring" definition, thereby leaving the scope the per se jurisdiction "adjacent waters" without limit. The new "neighboring" definition extends the jurisdiction of the CWA well beyond the limits of the historical "adjacent" definition and those set by the Court. Moreover, the Agencies have not defined any spatial or temporal parameters associated with "neighboring," thereby leaving the scope of per se jurisdictional "adjacent waters" without limit. To clarify the jurisdictional scope of the CWA, the Agencies must define the flow parameters associated with "neighboring," including magnitude, frequency, duration, and travel distance. Indeed, EPA's Office of Research and Development recognizes the effect of distance on the likelihood a water will significantly impact the ecological integrity of another water. The draft Connectivity Report states, "[i]f geographically isolated unidirectional wetlands have surface water

[597] 79 Fed. Reg. at 22,208.
[598] *Id*. at 22,204.

outputs . . . the probability that surface water will infiltrate or be lost through evapotranspiration increases with distance" and continues, "[a]ll things being equal, wetlands with shorter distances to the stream network will have higher hydrologic and biological connectivity than wetlands located farther from the same network."[599] In other words, the farther a so-called "neighboring" and therefore "adjacent" water is from an (a)(1) through (5) water, the less likely it is to significantly affect the chemical, physical, and biological integrity of that water; the less likely it is to exhibit a significant nexus.

The Agencies acknowledge the effect of distance on a "significant nexus" between waters in the proposed rule: "[t]he scientific literature recognizes the role of hydrologic connections in supporting a substantial chemical, physical, or biological relationship between water bodies, but this relationship can be reduced as the distance between water bodies increases."[600] Yet, they only pay lip service to this relationship, stating "[i]n circumstances where a particular water body is outside of the floodplain and riparian area of a tributary, but is connected by a shallow subsurface hydrologic connection or confined surface hydrologic connection with such tributary, the agencies will . . . assess the distance between the water body and tributary in determining whether or not the water body is adjacent . . . The agencies recognize that in specific circumstances, the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination."[601] While the Agencies may think that is a reasonable approach, as they retain the ability to make whatever jurisdictional call they believe to be prudent, the regulated community is left in the dark without bright line thresholds used to determine whether or not a water "neighbors" and is "adjacent" to an (a)(1) through (5) water and as a result is or is not under the jurisdiction of the CWA. (p. 94-95)

Agency Response: **The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII; Science Compendium.**

American Petroleum Institute (Doc. #15115)

10.370 The 2014 Proposed Rule appears to base this expansion of jurisdiction on a review of the scientific literature, and acknowledges there is no legal precedent supporting this broad expansion: "While the issue was not before the Supreme Court, it is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy's opinion makes clear that a significant nexus is a touchstone for the CWA."[602] The agencies provide no statutory or judicial support for this conclusion.

[599] Draft Connectivity Report at 3-42 and 3-43.
[600] 79 Fed. Reg. at 22,211.
[601] *Id*. at 22,207, 22,208.
[602] *Id*. at 22,209, 22,260.

No such statutory or judicial support in fact exists. The Supreme Court has never held that the Clean Water Act protects all "waters" with a significant nexus to navigable waters.[603] In *United States v. Riverside Bayview Homes*, the Court upheld the Corps' definition of "waters of the United States" to include adjacent wetlands based, in large part, on a finding that it was reasonable to treat adjacent wetlands as unique and subject to Clean Water Act jurisdiction despite their non-navigability.[604] *Riverside Bayview* did not suggest that other adjacent waters should be considered jurisdictional. Nor did *Rapanos*: "No Justice [in *Rapanos*], even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act."[605]

In fact, both opinions in the *Rapanos* majority limited jurisdiction even over adjacent wetlands. The plurality opinion would find adjacent wetlands to be jurisdictional only if the wetlands have a continuous surface connection to a navigable water.[606] Although Justice Kennedy did not overrule the agencies' presumption that wetlands adjacent to navigable waters are jurisdictional, he rejected any presumption of jurisdiction for wetlands adjacent to non-navigable waters— requiring that jurisdiction be established by a significant nexus.[607] Lower courts have also rejected the notion that all adjacent "waters" to navigable waters are per se jurisdictional.[608]

The 2014 Proposed Rule extends the reference waters to which adjacency applies to not just navigable waters but also all interstate waters (including interstate wetlands), territorial seas, impoundments of waters, and all tributaries of waters of these waters.[609] This is an exponential expansion in coverage for adjacent waters given the 2014 Proposed Rule's broad new definition of "tributary." Under the 2014 Proposed Rule, a tributary to any stream, pond or other wet feature that crosses a state line would become jurisdictional.

The agencies ground their legal justification for asserting per se jurisdiction over all adjacent waters on Justice Kennedy's conclusion that adjacent wetlands to tributaries are jurisdictional.[610] The agencies also acknowledge, however, that Justice Kennedy's opinion was based solely on the facts before him, and that those facts did not involve the question of jurisdiction over all adjacent waters.[611] Without legal support, the agencies

[603] *San Francisco Baykeeper*, 481 F.3d at 706.
[604] *Bayview Homes, Inc.*, 474 U.S. at 135 (wetlands "may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water"); *Rapanos*, 547 U.S. at 779 (quoting same).
[605] *San Francisco Baykeeper*, 481 F.3d at 707.
[606] *Rapanos*, 547 U.S. at 742.
[607] *Id*. at 780, 782.
[608] In *San Francisco Baykeeper v. Cargill Salt Div*., 481 F.3d 700 (9th Cir. 2007), the Ninth Circuit explicitly rejected jurisdiction over adjacent ponds: "the district court improperly expanded the regulatory definition of 'waters of the United States' when it held that bodies of water that are adjacent to navigable waters are subject to the CWA by reason of that adjacency. Our conclusion is based on the CWA, the regulations promulgated by the agencies responsible for administering it, and the decisions of the Supreme Court addressing the reach of the Act and its regulations."
[609] 2014 Proposed Rule, 79 Fed. Reg. at 22,263-64.
[610] *Id*. at 22,260 ("Justice Kennedy's significant nexus standard provides a framework for establishing categories of waters which are per se "waters of the United States.").
[611] *Id*. at 22,260.

determine it is "reasonable to also assess whether non-wetland waters have a significant nexus," and conclude "that adjacent waters as defined in today's 2014 Proposed Rule, alone or in combination with other adjacent waters in the region that drains to a traditional navigable water, interstate water or the territorial seas, significantly affect the chemical, physical, and biological integrity of those waters."[612] On that basis, the agencies have determined to treat all adjacent waters as categorically significantly affecting the chemical, physical or biological integrity of downstream waters. In support of this sweeping claim of jurisdictional authority, the agencies simply claim that this authority is an "appropriate reflection of Congressional intent."[613] A new and massive expansion of jurisdiction such as this must rest on more than bald assertions of Congressional intent. (p. 25-26)

Agency Response: The rule is consistent with the statute and caselaw. Technical Support Document, I.A., B., and C. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII. The agencies' rule makes no change to the interstate waters section of the existing regulations and the agencies will continue to assert jurisdiction over interstate waters, including interstate wetlands. The language of the CWA is clear that Congress intended the term "navigable waters" to include interstate waters, and the agencies' interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history. The Supreme Court's decisions in *SWANCC* and *Rapanos* did not address the interstate waters provision of the existing regulation. Technical Support Document, IV.

Jefferson Mining District (Doc. #15706)

10.371 This jurisdiction determining term, in respect of Congressional disposal obligations does not include a mere hydrologic connection but more "that would be required'. These are to be determined; not prejurisdictionally predetermined, or as the agencies mischaracterize as 'confused', lacking clarity. In the 2006 case Rapanos v. United States, the Supreme Court stated the extent of the interpretive authority by way of identified obfuscation, continuing in the definition proposal: "The dissent reasons (I) that *Riverside Bayview* held that "the waters of the United States" include "adjacent wetlands," and (2) we must defer to the Corps' interpretation of the ambiguous word "adjacent." Post, at 20-21. But this is mere legerdemain. The phrase "adjacent wetlands" is not part of 'the statutory definition that the Corps is authorized to interpret, which refers only to "the waters of the United States," 33 U. S. C. §1362(7). "The term "waters of the United States" is likewise determined by statute 33 U.S. Code § 1362 2 Definitions: (7) to include "navigable waters", circumscribing the intent of an agencies' interpretive authority. (p. 1)

Agency Response: The rule is consistent with the statute and caselaw. Technical Support Document, I.A. and C.

[612] *Id*.
[613] *Id*.

Gas Processors Association (Doc. #16340)

10.372 In the context of the Clean Air Act, EPA's prior attempt to define "adjacent" in terms other than distance failed in the courts. In April 2012, the United States Court of Appeals for the Sixth Circuit held that EPA interpreted the term "adjacent" too expansively when the agency aggregated a natural gas company's facilities that were separated by several miles as a single source under the Clean Air Act. See *Summit Petroleum Corp. v. U.S. Envtl. Prot. Agency*, 690 F .3d 733 (6th Cir. 2012). The EPA relied on prior agency guidance in making its source determination. *Id*. at 740. At issue was whether Summit Petroleum's facilities were "adjacent" to one another, turning them into a stationary source that requires EPA to regulate the facilities as a major source under Title V of the Clean Air Act. *Id*. at 741. EPA argued that the term "adjacent" was ambiguous and added that the court should look at the "functional relatedness" of the facilities to see whether they are adjacent. *Id*.at 741-42. The court disagreed, holding that the term "adjacent" unambiguously refers only to physical proximity and that EPA's unlawful interpretation defied the plain and ordinary meaning of the Clean Air Act regulations. *Id*. at 744. Therefore, the agencies cannot expand the concept of "adjacent" to mean anything other than physical proximity or else the interpretation will be invalidated by the courts similar to the *Summit Petroleum* case. (p. 3-4)

Agency Response: **The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. With this rule, the agencies interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court caselaw, the relevant and available science, and the agencies' technical expertise and experience. Technical Support Document, I. A and C and Preamble, III and IV.**

Home Builders Association of Tennessee (Doc. #19581)

10.373 The definition of "adjacent" waters or wetlands must be read in the same context as that described in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) which determined that adjacent wetlands arc "inseparably bound up" with the waters to which they are adjacent. Since the wetlands themselves are not navigable, the Court took the occasion in that case to read the CWA broadly to cover such adjacent wetlands physically adjacent to the traditional navigable waters of Saginaw Bay. However, the newly defined terms appear to go much further than that permitted under any of the Supreme Court decisions. (p. 10-11)

Agency Response: **The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.**

Barrick Gold of North America (Doc. #16914)

10.374 The agencies' assertion of jurisdiction over all "adjacent waters" suffers from the same deficiencies as the assertion of jurisdiction over all tributaries, discussed above. The proposed rule is based on the agencies' conclusion that "adjacent waters," alone or together with similarly situated waters, are per se "waters of the United States," because they have a "significant nexus" with traditional navigable waters, interstate waters, the territorial seas, tributaries (as defined in 18 the proposed rule), or impoundments. 79 Fed. Reg. at 22,207-09. The proposed rule relies on aggregation of "similarly situated"

adjacent waters to conclude that they are "waters of the United States" categorically. 79 Fed. Reg. at 22,209. Like the proposed rule's treatment of tributaries, its treatment of adjacent waters would result in jurisdiction over channels with intermittent or ephemeral flow and isolated wetlands. These features may be hundreds of miles from a traditional navigable water.[614] The rule would require no proof that such remote water features actually contribute flow to a traditional navigable water, or that any such flow represents the required significant nexus. That outcome is inconsistent with *SWANCC* and *Rapanos*, including with Justice Kennedy's concurring *Rapanos* opinion upon which the proposed rule purports to be based. (p. 19-20)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters and covered tributaries. Preamble, IV and Technical Support Document, I, VII and VIII.

Independent Petroleum Association of New Mexico (Doc. #16915.1)

10.375 The US Supreme court has established legal standards as to how expansive the jurisdiction of the agencies will be in defining 'Waters of the United States' which does not include 'other waters.' The interpretation of the terms "waters of the United states" and "navigable waters" are issues that have been repeatedly addressed by the Courts. Indeed, twice before, the US Supreme Court has specifically reviewed the Army Corps interpretations of the term "navigable waters" in the Clean Water Act. The "significant nexus" standard expounded by Justice Kennedy in his concurrence in *Rapanos* is what the EPA and USACE rely upon in creating the "other waters" category in the proposed rule for the definition of "waters of the United States" under the CWA. *Rapanos v. U.S.*, 547 U.S. 715, 767 (2006). IPANM would submit that the expansive nature of the proposed new definition for 'waters of the United States' is another overreach by the Corps which will result in additional litigation and ultimately another case before the Supreme Court.[615]

In *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), the Court upheld the Corps' jurisdiction over wetlands adjacent to navigable---in---fact waterways. *Id*., at 139. The Court held that wetlands are lands that "are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

[614] Under the proposed rule, waters may be "adjacent" to a tributary (as defined in the proposed rule) and thus such waters in many cases could be remote from any traditional navigable water. See 79 Fed. Reg. at 22,210.11 "While the issue [of non-wetland waters] was not before the Supreme Court, it is reasonable to assess whether [they] have a significant nexus, as Justice Kennedy's opinion makes clear that a significant nexus is the touchstone for CWA jurisdiction." 79 Fed. Reg. at 22,209.

[615] Given the ages of the Supreme Court Justices, it is likely that the makeup of the court will be substantially different in the very near future. In the *Rapanos* case, cited below, Justice Kennedy offered a concurrence opinion and the remaining Justices split down the traditional lines of Scalia, Roberts, Thomas and Alito with the plurality opinion and Justice Stevens, Ginsbuerg, Souter and Breyer dissenting. Justice Kennedy is currently 79 and was appointed by President Regan. Justice Scalia is 79, Alita is 64, Thomas is 66 and Chief Justice Roberts is 59. There has been speculation and media commentary that Justice Ginsberg, who is 81 should retire by the end of this term so that President Obama can replace her with a Justice with similar liberal leanings.

saturated soil conditions." *Id*. (citing 33 C.F.R. § 323.2(c) (1985)). The Court also accepted the Corps argument that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment. In the context of this case, wherein the respondents property abutted a navigable waterway, the Court concluded that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the government has jurisdiction. *Id*. at 135.

In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 163 (2001). ("*SWANCC*"), the Corps created a 'migratory bird rule' and "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States'. *Id*. at 164-65 (citing U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6). However, the Supreme Court held the "Migratory Bird Rule" was not sufficient to establish Corps jurisdiction under the CWA. *Id*. at 167. Interestingly, in *SWANCC* the Court seemed to have expanded its own decision in the Riverside case when it held:

> "It was the "significant nexus" between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*; indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water…" *Id*. at 167 (citing *Riverside Bayview Homes, Inc*., 474 U.S. at 131--32, n. 8).

The most recent Supreme Court decision on the Corps jurisdiction under CWA is *John A. Rapanos, et al. v. United States,* 547 U.S. 715 (2006). Unfortunately, this decision was a plurality decision, with the Court splitting 4-1-4, as Justice Kennedy only agreed with the majority decision to remand but offered the 'significant nexus' standard in determinations of whether a particular source of water is to be considered a 'water of the United States'. In contrast, the plurality found that the Corps authority to regulate limited "waters of the United States" constituted those waters that were "relatively permanent, standing or flowing bodies of water…forming geologic features" and not "ordinary dry channels through which water occasionally or intermittently flows." *Id*. at 732---33. The plurality specifically excluded from the definition "streams that flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id* at 739. The plurality also stated, "[O]nly those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act." *Id*. at 742 (citing *Solid Waste Agency of N. Cook Cnty*., 531 U.S. at 167). The proposed expansion of the definition of "waters of the United States" to include "other waters" extends far beyond the plurality ruling of the Court.

In expanding its jurisdictional authority with the proposal, the Corps will have to most likely face Chief Justice Roberts in any litigation that arises from this proposal.[616] In *Rapanos*, Chief Justice Roberts' wrote a scathing concurring opinion admonishing the

[616] IPANM would note that Justice Roberts is the second youngest Justice on the court so the likelihood of his involvement in the next round is likely.

Corps for ignoring the Court's "generous standards" and direction in the *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers* case. *Rapanos* at 758. "[In *SWANCC*] the Corps had taken the view that its authority was essentially limitless; [however], this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act" *Rapanos* at 758 citing *Solid Waste Agency of N. Cook Cnty*. 531 U.S. at 167–174. Justice Roberts further noted that,

> "Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. (citing, *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984)}. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority." *Ibid*.

Justice Roberts' palatable frustration with the agencies will easily be resurrected when this proposal is litigated, "Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency." IPANM maintains that this current proposal is yet another example of the Corps seeking to expand its authority beyond the very clear limitations imposed by Congress in the CWA.

In Justice Kennedy's *Rapanos* opinion, he holds that "[u]nder the Corps' regulations, wetlands are adjacent to tributaries, and thus covered by the [CWA], even if they are 'separated from other "waters of the United States" by man---made dikes or barriers, natural river berms, beach dunes, and the like.'" *Id*. at 762 (citing 33 C.F.R. § 328.3(c)). "A "significant nexus" standard must be applied in order to determine if a connection between a nonnavigable water or wetland is significant enough to deem the water or wetland a "navigable water" under the CWA". *Id*. at 767. In addition, it is of note that in his opinion, Justice Kennedy applied the significant nexus test to only wetlands as a type of 'water' other than 'navigable waters'. In a lengthy dissertation, Justice Kennedy states, "[wetlands] can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage." *Id*. at 779.

[I]f the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. When, in contrast, wetlands affect on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Id*. at 780.

Finally, Justice Kennedy limits the Corp jurisdiction in the final step of the 'significant nexus' analysis, stating that,

> "…if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effect on water quality is speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

It is IPANM's position, as well as that of several other associations that the plurality opinion of *Rapanos* should govern implementation of the Clean Water Act "waters of the United States." The agencies have over-stated the Kennedy standard which clearly only applies to wetlands, to apply the standard to waters with tenuous nexus results in impermissibly expanding the proposed definition beyond the scope of the Clean Water Act. (p. 4-9)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

Petroleum Association of Wyoming (Doc. #18815)

10.376 Of particular importance to PAW, is the agencies' reliance on an incorrect interpretation of Justice Kennedy's analysis of the "significant nexus" test to assert sweeping jurisdiction over "tributaries", "adjacent" waters and "other waters" (alone or aggregated with other "similarly situated waters") under subsections (5), (6) and (7) of the proposed rule. 40 CFR 230.3(5), (6), (7). Justice Kennedy's concurring opinion in *Rapanos* does not support the agencies' broad interpretation of the "significant nexus" test, and the agencies' interpretation essentially removes the limitations on federal jurisdiction imposed by the CWA and recognized in *Rapanos* by both the plurality and Justice Kennedy. By proposing that virtually any drainage feature could present a "significant nexus" to traditional navigable waters ("TNW"), the agencies have stretched Justice Kennedy's concurring opinion well past the breaking point. In doing so, they have also largely ignored the legal rationale articulated by both the *Rapanos* plurality and Justice Kennedy's concurrence. Essentially the proposed rule appears to attempt to circumnavigate the limitations expressed by both the plurality and Justice Kennedy's concurrence.

The agencies' extensive reliance on Justice Kennedy's concurrence as the prevailing law as to what constitutes a jurisdictional water is misplaced. The agencies compound this misplaced reliance by attempting to fill legal holes with rationale from the agencies' Connectivity Report to attempt to support some of the most controversial aspects of subsections (5), (6), and (7) of the proposed WOTUS definition. The end result is that the agencies have ignored any reasonable reading of the plurality and concurring opinion in *Rapanos*. The plurality was critical of Justice Kennedy's significant nexus discussion and pointed out its limited utility in light of the Court's earlier precedent referring to the "significant nexus" test. *Rapanos*, pp. 753-756. Rather than exercising any restraint, or acknowledging the plurality's criticism of the Kennedy concurrence, it appears the agencies have instead liberally extended Justice Kennedy's concurrence as far as possible to expand federal jurisdiction to the maximum extent their arguments will permit.[617]

For example, the agencies expansive jurisdictional assertion overlooks the most basic of limitations expressed in the CWA, that grant the agencies authority over only "navigable waters" or "water of the United States" 33 U.S.C. § 344, 1362(7). In *Rapanos*, the plurality determined the "Corps has stretched the term 'waters of the United States'

[617] Should the agencies determine it is appropriate to withdraw the proposed rule and start over, PAW urges the agencies to focus on following a reasonable reading of the CWA and the Supreme Court's interpretation of the act, rather than trying to find ways to enlarge upon the fair import of CWA jurisprudence.

beyond parody" by applying it to such things as ephemeral streams, wet meadows, directional sheet flow during storm events, manmade drainage ditches and dry arroyos . Instead, the plurality recognized that jurisdiction depended on "relatively permanent, standing or continuously flowing bodies of water" or waters which have a "continuous surface connection to relatively permanent waters." *Rapanos*, 547 U.S. 715, 734, 742.

Nor does Justice Kennedy's concurrence support the expansive reach of the agencies ' proposed rule. Justice Kennedy's concurrence specifically limited his opinion to "wetlands" (not other "waters") that "alone or in combination with similarly situated lands in the region" could "significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable'." *Id*. at 780. Taken in context, his analysis cannot be stretched as far as the agencies have proposed, as it does not support a determination that non-wetland drainage features such as many ephemeral and intermittent drainages or "waters" within floodplains or ditches possess the requisite significant nexus to be jurisdictional.

In Wyoming, there are many such features that have historically been deemed nonjurisdictional, but which could become jurisdictional if the proposed rule were adopted. Notably, Justice Kennedy specifically criticized the *Rapanos* dissent's interpretation of CWA jurisdiction, stating that it "reads a central requirement out- namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." *ld*, at 179. Far from supporting a general notion that any drainage feature could rise to a "significant nexus" with TNW, the issues that Justice Kennedy addressed in his concurrence were limited to wetlands in the context of the facts before the Court.

The agencies' reliance on statements by Justice Kennedy to assert jurisdiction over remote intermittent and ephemeral waters and wetlands, (individually or aggregated with others in a watershed), takes too many liberties with the concurrence. Justice Kennedy himself recognized that where "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters" that "[t]he deference owed to the Corps' interpretation of the statute does not extend so far." *Id*. at 778-779. Many of the drainage features in Wyoming that could fall under regulation in the proposed rule are so "remote and insubstantial" as to render wholly erroneous the agencies' reliance on Justice Kennedy's concurrence to support the jurisdictional assertions. Numerous comments submitted under this docket demonstrate the fallacy in the agencies' broad reading of Justice Kennedy's concurrence, and their analysis will not be repeated here, other than to state that PAW agrees with the analysis in the comments referenced previously.[618] PAW also believes that as a matter of law, the agencies place undue weight and reliance on the concurring opinion of one justice. (p. 2)

Agency Response: **The rule is narrower in scope than the existing rule and is consistent with the statute and caselaw. Technical Support Document, I.A., B., and C.**

[618] See, e.g., IPAA, AXPC, WEA Comments referenced, *Supra*.

10.377 In 2008 Guidance[619], the agencies recognized two significant limitations on their jurisdiction based on their then-prevailing interpretation of the *Rapanos* and *SWAANC* decisions, which have been stripped in the proposed rule. First, the 2008 Guidance held that for non-navigable "tributaries" to be deemed WOTUS, they must be "relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)." 2008 Guidance, p. 1. Any "tributary" that was not "relatively permanent" and "wetlands" adjacent to tributaries that were not "relatively permanent" required a fact-specific analysis to determine whether a significant nexus with a TNW existed, sufficient to exercise jurisdiction. By contrast, the proposed rule would deem any "tributary" exhibiting a bed, banks and ordinary high water mark ("OHWM") to be jurisdictional, regardless of any flow considerations. Further, a tributary that by itself would fail the jurisdictional test, could, under the proposed rule, be aggregated with other "similarly situated" "tributaries" in the watershed to overcome the lack of jurisdiction. PAW contends that interpreting jurisdiction in this manner clearly exceeds any reasonable construction of the CWA or Supreme Court precedent and is grossly over-inclusive.

Second , the 2008 Guidance limited jurisdictional determinations relating to wetlands that "directly abut" jurisdictional tributaries to just that-"wetlands". By contrast, the proposed rule purports to extend jurisdiction to both "waters" and "wetlands" that abut, or are "adjacent" to tributaries, regardless of whether the tributary is relatively permanent or not.

The agencies purport to support these significant expansions of jurisdiction through an overly-generous interpretation of Justice Kennedy's *Rapanos* concurrence. But as many comments filed in response to the proposed rule have demonstrated, such an expansive reading of the Kennedy concurrence is erroneous. In addition, the agencies present no compelling justification or analysis for changing their prior legal interpretation of their jurisdictional limits under the CWA, as expressed in their own 2008 Guidance , and substituting a far more liberal legal analysis that purports to grant the agencies virtually unbounded jurisdiction. (p. 2-5)

Agency Response: The agencies do not view the 2008 Guidance as an interpretation of the Clean Water Act, but to the extent the agencies have changed their interpretation, they disagree that they failed to explain their basis. Technical Support Document, I.C.

Montana Wool Growers Association (Doc. #5843.1)

10.378 The Court concluded in *SWANCC* that the CWA did not grant the Corps jurisdiction over "ponds that are *not* adjacent to open water." The Proposed Rule would confront this holding. (p. 5)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

[619] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, December 2, 2008.

Red River Joint Water Resource Board (Doc. #4227)

10.379 In our view, the proposed rules seek to widely expand the jurisdiction of EPA and the Corps under the CWA, and to roll-back the outcome of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers*, 531 U.S 159 (2001) ("*SWANCC*"). While EPA contends the proposed rule does not seek to protect any new types of waters and does not broaden the coverage of the CWA, the clear language of the proposed rule revisions expands greatly on the proposed 2011 guidance document circulated by EPA and the Corps, and basically enacts a more expansive version of the migratory bird rule. In short, the new descriptions of "other waters" and "adjacent waters" in the proposed rules seek to render previously non-jurisdictional waters jurisdictional via the rulemaking process and contrary to Supreme Court precedent. (p. 1)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute and caselaw. Technical Support Document, I.A., B., and C.

National Cattlemen's Beef Association (Doc. #8674)

10.380 Additionally, our organizations disagree that *Riverside Bayview* and *Rapanos* allow the agencies to take the adjacent wetlands "significant nexus" and "similarly situated" test and apply it to all tributaries. Both cases analyzed "adjacent wetlands," neither were analyzing the far removed, isolated waters, which the agencies now seek to apply this test to. Since *Rapanos*, even a lower court has recognized the importance of such distinction.[620] In *Baykeeper*, the 9th Circuit recognized the distinction between wetlands that are adjacent to navigable waters and other waters such as ponds, streams, and other waters that might also be near navigable waters. The agencies have failed to adequately explain their justification in applying such a test to all categories of water features. (p. 8-9)

Agency Response: The rule is consistent with caselaw. Technical Support Document, I.C.

10.381 What the agencies have done in this proposed rule however, goes against the logic and reasoning in all three Supreme Court decisions. The agencies have expanded the category of "adjacent wetlands" to "adjacent waters" and expanded the word "adjacent" to mean any open water within a floodplain or riparian area, the size and scope ofboth are undefined in the proposed rule and left to the "best professional judgment" of the regulator. The agencies have made the new category of "adjacent waters" virtually limitless, violating the CWA and contrary to the Supreme Court decisions. Justice Kennedy summed it up well when he stated, "Because such a nexus was lacking with respect to isolated ponds [in *Riverside Bayview Homes*], the Court held that the plain test of the statute did not permit the Corps' action." (*Rapanos*, J. Kennedy, concurring at 9). Geographically located in an undefined floodplain area does not remove a feature from being "isolated." There are countless ponds and wetlands in floodplains or riparian areas that are considered "isolated." Based on *Riverside Bayview Homes* and even Justice

[620] *San Franscisco Baykeeper v. Cargill Salt Division*, 418 F.3d 700, 707 (9th Cir. 2007).

Kennedy's opinion in *Rapanos*, these isolated features LACK a significant nexus connection to a TNW and therefore cannot be a "water of the U.S.," putting the proposed definition beyond the bounds of the law itself. (p. 12)

Agency Response: **The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII. The rule is consistent with caselaw. Technical Support Document, I.C.**

10.382 In *Rapanos*, the court evaluated jurisdiction over adjacent wetlands. In his concurring opinion, Justice Kennedy stated that the agencies could "identify categories of tributaries that, due to their volume of flow, their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." In fact, the entire analysis of adjacency goes no further than wetlands adjacent to these major tributaries, but the Corps and EPA has expounded upon this language (major tributaries of TNWs) to say that any waters that are in the floodplain or riparian area of (a)(1)-(5) waters are considered adjacent. (a)(1)-(5) includes TNWs; interstate waters; the territorial seas; impoundments of TNWs, interstate waters or the territorial seas; and tributaries of TNWs, interstate waters, the territorial seas, or impoundments. (Proposed Rule at 22198-99). This is clearly an expansion of what the Supreme Court would consider "adjacent."(p. 13)

Agency Response: **The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. Preamble, IV. The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.**

National Alliance of Forest Owners (Doc. #15247)

10.383 Under the proposed rule, all waters, not just wetlands, that are "adjacent" to a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary, are jurisdictional.[621] Although the proposed rule carries forward the definition of "adjacent" from the existing regulations (i.e., "bordering, contiguous, or neighboring"), it contains a new definition for the term "neighboring," which "includes waters located within the riparian area or floodplain of" a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary.[622] "Neighboring" waters also include those "with a shallow subsurface hydrologic connection or a confined surface hydrologic connection to such a jurisdictional water."[623] The proposed rule leaves it to the regulators' "best professional judgment" how to apply these new definitions in

[621] See 79 Fed. Reg. at 22,263.
[622] *Id*.
[623] *Id*.

determining the extent of CWA jurisdiction.[624] Thus, individual regulators have wide latitude to determine, e.g., which floodplain[625] to use; how large a given riparian area[626] is; or what it means to have a confined surface hydrologic connection. According to the Agencies, "[w]aters, including wetlands, that meet the proposed definition of adjacency, including the new proposed definition of neighboring, have a significant nexus to (a)(1) through (a)(3) waters, and this proposed rule would include all adjacent waters, including wetlands, as 'waters of the United States' by rule."[627]

By extending the definition of "waters of the United States" to encompass all adjacent waters, not just wetlands, the Agencies have stretched the scope of CWA jurisdiction well beyond what the Supreme Court would allow and even beyond existing regulations and guidance. None of the relevant Supreme Court decisions addressed, much less affirmed, whether CWA jurisdiction extends to adjacent nonnavigable waters that are not wetlands. *Riverside Bayview*, for example, upheld the assertion of CWA jurisdiction over wetlands abutting a navigable-in-fact waterway.[628] The Court made it clear in that case that it was not addressing "wetlands that are not adjacent to bodies of open water."[629] Decades later, "*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent wetlands.[630] Importantly, "[n]o justice, even in dictum, addressed the question of whether all waterbodies with a significant nexus to navigable waters are covered by the Act."[631] And not even the Agencies' 2008 *Rapanos* Guidance goes so far as to address adjacent non-wetlands.

In addition to improperly extending CWA jurisdiction to adjacent non-wetlands, the proposed rule has defined "neighboring," "riparian area," and "floodplain" far too broadly. This new concept of adjacency runs headlong into both Justice Kennedy's and the plurality's opinions in *Rapanos*. Because all waters that are "adjacent" to tributaries (as newly defined under the proposed rule) are per se jurisdictional, the proposed rule will allow the Agencies to assert jurisdiction over waters that are "adjacent" to "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it."[632] Justice Kennedy's opinion, however, does not leave room for such a categorical assertion of jurisdiction even over wetlands adjacent to those types of waters. Rather, he explained that a "more specific inquiry" is necessary to determine

[624] See *id* at 22,208.
[625] "Floodplain" is defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows." The proposed rule does not specify a particular flood interval.
[626] "Riparian area" means "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." They are "transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."
[627] 79 Fed. Reg. at 22,207.
[628] See 474 U.S. at 135.
[629] *Id*. at 131 n.8.
[630] *San Francisco Baykeeper*, 481 F.3d at 707.
[631] *Id*.
[632] Ra*p*anos, 547 U.S. at 781.

whether wetlands' "mere adjacency" to nonnavigable tributaries is sufficient to establish CWA jurisdiction.[633]

The plurality opinion in *Rapanos*, for its part, found that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[634] The plurality emphasized that wetlands with merely an "intermittent, physically remote hydrologic connection to 'waters of the United States'…lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*."[635] Notably, the plurality spoke critically about how, despite the holding in SWANCC, "some of the Corps' district offices have concluded that wetlands are 'adjacent' to covered waters if they are hydrologically connected 'through directional sheet flow during storm events…or if they lie within the '100-year floodplain' of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years."[636] Despite these criticisms, that is exactly what the proposed rule allows by, for example, failing to place any limits on the Agencies' ability to choose what floodplain interval to use when applying the new definition of "neighboring." As a result, waters that are miles away from the nearest jurisdictional water can now be deemed jurisdictional simply by an agency employee's selection of the 100-year (or perhaps even the 50-year) floodplain interval as the basis for identifying "adjacent" waters.

Similarly, waters that are currently considered to be isolated (and thus, nonjurisdictional) are nevertheless per se jurisdictional so long as a regulator determines that: (i) there is some subsurface connection to a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary; and (ii) the "adjacent" water is within "reasonable proximity" of the downstream jurisdictional water.[637] The Agencies' categorical assertion of jurisdiction over such "adjacent" waters based on subsurface hydrologic connections is incompatible with the Supreme Court's rejection of the "any hydrologic connection" standard in *Rapanos*.

Not only are the new definitions in the proposed rule overly broad, they are too vague to serve the Agencies' goal of providing clarity through this rulemaking. Individual regulators have discretion in determining how to apply the definitions of "floodplain" (e.g., which floodplain interval to use[638]); how to apply the definition of "riparian area" (e.g., whether hydrology "directly influence[s]" ecological processes and plant and

[633] *Id*. at 780, 786.
[634] *Id*. at 742.
[635] *Id*.
[636] *Id*. at 728.
[637] 79 Fed. Reg. at 22,263, 22,207-08.
[638] The proposal's lack of clarity with respect to floodplains is particularly problematic. The preamble provides that the term "floodplain" as used in the proposed rule does not necessarily equate to the 100-year floodplain defined by the Federal Emergency Management Agency (FEMA), but it does not specify how else a regulator might interpret the term. See 79 Fed. Reg. at 22,236. To add to the confusion, regulations from a number of federal agencies, including FEMA, refer to various floodplain categories. See, e.g., 7 C.F.R. § 761.2 (referencing 100-year and 500-year floodplains); 14 C.F.R. § 1216.204 (same); 24 C.F.R. § 55.12 (same); 40 C.F.R. § 280.43 (referencing 25-year floodplain); 40 C.F.R. part 300, Appx. A (referencing 10-year, 100- year, and 500-year floodplains).

animal community structures[639]); how deep subsurface connections can be; and how remote an adjacent water can be located from a jurisdictional water but still be within "reasonable proximity" of the jurisdictional water. These ambiguities are bound to result in inconsistent application of the rule and will further encourage citizen suit litigation against the forest industry.

The breadth of the adjacency standard is self-evident and troubling. Entire tributary (including ditch) systems are now per se jurisdictional under the proposed rule. Such systems likely have subsurface and surface hydrologic connections to a variety of water features, and their floodplains and riparian areas could cover vast reaches of lands and include countless small wetlands, ponds, playas, and other man-made and natural waterbodies. All of these features could now be jurisdictional under the proposed rule depending how regulators exercise their discretion in applying the new definitions in the proposed rule.

The proposed rule's new adjacency concept is deeply flawed. The Agencies should withdraw the proposed provisions relating to adjacency and carry forward existing provisions that extend jurisdiction only to adjacent wetlands. (p. 15-18)

Agency Response: **The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain. While the plurality questioned the use of the 100 year floodplain, the dissent did not, and for purposes of adjacency the agencies have established that a water must be located in the 100 year flood plain and within 1500 foot of the ordinary high water mark. Preamble, IV. The agencies do not view the 2008 Guidance as an interpretation of the Clean Water Act, but to the extent the agencies have changed their interpretation, they disagree that they failed to explain their basis. Technical Support Document, I.C. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters and covered tributaries. Preamble, III and IV, and Technical Support Document, I, VII and VIII.**

Beet Sugar Development Foundation (Doc. #15368)

10.384 The preamble to the proposed rule states "that adjacent waters, rather than simply adjacent wetlands, are 'waters of the United States.'"[640] The preamble recognizes that the Supreme Court has not addressed the agencies' jurisdiction over adjacent non-wetland waters but concludes that "it is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy's opinion makes clear that a significant nexus is a touchstone for CWA jurisdiction."[641] But the agencies' conclusion is legally unreasonable because the proposed rule extends CWA jurisdiction past Supreme Court guidance. In *Riverside Bayview*, the Court only addressed and approved of CWA

[639] 79 Fed. Reg. at 22,263.
[640] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22193.
[641] *Id*. at 22260.

jurisdiction over adjacent wetlands.[642] Likewise in *Rapanos*, the Court only considered wetlands.[643] Further, Justice Kennedy applied his "significant nexus" test specifically to wetlands without any language or indication that he would approve of CWA jurisdiction over non-wetlands with a "significant nexus."[644] Even if Justice Kennedy would approve of the application of the "significant nexus" test to non-wetlands, that speculative approval would have no binding effect on future judicial review because the test is entirely dicta. If the agencies extend CWA jurisdiction to all "adjacent waters," they do so without any indication that the Court would support the jurisdictional extension. (p. 11-12)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

10.385 Both the existing and proposed rules include the word "neighboring" within the definition of "adjacent."[645] But the proposed rule adds a new overbroad definition for "neighboring" waters: "waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[646] This proposed definition adds new and troubling aspects to the term "adjacent." The proposed rule categorically covers all waters based on their location within a riparian area or floodplain without a case-by-case analysis of a "significant nexus."[647] The agencies' categorical finding of jurisdiction based solely on location ignores the case-by-case determination requirement underlying Justice Kennedy's "significant nexus" test.[648] Justice Kennedy stated: "Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency."[649] The proposed regulations would fail Justice Kennedy's test because the proposed rule per se extends jurisdiction based only

[642] See generally United *States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985). In *Riverside Bayview*, the Court used the phrase "adjacent wetlands" fourteen times. *Id*. at 125, 130, 134, 135 n.9, 136–38. The Court only used the term "adjacent waters" once in *Riverside Bayview*. *Id*. at 134 ("For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters.". And the one time the Court used the term "adjacent waters," it referred to "waters of the United States" that were adjacent to wetlands. *Id.*

[643] *Rapanos v. United States*, 547 U.S. 715, 729 (2006) (Scalia, J., plurality opinion).

[644] *Id*. at 780 ("Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'")

[645] 33 C.F.R. § 328.3(c) (2013); Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22263.

[646] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22263.

[647] *Id*. at 22207 ("Waters, including wetlands, that meet the proposed definition of adjacency, including the new proposed definition of neighboring, have a significant nexus to (a)(1) through (a)(3) waters, and this proposed rule would include all adjacent waters, including wetlands, as 'waters of the United States' by rule.").

[648] See *id*. at 22207 ("The agencies propose a definition of the term 'neighboring,' to identify those adjacent waters that the agencies concluded have a significant nexus to (a)(1) through (a)(3) waters.").

[649] *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring).

on a water's location within a riparian area or floodplain.[650] The proposed rule contains no adequate explanation of why its conclusion that location equals a "significant nexus" would satisfy either Justice Kennedy's regulatory specificity or case-by-case "significant nexus" requirements.[651] The proposed rule's definition of neighboring fails Justice Kennedy's test.

The proposed rule's addition of the term "floodplain" automatically extends jurisdiction over waters in broad geographical areas without any concern for those waters' nexus, or lack thereof, with "waters of the United States." The current rule, for example, provides that "wetlands separated from other waters of the United States by man-made dikes or barriers" qualified as "adjacent."[652] The upshot of the current rule is that physically adjacent wetlands do not lose their physical proximity merely due to man-made features. But the proposed rule extends jurisdiction based on adjacency to waters in broad geographical floodplains when those waters may have no nexus to "waters of the United States." For example, a man-made treatment pond that is not physically adjacent to a jurisdictional water but is located within the geographical area of a floodplain might be constructed to withstand a 100-year flooding event, thereby preventing any possible interchange between the man-made treatment pond and the flooding water. But the categorical inclusion of all waters within a floodplain would provide jurisdiction over the man-made treatment pond without consideration for the significance of the man-made treatment pond's connectivity with "waters of the United States." The categorical inclusion of all waters within a floodplain, without specific consideration for their nexus with jurisdictional waters has no basis in law or sound public policy.

The proposed rule also adds a shallow subsurface connection as a jurisdictional trigger. But the proposed rule does not define "shallow," making only the blanket assertion that "[s]hallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters."[653] The proposed rule's use of the words "shallow" and "deeper" leaves the agencies and the regulated community guessing at the depth limitations of subsurface jurisdiction. Despite the EPA's assertions that the proposed rule "[d]oes not regulate groundwater,"[654] in many geographical areas the uppermost groundwater aquifer is relatively shallow. The overbroad definition of "neighboring" may therefore allow the agencies to regulate groundwater under the CWA. Furthermore, expanding federal jurisdiction to "shallow

[650] See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22263 (providing for CWA jurisdiction over adjacent wetlands regardless of a significant nexus determination under proposed the 33 C.F.R. § 328.3(a)(6)); *id*. at 22207 ("Waters, including wetlands, determined to have a shallow subsurface hydrologic connection . . . to an (a)(1) through (a)(5) water would also be 'waters of the United States' by rule as adjacent waters falling within the definition of 'neighboring.')

[651] Only "other waters," a different subcategory of "waters of the United States," would require a case-by-case "significant nexus" finding. See id. (providing jurisdiction over "other waters" so long as they have a "significant nexus" to "waters of the United States" under proposed 33 C.F.R. § 328.3(a)(7)).

[652] 33 C.F.R. § 328.3(c) (2013).

[653] *Id*. at 22208.

[654] Waters of the United States: Proposal to Protect Clean Water, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/uswaters.(last visited Oct. 27, 2014) ("What the Rule Does Not Do . . . Does not regulate groundwater.")

subsurface connections" is unlikely to withstand judicial review.[655] A "shallow subsurface connection" might not be so physically distant to qualify as "isolated" under *SWANCC*, but a shallow subsurface connection certainly fails the Rapanos plurality's "continuous surface connection" requirement.[656] This is so because a neighboring water with only a subsurface connection may very well have a "clear [surface] demarcation" between the wetlands and a navigable water.

Expanding the categories of surface and subsurface waters that fall within the jurisdictional reach of the agencies will have meaningful economic consequences for beet sugar processing facilities and factory grounds. If tenuous subsurface connectivity triggers "adjacency," many features of sugar beet operations may not be sustainable: stormwater management in ponds, discharged water and materials management in lagoons, land application of treated water onto hay fields, stormwater ditches, stormwater mains, and lift stations will all be subject to an additional layer of costly federal regulation. If processing facilities may no longer irrigate on land or release stormwater from pile sites, the facilities will have to double the capacity of manmade treatment plants and build miles of discharge pipeline. BSDF estimates that the proposed rule could result in compliance costs of fifty to eighty million dollars for sugar beet processing plants.

Sugar beet farmers will face similar costs. If the proposed rule is implemented, farmers' drain tiles will be subject to a new layer of additional regulation. Farmers will be compelled to take lands out of production to create, among other features, buffer strips, ponds, and impoundments. Many of BSDF members' farms also operate on or near wetlands, specifically in the southern part of Minnesota. Should these isolated wetlands become subject to the regulatory requirements the CWA imposes, additional compliance costs will strain smaller farmers, potentially driving those farmers out of business. (p. 12-14)

Agency Response: **The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. That said, waters with a "confined surface hydrologic connection" may be adjacent where they are bordering, contiguous, or neighboring an (a)(1) through (a)(5) water. Even if a water does not meet the definition of neighboring a "confined surface hydrologic connection" may be an important factor considered in a case-specific significant nexus determination. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make**

[655] See Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22263 (proposed April 21, 2014) (to be codified at 33 C.F.R. § 328.3(c)(2)).

[656] *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (Scalia, J., plurality opinion) ("Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act.").

a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII. The agencies have concluded the benefits of the rule exceed the costs. Preamble, V and Economic Assessment in the docket.

Weyerhaeuser Company (Doc. #15392)

10.386 Under the proposed rule, all waters, not just wetlands, that are "adjacent" to a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary, are jurisdictional.[657] Although the proposed rule carries forward the definition of "adjacent" from the existing regulations (i.e., "bordering, contiguous, or neighboring"), it contains a new definition for the term "neighboring," which "includes waters located within the riparian area or floodplain of" a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary, are jurisdictional.[658] "Neighboring" waters also include those "with a shallow subsurface hydrologic connection or a confined surface hydrologic connection to such a jurisdictional water."[659] The proposed rule leaves it to the regulators' "best professional judgment" how to apply these new definitions in determining the extent of CWA jurisdiction.[660]

Thus, individual regulators have wide latitude to determine, e.g., which floodplain to use; how large a given riparian area is; or what it means to have a confined surface hydrologic connection. According to the Agencies, "[w]aters, including wetlands, that meet the proposed definition of adjacency, including the new proposed definition of neighboring, have a significant nexus to [traditional jurisdictional] waters, and this proposed rule would include all adjacent waters, including wetlands, as 'waters of the United States' by rule."[661]

By extending the definition of "waters of the United States" to encompass all adjacent waters, not just wetlands, the Agencies have stretched the scope of CWA jurisdiction well beyond beyond existing regulations and guidance, and well beyond their lawful statutory authority. None of the applicable Supreme Court decisions have addressed, much less affirmed, whether CWA jurisdiction extends to adjacent nonnavigable waters that are not wetlands. *Riverside Bayview*, for example, upheld the assertion of CWA jurisdiction over wetlands abutting a navigable-in-fact waterway.[662] Similarly, *Rapanos* concerned the scope of ACOE's authority to regulate adjacent wetlands.[663] Importantly, "[n]o justice, even in dictum, addressed the question of whether all waterbodies with a significant nexus to navigable waters are covered by the Act."[664] Tellingly, not even the Agencies' 2008 *Rapanos* Guidance goes so far as to address adjacent non-wetlands.

In addition to improperly extending CWA jurisdiction to adjacent non-wetlands, the proposed rule has defined "neighboring," "riparian area," and "floodplain" far too

[657] See 79 Fed. Reg. at 22,263.
[658] *Id*.
[659] *Id*.
[660] See *id* at 22,208.
[661] 79 Fed. Reg. at 22,207.
[662] See 474 U.S. at 135.
[663] *San Francisco Baykeeper*, 481 F.3d at 707.
[664] *Id*.

broadly. This new concept of adjacency runs headlong into both Justice Kennedy's and the plurality's opinions in *Rapanos*. Because all waters that are "adjacent" to tributaries (as newly defined under the proposed rule) are per se jurisdictional, the proposed rule will allow the Agencies to assert jurisdiction over waters that are "adjacent" to "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it."[665] Justice Kennedy's opinion, however, does not leave room for such a categorical assertion of jurisdiction. Rather, he explained that a "more specific inquiry" is necessary to determine whether "mere adjacency" to nonnavigable tributaries is sufficient to establish CWA jurisdiction.[666]

Not only are the new definitions in the proposed rule overly broad, they are too vague to serve the Agencies' goal of providing clarity through this rulemaking. Individual regulators have discretion in determining how to apply the definitions of "floodplain" (e.g., which floodplain interval to use[667]); how to apply the definition of "riparian area" (e.g., whether hydrology "directly influence[s]" ecological processes and plant and animal community structures[668]); how deep subsurface connections can be; how remote an adjacent water can be located from a jurisdictional water but still be within "reasonable proximity" of the jurisdictional water. These ambiguities are bound to result in inconsistent application of the rule and will further encourage citizen suit litigation against the forest industry.

The breadth of the adjacency standard is self-evident and troubling. Entire tributary (including ditch) systems are now per se jurisdictional under the proposed rule. Such systems likely have subsurface and surface hydrologic connections to a variety of water features, and their floodplains and riparian areas could cover vast reaches of lands and include countless small wetlands, ponds, playas, and other man-made and natural waterbodies. All of these features could now be jurisdictional under the proposed rule depending how regulators exercise their discretion in applying the new definitions in the proposed rule.

In sum, the proposed rule's new adjacency concept is deeply flawed. The Agencies should withdraw the proposed provisions relating to adjacency and carry forward existing provisions that extend jurisdiction only to adjacent wetlands. (p. 8-10)

Agency Response: **The agencies disagree with the commenter's assertion that by changing "adjacent wetlands" to "adjacent waters," they have expanded the scope of the definition of "waters of the United States." Technical Support Document, I. The rule no longer includes a provision defining "neighboring" based on a surface**

[665] *Id*. at 781.
[666] *Id*. at 780, 786.
[667] The proposal's lack of clarity with respect to floodplains is particularly problematic. The preamble provides that the term "floodplain" as used in the proposed rule does not necessarily equate to the 100-year floodplain defined by the Federal Emergency Management Agency (FEMA), but it does not specify how else a regulator might interpret the term. See 79 Fed. Reg. at 22,236. To add to the confusion, regulations from a number of federal agencies, including FEMA, refer to various floodplain categories. See, e.g., 7 C.F.R. § 761.2 (referencing 100-year and 500-year floodplains); 14 C.F.R. § 1216.204 (same); 24 C.F.R. § 55.12 (same); 40 C.F.R. § 280.43 (referencing 25-year floodplain); 40 C.F.R. part 300, Appx. A (referencing 10-year, 100-year, and 500-year floodplains).
[668] *Id*. at 22,263.

or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is consistent with the statute and caselaw. Technical Support Document, I.A. and C. The agencies do not view the 2008 Guidance as an interpretation of the Clean Water Act, but to the extent the agencies have changed their interpretation, they disagree that they failed to explain their basis. Technical Support Document, I.C.

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10.387 The agencies have expanded the category of "adjacent wetlands" to "adjacent waters" and expanded the word "adjacent" to mean any open water within a floodplain or riparian area, the size and scope of both are undefined in the proposed rule and left to the "best professional judgment" of the regulator. The agencies have made the new category of "adjacent waters" virtually limitless, violating the CWA and contrary to the Supreme Court decisions. Justice Kennedy summed it up well when he stated, "Because such a nexus was lacking with respect to isolated ponds [in *Riverside Bayview Homes*], the Court held that the plain test of the statute did not permit the Corps' action." (*Rapanos,* J. Kennedy, concurring at 9). Geographically located in an undefined floodplain area does not remove a feature from being "isolated." There are countless ponds and wetlands in floodplains or riparian areas that are considered "isolated." Based on *Riverside Bayview Homes* and even Justice Kennedy's opinion in *Rapanos*, these isolated features LACK a significant nexus connection to a TNW and therefore cannot be a "water of the U.S.," putting the proposed definition beyond the bounds of the law itself.

On more than one occasion during the comment period, the agencies have said the "adjacent waters" category does not include every water within a floodplain and riparian area, but simply those that have a connection to another jurisdictional water. Perhaps these officials should read the words that were placed in the Federal Register on April 21, 2014. "The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." (Proposed Rule at 22207). The plain language of the regulation makes all waters within a floodplain or riparian area jurisdictional and any water left outside those areas that might have some surface or subsurface hydrologic connection can also be included. The agencies are out of bounds. Not every water within a floodplain and riparian area meet Justice Kennedy's "significant nexus" test and therefore you cannot make them jurisdictional by rule. This change in the definition has a very real possibility to impact every single operation in the United States that is involved in production agriculture, usurping the federal-state partnership that underpins the CWA.

In *Rapanos*, the court evaluated jurisdiction over adjacent wetlands. In his concurring opinion, Justice Kennedy stated that the agencies could "identify categories of tributaries that, due to their volume of flow, their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the

majority of cases, to perform important functions for an aquatic system incorporating navigable waters." (*Rapanos*, J. Kennedy, concurring, at 24). In fact, the entire analysis of adjacency goes no further than wetlands adjacent to these major tributaries, but the Corps and EPA has expounded upon this language (major tributaries of TNWs) to say that any waters that are in the floodplain or riparian area of (a)(1)-(5) waters are considered adjacent. (a)(1)-(5) includes TNWs; interstate waters; the territorial seas; impoundments of TNWs, interstate waters or the territorial seas; and tributaries of TNWs, interstate waters, the territorial seas, or impoundments. (Proposed Rule at 22198-99). This is clearly an expansion of what the Supreme Court would consider "adjacent."

The term "adjacent" should have the plain meaning of the word if the true intent of the regulation is to provide clarity to the regulated community. Using the common definition of the word allows the vast majority of people to have a shared understanding of its meaning. The term "neighboring" within the agencies' definition of "adjacent" is beyond the common understanding of what would be an "adjacent water" to a TNW. A simple google search should enlighten the agencies on the public's understanding of the term "neighboring." That search results in a definition for "neighboring" of "next to or very near another place; adjacent."[669] If the agencies' definition of neighboring can include all waters within an undefined floodplain and riparian area they have gone well beyond the common understanding of the term, making the category of "adjacent waters" virtually limitless.

Jensen Livestock and Land LLC. assert that the agencies expansive definition for "neighboring" in their per se jurisdictional category of "adjacent waters" is beyond the scope of the CWA. It is so expansive that it obliterates the federal-state partnership under the CWA, and pushes the outer limits of the Commerce Clause of the Constitution. Based on the Supreme Court's decisions in *Rapanos* and *SWANCC*, the agencies cannot finalize a regulation that makes any open water within a floodplain or riparian area per se jurisdictional. Jensen Livestock and Livestock LLC strongly encourage the agencies not to change the "adjacent wetlands" category to "adjacent waters" and not to finalize their definition of "neighboring." (p. 12-13)

Agency Response: **The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B. and C.**

10.388 The agencies have failed to adequately distinguish "shallow subsurface flow" (or "shallow subsurface connection") from groundwater, and through its use of the phrase has raised the question whether groundwater is truly excluded from the category of "waters of the U.S." or not (Proposed Rule at 22207). What is Shallow Subsurface Flow? How shallow is it? And how is a landowner supposed to know whether the wetland in his pasture is connected through shallow subsurface flow?

[669] Google definition of "neighboring," available at https://www.google.com/?gws_rd=ssl#q=define+neighboring.

The proposed rule states, "The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." (*Id.*). The agencies use of the term "or" in this definition means that even geographically isolated waters outside of a floodplain and riparian area, but that have such shallow subsurface hydrologic connection, are automatically jurisdictional. It seems this definition is in direct conflict with the Supreme Court's decision striking down the "any hydrologic connection" rule of jurisdiction because this definition allows automatic jurisdiction over waters that have only a hydrologic subsurface connection.

When "waters with a shallow subsurface hydrologic connection" to (a)(1) through (5) waters are jurisdictional simply by virtue of that connection, without any consideration of the significance of that connection. Because EPA and the Corps have not excluded any types of water from the term "waters" it could have the meaning of puddles, wetlands, ditches, or possibly damp depressions in a pasture. If that damp depression does have a shallow subsurface hydrologic connection it appears by the language of the proposed rule to be a jurisdictional water.

Based on the intent of Congress to only regulate surface water via the CWA, it follows that the agencies should not use shallow subsurface flow, shallow subsurface hydrologic connections or the like to serve as the basis for determining jurisdiction. Regulating the surface water that has this "groundwater" flow is the same as regulating the groundwater connection. Is it the agencies' position that a citizen could inject pollutants into this "shallow subsurface hydrologic connection" without running afoul of the CWA? If the answer is no then the agencies are regulating groundwater, running afoul of their stated exclusion of groundwater.

There are also additional questions regarding this phrase. How deep must a landowner dig to discover whether his pond is connected to another water via "shallow subsurface flow"? At what depth must he dig to know whether it is groundwater instead of "shallow subsurface flow?" The agencies stated intent in providing this proposed rule was to provide clarity to everyone, including landowners. Jensen Livestock and Land LLC. assert that the agencies' decision to find adjacent waters with "shallow subsurface hydrologic connections" jurisdictional by rule puts an enormous burden on landowners to have surveys and analysis done on each and every "water" on their property to determine whether they have this type of connection and whether they can utilize their waters or must ask permission from the government to conduct numerous activities near these waters.

Jensen Livestock and Land LLC strongly encourages the agencies to consider not looking at groundwater as the source of any connection, as there is too much confusion regarding whether it is part of the regulated water. Additionally, there is no logical way for landowners to know whether these connections exist, unfairly placing them squarely in the sites of a regulatory enforcement action without any knowledge. (p. 17-18)

Agency Response: **The rule explicitly excludes groundwater from the definition of "waters of the United States." The rule does not include a provision defining adjacency and neighboring based on shallow subsurface flow. Preamble IV. While**

the agencies acknowledge that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." Preamble IV. The rule is consistent with the statute and caselaw. Technical Support Document, I.A and C.

10.389 The definition of floodplain in the proposed rule has been left overly broad by the agencies, providing maximum administrative flexibility for regulators, while leaving livestock owners guessing whether water features on their property are or are going to be within the floodplain designated by a regulator. Additionally, it is unclear from the proposed rule whether the entire floodplain itself is a "water of the U.S."

According to the U.S. Geological Service the Mississippi River floodplain includes over 30 million acres.[670] The proposed rule does not prevent a regulator from determining that every open water within the 30 million acres that make up the entire Mississippi River floodplain is jurisdictional. Within those 30 million acres are numerous natural ponds, perennial ditches, isolated wetlands, and isolated prairie potholes. Based on the proposed rule, the regulator decides using their "best professional judgment" the size and scope of the floodplain.[671] The proposed rule continues that it can be the same as the FEMA 100-year floodplain, but does not have to be. (*Id*. at 22236).

Jensen Livestock and Land LLS. Assert this does not provide clarity, but expands the type and number of waters that are jurisdictional under the CWA, and flies in the face of the Supreme Court decisions that clearly stated there is a limit to federal jurisdiction.[672] The definition of floodplain in the proposed rule recognizes no limit when, and with the stroke a regulator's pen, every water within a 30 million acre plot would become federal waters. Should the agencies choose a floodplain frequency such as 100-year, 50-year, or 5-year, Jensen Livestock and Land LLC would make specific comments to that frequency. Because the agencies failed to provide any sort of specificity for the regulated community, we cannot meaningfully comment on every possibility the agency might choose. Instead, the agencies should withdraw the proposed rule, fill in the many gaps that are prevalent throughout the proposal and re-propose the rule.

The agencies' proposed rule also is unclear to the floodplain itself, leaving open the interpretation that the floodplain itself is a "water of the U.S." If every open water in a floodplain is a "water of the U.S.," then it could mean that when the water is out of its bank and covering the land in the floodplain, that is an "open water" and automatically a "water of the U.S." And of course, just like tributaries, just because the water recedes and is not present does not mean that jurisdiction ends. Can the agencies clarify this confusion for the public. We understand that the agency stated in the proposed rules, "Absolutely no uplands located in ''riparian areas'' and ''floodplains'' can ever be ''waters of the United States'' subject to jurisdiction of the CWA," (Proposed Rule at 22207), but if the floodplain itself is a "water of the U.S." then there is actually no

[670] USGS, available at http://www.umesc.usgs.gov/reports_publications/psrs/psr_1997_02.html.
[671] Proposed rule at 22209; "When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determining which flood interval to use.".
[672] *SWANCC* at 172; "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute."

"uplands" located within it. It is also unclear from the proposal what the agencies mean by "uplands," making the proposal even more perplexing. Jensen Livestock and Land LLC. believe that floodplains should not be "waters of the U.S." and the agencies should make that clear in a new proposed rule.

Jensen Livestock and Land LLC believe the agencies to re-think their proposal to make all open waters in a floodplain or riparian area jurisdictional by rule. It is limitless. The agencies must find a way to limit their jurisdiction to within the bounds set for it by *SWANCC* and *Rapanos*. (p. 19-20)

Agency Response: The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A., B. and C. The agencies reiterate that only waters, not land, are subject to today's definition of "waters of the United States."

10.390 The proposed rule expands its "adjacent wetlands" category to include all "adjacent waters," which now wraps every water within a floodplain or riparian in as a "water of the U.S." by rule. While Jensen Livestock and Land LLC believe that this category should be expanded as such, we also disagree with the agencies vague description of "riparian area." The agencies state,

> "The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shall subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." (Proposed Rule at 22207).

Jensen Livestock and Land LLC. would like the agencies to explain how a livestock producer should know whether a natural pond, or puddle in his pasture lies within an area where the "surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area?" The agencies have again failed miserably in providing any clarity to the public, its field personnel, or anyone else. All the agencies have done is provide themselves enough flexibility to find any water (however broad that term can be expanded) to be a "water of the U.S." Jensen Livestock and Land LLC. asserts that the agencies definition of "riparian area" is vague at best and does not articulate any discernible limit to their authority, violating both the CWA itself and the Commerce Clause of the Constitution. (p. 20)

Agency Response: The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Preamble, IV. The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

10.391 The agencies' proposed rule leaves open the question whether they will assert jurisdiction over groundwater through contradictory statements and ill-defined terms and phrases. While under Section I. the agencies have specifically excluded "Groundwater, including groundwater drained through subsurface drainage systems" they turn around and find that connection through "shallow subsurface" flows can make a water an "adjacent water" and therefore jurisdictional. (Proposed Rule at 22207). It is hard for a reasonable person to see how "groundwater" is different than "shallow subsurface" flow. It appears that "groundwater" includes "shallow subsurface" flow, and the agencies have failed to distinguish the two from each other. It is also unclear how a landowner could dig up some ground, and seeing water, whether they would know whether they are obstructing "shallow subsurface" flow or are at groundwater. EPA official Robert Perciascepe stated at a Congressional hearing before the House Science Committee on July 9, 2014 that the "shallow subsurface" flow is not jurisdictional. If true, could a landowner not cut off the "shallow subsurface flow" and prevent their natural pond from being a "water of the U.S.?"

The federal government cannot divert or otherwise control water for its own uses regardless of the authority cited without a reserved water right or a state-adjudicated water right. Never has it been suggested that the scope of the CWA extends to the regulation of groundwater.[673]

States have their own system of water law that governs public and private water rights within their borders. The western states in particular have adopted some form of the prior appropriation doctrine (prior appropriation), or "first in time, first in right," regarding surface water and many have, to some degree, integrated this approach into their system of ground water law. Under the prior appropriation doctrine, water rights are obtained by diverting water for "beneficial use", which can include a wide variety of uses such as domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, agriculture, recreation, fish and wildlife, among others, depending on state law. The extent of the water right is determined by the amount of water diverted and put to beneficial use.

Any imposition by the federal government that infringes on property rights based on settled state water law would constitute takings under the Fifth Amendment to the United States Constitution and would require just compensation.

Jensen Livestock and Land LLC. agrees that the agencies' properly excluded groundwater from jurisdiction under the CWA, and similarly, have no jurisdiction over "shallow subsurface flow." This should not be a valid consideration under the "adjacent waters" analysis. (Proposed Rule at 22207). Similarly, it should not be a consideration under the significant nexus determination under the "other waters" or any other category. (p. 25-26)

[673] *Rapanos*, J. Scalia, at 24 ("First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional inter- state navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.)

Agency Response: **The rule explicitly excludes groundwater from the definition of "waters of the United States." The rule does not include a provision defining adjacency and neighboring based on shallow subsurface. Preamble IV. While the agencies acknowledge that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." Preamble IV. The rule is consistent with the statute and caselaw. Technical Support Document, I.A and C. This rule does not constitute a taking of private property in violation of the Fifth Amendment. Technical Support Document, I.C.**

Bayer CropScience (Doc. #16354)

10.392 BCS is convinced that, contrary to the agencies' position, the overriding question in the rulemaking is not one of science, but of legal authority. The proposed rule would create a sweeping jurisdictional expansion of federal regulation of minor waters and manmade conveyances based on inappropriate technical assumptions that overlook the legal and institutional boundaries established by Congress and interpreted by the Supreme Court (SC). In *Rapanos v. United States* (*Rapanos*) and the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) decision that preceded it, the Supreme Court specifically rejected the notion that "any hydrological connection" is a sufficient basis for federalization of conveyances. In *SWANCC*, the SC held that CWA jurisdiction did not extend to isolated "non-navigable" intrastate ponds by virtue of migratory birds using them as habitat. 531 U.S. 159, 174 (2001). Five years later, in *Rapanos* the SC was asked whether wetlands near ditches or man-made drains that eventually connected to traditionally navigable waters were "waters of the U.S." Justice Scalia, writing for the plurality, concluded that only those wetlands with a continuous surface connection to bodies that are "waters of the U.S."…are "adjacent to" such waters and covered by the Act. 547 U.S. 715, 742 (2006). The plurality opinion also concluded that "waters of the United States" only included "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features'" such as streams, rivers, lakes and oceans and does not include channels that flow intermittently, ephemerally or periodically after rain. Justice Kennedy, while concurring with the plurality judgment, added that the Corps must establish that a "significant nexus" exists when it asserts jurisdiction over wetlands adjacent to non-navigable tributaries. In his concurrence, Justice Kennedy rejected the agencies' assertion of jurisdiction over non-navigable waters based on "any hydrological connection" to navigable waters." 547 U.S. at 784. He repeatedly cautioned that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a significant nexus. A significant nexus exists "if the wetlands…significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as "navigable." 547 U.S. 715, 779 (2006). BCS concludes that the proposed rule ignores most of the limits placed on the agencies and selectively extrapolates from Justice Kennedy's opinion those aspects which suit the agencies' interests. Not only is the science lacking to justify such an expansion, but the legal authority too. (p. 4)

Agency Response: **Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus**

for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III and IV, and Technical Support Document, I.A., B., C. and II.

Glenn-Colusa Irrigation District (Doc. #16635)

10.393 The Proposed Rule's new definition of "adjacent" significantly expands jurisdiction without sufficient case-by-case analysis. In the Proposed Rule, all types of waterbodies (not just wetlands, as was the case previously) that are "adjacent" to WOTUS would be jurisdictional by rule. In addition to previous definitions of "adjacent" (separated by man-made dikes, berms, dunes, etc.), the category would now include, by rule, all waterbodies located within the riparian area or floodplain of a "traditional" WOTUS. Further, where waterbodies are adjacent to impoundments or tributaries of traditional navigable waters, interstate waters, or territorial seas, under the Proposed Rule these waters would also be jurisdictional by rule. "Neighboring" waters would include "waters located within the riparian area or floodplain" of WOTUS, or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to WOTUS. Like with the proposed definition of "tributaries," the new definition of "adjacent" does not require any nexus analysis, and thus arguably expands the reach of the CWA to include entire floodplains or riparian areas that may not have been previously regulated under the CWA.

The Proposed Rule broadly asserts jurisdiction by rule over waters (not just wetlands) adjacent to more traditional navigable waters. Specifically, the Proposed Rule defines "riparian area" to mean "transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."[674] The Proposed Rule defines "floodplain" to mean "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."[675] The Proposed Rule also states that when adjacent water and neighboring water are in contact with the same shallow aquifer, a shallow subsurface connection exists.[676] These new definitions and their accompanying explanations are an attempt to demonstrate a hydrologic connection or a chemical, physical, or biological effect for purposes of the relatively permanent and significant nexus tests. In so doing, however, the Agencies expose the flaw in their approach—specifically, the failure to undertake a case-bycase analysis to determine whether a particular waterbody is sufficiently adjacent under the relatively permanent test or significant nexus test.

Thus, the Proposed Rule broadens the scope of waterbodies that would be jurisdictional by rule, here, by including definitions for "adjacent," "riparian area," and "floodplain," which are not defined in the existing WOTUS definition. This approach impermissibly contravenes U.S. Supreme Court precedent requiring case-by-case analysis under the relatively permanent or the significant nexus tests, and shifts the burden of demonstrating jurisdiction from the Agencies to the regulated communities. (p. 5-6)

[674] 79 Fed. Reg. 22207.
[675] *Id*.
[676] *Id*.

Agency Response: **The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII. The rule does not shift the burden of proof to the regulated community; the federal government must demonstrate that a water is a "water of the United States" under the CWA and its implementing regulations.**

Association of American Railroads (Doc. #15018.1)

10.394 The Agencies must remove "floodplain" areas from the definition of Waters of the United States, as this term is undefined and includes features that exceed the scope of the CWA and constitutional limitations.

> ● The proposed rule does not satisfy Due Process and Fair Notice doctrines because it fails to define critical terms such as "upland," "waters," and "floodplain."
>
> ● The Agencies must remove "riparian" from the definition of Waters of the United States, as this term is so poorly defined it does not satisfy Due Process and Fair Notice doctrines and will create excessive uncertainty and cost for the regulated community (p. 2)

Agency Response: **The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent."Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is consistent with the Constitution. Technical Support Document, I.C.**

10.395 The proposed rule determines that all "waters" within the floodplain or riparian area of a jurisdictional water or that have a shallow subsurface hydrological connection to a jurisdictional water categorically have a significant nexus and will be jurisdictional by rule. 79 Fed. Reg. at 22,207. The addition of floodplain and riparian areas represents a substantial expansion of the definition of Waters of the United States, is not supported or justified by science or the administrative record, exceeds the Agencies' authority under the enabling CWA statute, and applicable Constitutional provisions, is arbitrary, capricious, and constitutes an abuse of discretion.

> 1. "Adjacent waters" is Undefined and Vastly Expands CWA jurisdiction. The Agencies are expanding the definition of Waters of the United States to include "neighboring" waters as Waters of the United States. The proposed rule asserts jurisdiction over "[a]ll waters, including wetlands, adjacent to" a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. 79

> Fed. Reg. at 22,263 – 22,274. There is nothing in the proposed rule that limits or explains what is meant by the term "adjacent waters." In the proposed rule, "adjacent" is defined as "bordering, contiguous, or neighboring." *Id*. The proposed rule expands the meaning of "adjacency" with its new, broader definition of the word "neighboring" and undefined terms "bordering" and "contiguous" and the addition of the terms "floodplain," "riparian areas" and "subsurface" connections. This broad language allows the agencies to treat essentially any feature adjacent to a Water of the United States as a jurisdictional "water" by virtue of its adjacency. (p. 10-11)

Agency Response: The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII. The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Union Pacific Railroad Company (Doc. #15254)

10.396 The Proposed Rule's regulation of "adjacent waters" and "other waters" expands CWA jurisdiction, contrary to the limitations set forth in both the plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*, and further confuses the extent to which the Agencies will seek to regulate features that have no direct surface connection to traditional navigable waters, provides no fair notice to stakeholders, and rather than serving the professed goals of "increased clarity" and "greater predictability,"[677] will result in continuing inconsistent jurisdictional determinations by the Agencies.[678]

> The Proposed Rule would extend jurisdiction to "[a]ll waters, including wetlands," adjacent to" a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,263. The preamble to the Proposed Rule states that the term "water" is used "in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems." *Id*. at 22,191 n.3. Thus, it appears that the Agencies intend to treat essentially any feature that is wet as a "water" that could be jurisdictional by virtue of adjacency, criteria that is overbroad, confusing, and contrary to the express limitations set forth by the Supreme Court.

[677] See 79 Fed.Reg. 22,189.

[678] As Justice Kennedy observed, the U.S. General Accounting Office found variations in jurisdictional determinations among Corps' district offices, and the breadth of the Corps' standard at issue in *Rapanos* "which seems to leave wide room for regulation or drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure . . ." *Id*., 547 U.S. at 781.

SWANCC rejected such an approach and held that regulation of isolated waters was beyond the scope of the Agencies' CWA authority. *SWANCC*, 531 U.S. at 168. Similarly, in *Rapanos*, the plurality made clear that only those waters with a "continuous surface connection to bodies that are 'waters of the United States' in their own right" can be considered "adjacent" for purposes of CWA jurisdiction. *Rapanos*, 547 U.S. at 742. Justice Kennedy's concurrence also rejected the Corps' theory of jurisdiction based on "mere adjacency." *Rapanos*, 547 U.S. at 742, 786-787. Under Justice Kennedy's formulation, "[a] more specific inquiry" is necessary. *Id.* Yet under the Proposed Rule, features that are adjacent to remote and insubstantial tributaries would be per se jurisdictional, contrary to the limits imposed by *Rapanos*.

The expansive standards and convoluted definitions in the Proposed Rule would allow the Agencies to assert jurisdiction over "adjacent waters" that are "neighboring" within the same floodplain or riparian area based even on a "shallow subsurface" hydrologic connection. What constitutes floodplain or riparian is unclear. Moreover, groundwater hydrogeology is complex, and groundwater has traditionally been regulated by States and local governments. It is clearly not a "navigable water" under the CWA statute, and jurisdiction based on subsurface groundwater flows was clearly not contemplated as a basis for jurisdiction in the rulings of the Supreme Court. Additionally, groundwater migration – shallow subsurface or otherwise – cannot be easily determined and can require installation of monitoring wells, modeling, or other expert analysis. This is hardly consistent with the goal of making "the process of identifying 'waters of the United States' less complicated and more efficient," as professed in the preamble to the Proposed Rule. 79 Fed.Reg. at 22,190. (p. 20-21)

Agency Response: **Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters, including covered adjacent waters, and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III and IV, and Technical Support Document, I.A., B., C. and II. The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV.**

The rule explicitly excludes groundwater from the definition of "waters of the United States." The rule does not include a provision defining adjacency and neighboring based on shallow subsurface flow. Preamble IV. While the agencies acknowledge that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." Preamble IV. The rule is consistent with statute and caselaw. Technical Support Document, I.A. and C.

Airports Council international (Doc. #16370)

10.397 The EPA's Proposed Rule ignores the plurality opinion authored by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006) concluding that "waters of the United States" are "relatively permanent, standing or flowing bodies of water"; they are not "occasional," "intermittent," or "ephemeral" flows. On the question of connectivity, Justice Scalia stated that a mere "hydrological connection" is not sufficient to qualify a wetland as covered by the CWA; it must have a "continuous surface connection" with a "water of the United States" that makes it "difficult to determine where the 'water' ends and the 'wetland' begins."The EPA should reevaluate its reliance on court precedent to ensure a balanced approach to the justices' reading of the issue in *Rapanos v. United States.* Moreover, the science used in the form of the EPA's connectivity study extrapolates connectivity in an overly broad way that does not support a regulatory approach in its lack of determining the significance of connectivity in context. The proposed treatment of "tributary" and "adjacent" waters as suggested in the Proposed Rule will result in an unwarranted and significant expansion of features (both natural and artificial) subject to regulation under the CWA as WOTUS. The EPA should adjust its regulatory focus to address natural features of greater ecological importance/significance, and should clarify that features of the built environment, such as is typical of airports, are not within the intended scope of the CWA. (p. 3)

Agency Response: The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters and covered tributaries. Preamble, III and IV and Technical Support Document, I., II, VII and VIII. The rule is consistent with decisions of the Supreme Court, I.C. The agencies longstanding interpretation of the CWA is that is that it is not relevant whether a water is man-altered or man-made for purpose of determining whether a water is jurisdictional under the CWA. Technical Support Document, I.C. The rule is narrower in scope than the existing rule and is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

10.398 While Tri-State appreciates the complexities of the *Rapanos* Supreme Court decision, legal issues remain regarding whether the proposed rule is an appropriate application of this decision in conjunction with earlier decisions (i.e., *United States v. Riverside Bayview Homes*, 474 U.S. 122 (1985) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159(2001)). In *Rapanos*, the Supreme Court issued a split decision with four Justices agreeing to a plurality opinion written by Justice Antonin Scalia, with a separate concurring opinion from Justice Anthony Kennedy. As stated in the WAC comments, earlier Supreme Court precedent requires that in these split decisions "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds" (internal quotations omitted).[679] Justice Scalia's plurality interpreted the phrase "waters of the United States" to include only "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,]

[679] *Marks v. United States*, 430 U.S. at 188 and 193 (1977)

... oceans, rivers, [and] lakes," and would exclude "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[680] In contrast, Justice Kennedy focused on the "significant nexus to a traditionally navigable water", defined further as "more than speculative or insubstantial."[681] (p. 2)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

10.399 The concurring Justices continue with an additional definition related to adjacent wetlands. The plurality found that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act,".[682]Kennedy's opinion does not allow for jurisdiction based on "adjacency" to features that are not "major tributaries."[683] With respect to the non-navigable ditch at issue in *Carabell* (that was consolidated into *Rapanos*), Justice Kennedy's concurrence stated, "mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it."[684] In such situations, he found that "a more specific inquiry" was necessary.[685] Under the proposed rule, wetlands (and non-wetlands) that are adjacent to such remote and insubstantial tributaries (including jurisdictional ditches) would be per se jurisdictional. Asserting per se jurisdiction over any water or wetland within the floodplain or riparian area of a water of the United States directly contradicts Justice Kennedy's opinion. Based on WAC's assessment of the single *Rapanos* holding, the concurring Justices agreed that a mere hydrological connection is not enough to establish jurisdiction under the CWA, that the CW A does not extend to features distant from navigable waters and carrying only minor volumes of flow, and that there must be a meaningful relationship between non-abutting wetlands and traditionally navigable waters for those non-abutting wetlands to be jurisdictional.[686] In contrast, the Agencies focused primarily on Kennedy's concurring opinion and provided further support from the dissenting Justices in the proposed rule. The Agencies must evaluate the proposed rule in light of the single holding of *Rapanos* and amend as required by law. (p. 2-3)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII. The rule no longer provides that all

[680] *Rapanos*. 547 U.S. at 739.
[681] *Id* at 780
[682] *Id* at 742
[683] *Id* at 780.
[684] *Id* at 786.
[685] *Id.*
[686] WAC comments at page 16.

waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV

Washington County Water Conservancy District (Doc. #15536)

10.400 Riverside Bayview's holding is limited to adjacent wetlands. The Supreme Court first interpreted the phrase "waters of the United States" in 1985, In the case of *United States v. Riverside Bayview Homes, Inc.* (*Riverside Bayview*).[687] *Riverside Bayview* involved a wetland adjacent to a body of navigable water that was deemed jurisdictional because it was "inseparably bound up" with traditional navigable waters.[688] Noting that "the [Army] Corps must necessarily choose some point at which water ends and land begins,"[689] the Court upheld the Army Corps' interpretation of "the waters of the United States" to include wetlands that "actually abut[ted] on" traditional navigable waters.[690] *Riverside Bayview's* holding is limited to its facts, where "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway." Because the Court's holding was based on the uniquely inseparable nature of adjacent wetlands, it does not extend to other types of areas such as geographically-isolated ponds, non-adjacent wetlands, and other isolated areas. Thus, the Agencies' reliance on *Riverside Bayview* in the context of other types of waters is misplaced. (p. 5)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

10.401 Rapanos should be applied narrowly and consistently with prior Supreme Court decisions and CWA policies. Supreme Court's 2006 decision in *Rapanos v. United States* addressed the question of whether the Court's prior holding in *Riverside Bayview* regarding wetlands should be interpreted to include not only wetlands directly adjacent to navigable waters, but also wetlands adjacent to ditches and manmade drains that eventually drain into traditional navigable waters.[691] After reviewing two decisions by the Court of Appeals to affirm the Agencies' jurisdiction over such waters, a majority of the Justices in *Rapanos* agreed to remand both cases to the appellate court for further proceedings, but a majority could not agree on the grounds for remand. The Court's 4-1-4 decision included a plurality opinion authored by Justice Scalia, two concurring opinions authored by Chief Justice Roberts and Justice Kennedy, and two dissenting opinions authored by Justice Stevens and Justice Breyer.[692]

The two *Rapanos* opinions with the most legal significance are Justice Scalia's plurality opinion, which announced the judgment of the Court, and Justice Kennedy's concurring

[687] 474 U.S. 121, 134-35 (1985) ("Riverside Bayview").
[688] *Id*. at 131-34
[689] *Id*. at 132.
[690] *Id*. at 135
[691] *Rapanos v. United States*, 547 U.S. 715, 730 (2006).
[692] Justices Souter, Ginsburg, and Breyer joined in Justice Stevens' dissent.

opinion, which concurred in the judgment but not in the rationale underlying the plurality opinion. As described in Justice Scalia's plurality opinion, CWA jurisdiction would extend only to "relatively permanent, standing, or continuously flowing bodies of water" connected to traditional navigable waters, and to wetlands with a continuous surface connection to such relatively permanent water. The plurality opinion states that jurisdictional waters "do[] not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[693] In contrast, Justice Kennedy's concurring opinion announced an alternative rationale for remanding to the Court of Appeals. Under Justice Kennedy's opinion, CWA jurisdiction would extend to wetlands adjacent to waters that have a "significant nexus" to traditional navigable waters.[694]

Unlike *SWANCC*, which included an express holding adopted by a majority of the Supreme Court, *Rapanos* did not provide a clear holding for courts and the regulated community to follow.[695] Because the majority in *Rapanos* agreed only to the outcome and not to the grounds for the remand, it is unknown how the Supreme Court will ultimately apply *Rapanos* to different facts. Various members of the Supreme Court offered differing interpretations of the holding in *Rapanos*. For example, Justice Roberts found it "unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the [CWA]," noting that "[l]ower courts and regulated entities will now have to feel their way on a case-by case basis."[696] The appellate courts have also offered differing interpretations of the holding in *Rapanos*.[697] The Supreme Court has denied petitions seeking review of various lower court decisions interpreting *Rapanos*, but the Court's decisions to decline review have no precedential weight. In the

[693] *Rapanos*, 547 U.S. at 739

[694] *Id*. at 779 (citing 33 U.S.C. § 1251(a)).

[695] The Court's decision included a plurality opinion authored by Justice Scalia, two concurring opinions authored by Chief Justice Roberts and Justice Kennedy, and two dissenting opinions authored by Justice Stevens and Justice Breyer. Justices Souter, Ginsburg, and Breyer joined in Justice Stevens' dissent. Justice Roberts concurred in the grounds and the result as stated in Justice Scalia's plurality opinion, while Justice Kennedy filed an opinion concurring in the result but offering a different rationale for remand.

[696] *Rapanos*, 547 U.S. at 758.

[697] Since the *Rapanos* decision, the U.S. Courts of Appeal for the Seventh, Ninth, and Eleventh Circuits have concluded that Justice Kennedy's concurrency provides the controlling test of CWA jurisdiction, relying on *Marks v. United States*, which found that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the 'holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). See also, *United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2006), cert. denied, 552 U.S. 810 (2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008); *United States v. Robison*, 505 F.3d 1208, 1211 (11th Cir. 2007). In contrast, the U.S. Courts of Appeal for the First Circuit concluded that CWA jurisdiction may be found under either the plurality or Kennedy tests. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), cert. denied, 552 U.S. 948 (2007) (reversing lower court ruling finding of a CWA violation by cranberry bog farmers and remanding for fact finding on whether waters were jurisdictional under plurality or Kennedy opinion).

Supreme Court's words, such decisions carry "no implication whatever regarding the Court's views on the merits of a case which it has declined to review."[698]

Thus, it is unclear how *Rapanos* should be applied; even in cases involving the same set of facts presented in that case—wetlands adjacent to ditches and manmade drains that drain into traditional navigable waters. It is even less clear how *Rapanos* should be applied to other areas. Because *Rapanos* does not clearly address whether even an adjacent wetland is jurisdictional, it cannot support the Agencies' assertion of jurisdiction over areas with more attenuated connections to traditional navigable waters than adjacent wetlands.

In short, the Agencies cannot rely on *Rapanos* for their exercise of jurisdiction over nonadjacent and non-wetland areas. *Rapanos* did not overturn *SWANCC* or any of the Court's other decisions addressing jurisdiction under the CWA. Given the limitations and uncertainty regarding the scope of the holding in *Rapanos*, the Agencies should apply an interpretation of *Rapanos* that best comports with *SWANCC* and other cases in which a majority of the Court adopted a clear holding, and which best comports with all of the CWA's policies, not just its ecological goals. Because the Proposed Rule fails to apply such an interpretation, it must be revised. (p. 6-8)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

National Wildlife Federation (Doc. #15020)

10.402 We support the agencies' proposed rule that "all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section are "waters of the United States" by rule, because adjacent waters are "integrally linked to the chemical, physical, or biological functions of the (a)(1) through (a)(5) waterbodies to which they are adjacent." See 33 CFR 328.3(a)(6); 79 Fed. Reg. at 22206-7.

The proposed rule is strongly supported by the draft Connectivity Report, which thoroughly documents and supports its conclusion that: "[w]etlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open- waters in riparian areas and floodplains) are physically, chemically, and biologically connected with rivers" through multiple processes, and that they "serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters." Connectivity Report at 1-3. The SAB Connectivity Peer Review Report supports this conclusion at 5 concluding that there is strong scientific support for the overall conclusion that "bidirectional" wetlands and waters in floodplain settings are physically,

[698] *Maryland v. Balt. Radio Show, Inc*., 338 U.S. 912, 919 (1950). See also *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) ("Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" (citing United States v. Carver, 260 U.S. 482, 490 (1923))).

chemically, and biologically connected with rivers through multiple pathways. Additional literature could be included in the Report to bolster this conclusion and related findings.

The scientific evidence also demonstrates that shallow groundwater connections serve as hydrologic connections between surface waters and should be considered in assessing connectivity and effects on downstream waters. See, e.g., Connectivity Report at 1-7 to 1-14. This principle is scientifically sound and widely accepted as legally sound as well.[699]

The agencies' finding that all adjacent waters have a significant nexus to downstream waters and are jurisdictional by rule is fully consistent with and relevant to Justice Kennedy's significant nexus test. Justice Kennedy sets forth a clear framework for establishing adjacent waters and other categories of waters as jurisdictional by rule. First, he defines "significant nexus" and establishes significant nexus as the "touchstone for CWA jurisdiction." See *Rapanos*, supra, at 780 (defining significant nexus); 79 Fed. Reg. at 22209.

Justice Kennedy then provides that the agencies can, through regulation or adjudication identify categories of waters that "are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos* at 780-81. The agencies rightly conclude, based on the scientific evidence, that "all adjacent waters should be jurisdictional by rule because the discharge of many pollutants (such as nutrients, petroleum wastes, and other toxic pollutants) into adjacent waters often flow into and thereby pollute the traditional navigable waters, interstate waters, and the territorial seas." Therefore, "adjacent waters, as defined in the proposed rule, "are likely,

[699] See, *Healdsburg*, 496 F.3d at 1000 (citing to underground hydrologic connections as a basis for establishing a significance nexus between two bodies under Justice Kennedy's standard); *United States v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997) (finding that wetlands that were at least one half mile from navigable waters were jurisdictional due to a hydrologic connection that "was primarily through groundwater, but also occurred through surface water during storms"); *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983) (finding that wetlands with rare surface water connections, but demonstrated ecological and subsurface hydrological connections, were jurisdictional); see also, *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. *Id*. 2001) ("[T]he interpretive history of the CWA only supports the unremarkable proposition with which all courts agree – that the CWA does not regulate 'isolated/nontributary' groundwater which has no affect on surface water. It does not suggest that Congress intended to exclude from regulation discharges into hydrologically connected groundwater which adversely affect surface water. For these reasons, the Court finds that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States.") (citations omitted); *Quivira v. EPA*, 765 F.2d 126 (10th Cir. 1985) (arroyo with continuous groundwater connection and occasional surface water connection to downstream jurisdictional waters protected under the Act); *Washington Wilderness Coalition v. Hecla*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("[S]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit."); *Sierra Club v. Colorado Refining Company*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (where the Judge stated that, "I conclude that the Clean Water Act's preclusion of the discharge of any pollutant into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater.") (citations omitted); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D.Ca. 1988), vacated and remanded on other grounds, *M.E.S.S. v. Perry*, 47 F.3d 325 (9th Cir. 1995), cert. denied, 516 U.S. 807 (1995) (where the Court found that discharges to groundwater could be regulated under the Act if "discharges from the waste pits have an effect on surface waters of the United States" and it could be established that the groundwater was "naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act").

in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos* at 781-82. 79 Fed. Reg. at 22210. (p. 43-45)

Agency Response: **Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII.**

10.403 The 2003 [*SWANNC*] and 2008 [*Rapanos*] Guidances, and their application in the field, have put millions of adjacent wetlands at risk through a combination of flawed guidance and bad calls in the field. Here are just a few examples:

Forested wetlands, Coastal South Carolina – Corps determinations in 2002, 2003, and 2005 each found this 32-acre wetland site "isolated," with no surface water connection to nearby tributaries, and therefore not subject to Clean Water Act jurisdiction due to *SWANCC* and the *SWANCC* Guidance.[700] It was not until a citizen suit challenged the Corps' 2005 non-jurisdictional determination that the Corps and EPA conducted a series of field inspections that confirmed that the wetlands site was, in fact, adjacent to a tributary that ultimately flowed to a TNW, Collins Creek. In November 2010, the Corps ultimately found this adjacent wetland jurisdictional, documenting that this wetland, in combination with similarly situated adjacent wetlands identified along the tributary reach, had a significant nexus with a TNW-Collins Creek. This 2010 significant nexus analysis confirmed jurisdiction despite the fact that the aggregation of wetlands was artificially limited to the stream reach due to the constraints of the existing flawed guidance.[701]

Forested wetlands, Coastal Georgia – Following *SWANCC*, the Corps accepted a mining company assertion that it did not a permit to destroy over 300 wetland acres in the Satilla River basin near the Okefenokee Swamp because those wetlands were "isolated" from other wetlands by a dirt road. It was left to environmental groups to demonstrate that many of the wetlands drained into a working culvert that went under a dirt road and linked the 300 acres of wetlands to other waterways downstream. Only after months of communications and the threat of litigation did the Corps finally reverse its non-jurisdictional determination.[702] Careful implementation of the Corps' adjacency definition pursuant to this rule should prevent the wasted time and resources, as well as the potential wetland loss, associated with this flawed non-jurisdictional determination.

Sedge wetlands, Eastern Front Range, Colorado – In 2007, the Corps found "isolated" and non-jurisdictional a series of wetlands because they were geographically cut off from

[700] Charleston District, Army Corps of Engineers, Memorandum to Assert Jurisdiction for SAC 2005-41222-3JI (f.k.a. 87-2005-0575-3 Spectre LLC) (November 1, 2010) (2010 Spectre LLC Jurisdiction Memorandum) at 1. See also, Earthjustice, et al. Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It. (April 2009), at 5-6; Connolly, Kim D., The Effects of the *SWANCC* and *Rapanos* Supreme Court Rulings on South Carolina Waters, at 4-6 (2010) (prepared for National Wildlife Federation, Trout Unlimited, and Ducks Unlimited).

[701] *Id*. at 2-8.

[702] Courting Disaster at 13. See also, Courting Disaster at 20 citing EPA and Corps Memorandum to Assert Jurisdiction for SAS-2007-670 (February 12, 2008) (Agencies ultimately reversed non-jurisdiction determination for barrier island interdunal freshwater wetlands later found to be part of a connected interdunal system and hydrologically connected to the tidal Julienton and Little Mud Rivers.)

their historic Little Dry Creek drainage by a small low-level dam. This example is not an isolated one, but part of a pattern of similar non-jurisdictional determinations along the eastern front range.[703] "[O]ften the difference between wetlands receiving CWA protection or not depends on whether they abut a RPW or a TNW. If they do not, under current Corps practices, they likely will be designated non-jurisdictional regardless of whether they may be in the same floodplain or drainage and providing many if not all of the same functions."[704] A functional approach to adjacency in the final rule should require a more careful consideration of these wetlands and their likely ground water recharge, flood flow retention, and wildlife connections within the floodplain and the watershed.

Adjacent wetland, West Tennessee – In 2007, the Corps found non-jurisdictional a wetland that existed "only feet" from the confluence of the Reelfoot, North Reelfoot, and Cane Creek streams that flow through the Reelfoot National Wildlife Refuge.[705] "Given the proximity of the contested wetland to the stream, the destruction of the wetland site and loss of the wetland's water quality functions could significantly impact the stream and the refuge by introducing pollutants into the waterways."[706] (p. 53-55)

Agency Response: The rule provides for increased clarity and certainty. Preamble, II and IV.

Natural Resources Defense Council (Doc. #15437)

10.404 EPA and the Corps further propose to define the term "waters of the United States" as including all waters, including wetlands, adjacent to traditionally navigable waters, interstate waters, the territorial seas, impoundments of those same waters, and tributaries.[707] Wetlands, in turn, are defined (as they long have been) as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." And "adjacent" means "bordering, contiguous or neighboring," including waters that are separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like.[708] This proposal amply satisfies the criteria that Justice Kennedy laid out in his *Rapanos* opinion.

[703] Buechler, Dennis, Five Case Studies on the Effects of the *SWANCC* and *Rapanos* Supreme Court Rulings on Colorado Wetlands and Streams, at 19-22 (prepared for National Wildlife Federation, Trout Unlimited, and Ducks Unlimited) (February 2010).
[704] *Id*. at 22.
[705] Siedschlag, Greg, et al, Five Case Studies on the Effects of the *SWANCC* and *Rapanos* Supreme Court Rulings on Tennessee Waterways, at 9 (prepared for National Wildlife Federation, Trout Unlimited, and Ducks Unlimited) (January 2010).
[706] *Id*. at 10.
[707] See 79 Fed. Reg. at 22,269 (proposed 40 C.F.R. § 230.3(s)(6)). We strongly support the agencies' inclusion of adjacent waters generally, as opposed to simply adjacent wetlands, in this provision. Both the Connectivity Report and the SAB find that adjacent waters have a variety of critical connections to downstream waters, without limiting that analysis to adjacent wetlands.
[708] We support the agencies' proposal to eliminate the confusing parenthetical expression "other than waters that are themselves wetlands" from the adjacent waters provision. As proposed, the rule would not provide jurisdiction over waters adjacent to so-called "isolated" waters based solely on their adjacency. As that was the purpose of the

First, Justice Kennedy stated that wetlands' significant nexus can be analyzed "either alone or in combination with similarly situated lands in the region."[709] In other words, the significant nexus test can justify jurisdiction over either individual wetlands or categories of waters is "sustainable under the Act by showing adjacency alone," as adjacency to such waters supports a "reasonable inference of ecologic interconnection."[710] According to Justice Kennedy, it may also be reasonable to infer a significant nexus, and therefore CWA jurisdiction, for waters adjacent to "certain major tributaries" if the agencies determine that such tributaries are "significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."[711] For wetlands adjacent to other, "minor" tributaries, however, the agencies cannot assume without evidence that adjacent wetlands play an important enough "role in the integrity of an aquatic system."[712] For this reason, Justice Kennedy required a case-by-case analysis for such waters "absent more specific regulations."[713] This limited requirement – designed "to avoid unreasonable applications of the statute"[714]– thus permits the agencies to reasonably assert jurisdiction over waters adjacent to non-navigable tributaries through regulations, based on scientific evidence.

EPA and the Corps have put forth those "more specific regulations," supported by overwhelming scientific evidence, in this proposal.[715] With regard to waters adjacent to tributaries, the agencies have now determined, using their expert judgment and the available science, that waters adjacent to all tributaries have a significant nexus to traditionally navigable waters. The proposed provision is consistent with Justice Kennedy's interpretation of the Clean Water Act, as jurisdiction is not based on "assumptions" like the ones against which he warned, but rather on a detailed review of relevant science.

EPA's Connectivity Report explains the reasons why adjacent waters – which it refers to as waters located in floodplains and riparian areas with "bidirectional hydrologic exchanges with streams or rivers" – have important effects on downstream waters as follows:

> "Wetlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open-waters in riparian areas and floodplains) are physically, chemically, and biologically connected with rivers via the export of channel-forming sediment and woody

provision initially, see 79 Fed. Reg. at 22,209, the provision is unneeded. Moreover, because the proposal recognizes that wetlands can serve as tributaries, wetlands and other waters adjacent to those tributary wetlands should be jurisdictional by rule, something that this outdated provision would have prevented.

[709] *Rapanos*, 547 U.S. at 780.

[710] *Id*.

[711] *Id*. at 780-81.

[712] *Id*. at 781.

[713] *Id*. at 782.

[714] *Id*.

[715] We do not discuss here the assertion of jurisdiction over waters adjacent to the first four types of waters listed in the proposed definition: navigable-in-fact waters, interstate waters, the territorial seas, and impoundments of those waters. Those provisions were not at issue in *Rapanos* and we submit that *Riverside Bayview* provides the applicable precedent for jurisdiction over those kinds of features.

> debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus (P). They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters."[716]

These conclusions are irrefutable based on the literature summarized in Chapter 5 of the report. The material presented in the report is more than sufficient to conclude that adjacent waters, including wetlands, are highly connected to downstream waters. For example, "Riparian areas act as buffers that are among the most effective tools for mitigating nonpoint source pollution."[717] These adjacent waters "connect upland and aquatic environments through both surface and subsurface hydrologic flow paths," and they "can reduce flood peaks by storing and desynchronizing floodwaters."[718]

These findings have been confirmed by the Science Advisory Board in its peer review of the Connectivity Report. The SAB found "that the literature review substantiates the Report's conclusion that floodplains and waters and wetlands in floodplain settings support the physical, chemical and biological integrity of downstream waters."[719] In its review of the proposed rule, the SAB reaffirmed this conclusion: "adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters."[720]

Critically, the definition of "adjacent" that the agencies have proposed is consistent with the Connectivity Report's scientific criteria for "bidirectional" waters in riparian areas and floodplains, the criteria that circumscribe the waters to which the above conclusions apply.[721] The regulatory proposal defines "adjacent" to mean "bordering, contiguous or neighboring." "Neighboring" is the most inclusive of these terms and is defined as "waters located within the riparian area or floodplain of a water identified in paragraphs (1) through (5) of this section [traditionally navigable waters, interstate waters, the territorial seas, impoundments of those same waters, and tributaries], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." The Connectivity Report, in turn, draws the above-stated conclusions about waters "in landscape settings that have bidirectional hydrologic

[716] Connectivity Report at 1-3.
[717] *Id*. at 1-9.
[718] *Id*.
[719] SAB Connectivity Review at 4.
[720] SAB Rule Review at 2.
[721] Although the SAB recommends that the final Connectivity Report move away from using the term "bidirectional" and instead refer to "waters and wetlands in floodplain settings" to better reflect the geographic position of the waters in question, and although it also suggests discussing riparian areas largely in the Report's section on streams, SAB Connectivity Review at 4, it is noteworthy that the SAB did not question the inclusion of riparian waters in the definition of "adjacent" waters. See SAB Rule Review at 2-3.

exchanges with streams or rivers (e.g., wetlands and open-waters in riparian areas and floodplains)."[722]

Finally, the proposal's definitions for riparian areas and floodplains also closely align with those used in the Connectivity Report.[723] The upshot is that there is enormous overlap between the proposal's "adjacent waters" and those waters that the Connectivity Report states "are physically, chemically, and biologically connected" with navigable waters.[724] The Connectivity Report therefore amply supports, as it does with regard to tributaries, the conclusion that adjacent waters have scientifically proven effects, which are beyond significant, on other covered waters. These findings justify and in fact require that the proposal's categorical protections for adjacent waters be included in the final rule. (p. 34-37)

Agency Response: **The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. Preamble, IV. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII.**

Waterkeeper Alliance et al. (Doc. # 16413)

10.405 EPA has a longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. To be sure, in EPA's repeated expressions of that interpretation over the past 24 years, the Agency has not said that groundwater is a water of the United States, but rather that discharges to waters of the United States through groundwater may be covered by the CWA if the hydrologic connection is direct. That interpretation was not at issue in any of the Supreme Court decisions or called into question by those decisions, and EPA is, wisely, not undertaking to revisit that interpretation in the current rulemaking.

Indeed, EPA could not revisit that issue in the final rule because it did not propose to do so in the April 21, 2014 Notice of Proposed Rulemaking, and such a change would not be

[722] Connectivity Report at 1-9.

[723] Compare the proposal's definition of "riparian area" ("transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems") with Connectivity Report at 3-4 ("Riparian areas are transition zones between terrestrial and aquatic ecosystems … [and] include those portions of terrestrial ecosystems that that significantly influence exchanges of energy and matter with aquatic ecosystems.") (internal citations omitted); compare the proposal's definition of "floodplain" ("an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows") with Connectivity Report at 3-4 ("Floodplains are level areas bordering stream or river channels that are formed by sediment deposition from those channels under present climatic conditions. These natural geomorphic features are inundated during moderate to high water events.").

[724] Connectivity Report at 1-9.

a logical outgrowth of that notice.[725] Moreover, the proposed rule provides further scientific support for EPA's longstanding and consistent interpretation concerning discharges via groundwater in that it extensively discusses the critical role that groundwater plays in establishing hydrological, chemical, and biological connections between surface waterbodies.[726]

To aid in clarity, the agencies should confirm in their response to comments that nothing in this rule alters EPA's longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water. Such confirmation may be useful, for example, to those who might otherwise confuse the issue of discharges to surface waters "via groundwater" with the separate issues of: (1) whether certain surface waters, including wetlands, are waters of the United States due to their subsurface connection to a jurisdictional water; or (2) whether certain groundwaters might themselves be considered waters of the United States under the significant nexus test.

While the EPA is well aware of its own pronouncements in the Federal Register and elsewhere, we review them here for the record, along with federal court decisions on this issue. As EPA explained to Congress in 2012:

> "The EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water."[727]

EPA has expressed that longstanding and consistent interpretation in final regulations published in the Federal Register following notice–and–comment rulemaking, in individual and general National Pollution Discharge Elimination System ("NPDES") permits issued by EPA, in a brief filed by the Department of Justice on behalf of EPA in federal district court, and in the memorandum to Congress quoted above. In addition, the vast majority of federal courts that have considered the issue have likewise found that the CWA may cover discharges into directly hydrologically connected groundwater, if such connection can be demonstrated. (p. 43-45)

Agency Response: **EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of "waters of the United States."**

[725] Furthermore, Any attempt to revisit that interpretation in the future would face a heavy burden given that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza--- Fonseca*, 480 U.S. 421, 446 n.30 (1987).

[726] See, e.g., 79 Fed. Reg. at 22196, 22207--- 08, 22222, 22242, and 22248.

[727] Letter from Arvin Ganesan to Hon. John L. Mica, Enclosure at 1, dated Feb. 13, 2012 (internal footnotes omitted).

10.406 The earliest rulemaking decision of which we are aware came in 1990, in a final stormwater rule, in which EPA responded to a public comment concerning CWA jurisdiction by stating: "…discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body…)."[728]

The following year, in a final water quality standards regulation for Indian reservations, EPA explained the issue in slightly more detail:

> "EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters … because such discharges are effectively discharges to the directly connected surface waters. Second, it is EPA's long---established position that water quality standards are required for certain underground segments of surface waters. See *Kentucky v. Train*, 9 ERC 1280 (E.D. Kentucky 1972). In such streams, the subterranean component must be sufficiently stream---like so as to possibly allow the passage of fish and other aquatic organisms from a surface segment of the stream into the underground segment."[729]

In 1998, again in a final stormwater rule, EPA reiterated:

> "EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection ("hydrologically connected") between the groundwater and the surface water."[730]

Following those three 1990s rulemakings, EPA articulated its interpretation and legal analysis at considerable length in a 2001 proposed rule for CAFOs. Under the heading "Applicability of the Regulations to Operations That Have a Direct Hydrologic Connection to Ground Water," EPA stated:

> "Because of its relevance to today's proposal, EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water."[731]

Under the heading "Legal Basis," in a detailed and extensive analysis, EPA explained its statutory authority to "determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act," and why "the Act is best interpreted to cover such discharges."

EPA's extensive legal analysis was comprehensive. First, EPA framed the legal issue. Rather than asking whether groundwater is regulated under the Clean Water Act (as a

[728] 55 Fed. Reg. 47990, 47997 (col. 3) (Nov. 16, 1990) (citations omitted).
[729] 56 Fed. Reg. 64876, 64892 (col. 3) (Dec. 12, 1991).
[730] 63 Fed. Reg. 7858, 7881 (col. 2) (Feb. 17, 1998).
[731] 66 Fed. Reg. 2960, 3015 (col. 1) (Jan. 12, 2001).

point source or as a water of the United States), EPA asked "whether a discharge to surface waters via hydrologically connected ground water is unlawful." EPA stated that it:

> "…does not argue that the CWA directly regulates ground water quality. . . the question of whether Congress intended the NPDES program to regulate ground water quality . . . is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water."[732]

Exercising its authority to "fill gaps in the statutory framework." EPA reasoned that excluding discharges that occur via groundwater would create a loophole inconsistent with the CWA's statutory purposes:

> "[T]he Act is best interpreted to covers such discharges…An interpretation of the CWA which excludes regulation of point source discharges to the waters of the U.S. which occur via groundwater would…be inconsistent with the overall Congressional goals expressed in the statute…[T]here is no evidence that Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water."[733]

To reach this conclusion, EPA "utilized its expertise in environmental science and policy to determine the proper scope of the CWA," as well as the policymaking authority delegated by Congress.[734] "Given the Agency's knowledge of the hydrologic cycle and aquatic ecosystems, the Agency has determined that when it is reasonably likely that such discharges will reach surface waters, the goals of the CWA can only be fulfilled if those discharges are regulated."[735] Applying that knowledge of hydrology and aquatic ecosystems, EPA further explained that the existence of a hydrologic connection is a question of fact: "The determination of whether a particular discharge to surface waters via ground water which has a direct hydrological connection which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations."[736] To assure itself that its reasoning was sound and well-grounded, EPA examined the legislative history and found it consistent with EPA's interpretation: "Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible discharges which entered the 'navigable waters.'"[737] EPA also found that the courts agree: "[T]he majority of courts have determined that CWA jurisdiction may extend to surface water discharges via hydrologic connections…The decisions which did not find authority to regulate such discharges under the CWA may, for the most part, be distinguished."[738]

In 2003, EPA finalized that CAFO rule, which the U.S. Court of Appeals reviewed in Waterkeeper *Alliance, Inc. v. U.S. E.P.A.*[739] In that case, the Second Circuit explained

[732] *Id*. at 3015--- 3016.
[733] *Id*.
[734] *Id*. at 3018 (col. 1).
[735] *Id*. at 3018 (col. 1- 2).
[736] *Id*. at 3017 (col. 1).
[737] *Id*. at 3016 (col. 2).
[738] *Id*. at 3017 (col. 2- 3).
[739] 399 F.3d 486 (2d Cir. 2005).

that the shift from certain uniform national requirements governing discharges to surface waters via groundwater (in the proposed rule) to fully case-by-case determinations of hydrologic connection (in the final rule) did not alter EPA's position on the scope of the CWA:

> "It is thus clear that when the EPA stated, in the Preamble to the Final Rule, that 'requirements limiting the discharge of pollutants to surface water via groundwater…are beyond the scope of today's ELGs,' Preamble to the Final Rule at 7216, the EPA meant only that uniform national requirements are beyond the scope of today's ELGs. The EPA did not, in other words, mean to suggest that NPDES authorities lacked the power to impose groundwater-related requirements on a case-by-case basis, where necessary." (p. 45-49)

Agency Response: **EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of "waters of the United States."**

10.407 In 2011, EPA issued a NPDES permit to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site "has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtillotte Creek."[740]

EPA explained:

> "Based on the modeling and the porosity of the soil, the first of the new discharge plume would take 3 to 5 years to reach the creek and l3 to 21 years before the entire breadth of the plume reaches the creek. However, since the existing facility had been discharging to the groundwater since the facility began operations in the 1970's, the existing discharge plume is already reaching Tourtillotte Creek."[741]

EPA has permitted other facilities on a similar basis.[742]

As noted above, EPA expressed its position on this issue directly to Congress. In 2012, an EPA Associate Administrator responded to questions posed by U.S. Representative John L. Mica, in a memorandum, which EPA stated:

> "The EPA has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water…Whether or not such a hydrological connection exists, and the need for a

[740] EPA Region 5, NPDES Permit No. WI0073059 Fact Sheet (April 2011) at 2.
[741] *Id*.
[742] See, e.g., EPA Region 6, NPDES Permit No. NM0022306 Fact Sheet for Molycorp Mine (May 2006) at 4- 6; see also *id*. at 7 describing NPDES permits issued to U.S. Liquids of Louisiana, Ltd. in 1999, Texas Eastman in 1976, and a CAFO general permit in 1993.

> National Pollutant Discharge Elimination System (NPDES) permit for any given source, is highly dependent on the facts and circumstances surrounding each permitting situation…A number of factors are relevant in evaluating the connection between ground water and surface water, such as geology, flow and slope. A fact-specific evaluation could support a determination that an NPDES permit is required…."[743]

In 2012, the U.S. Department of Justice, on behalf of EPA, confirmed to a federal district court that:

> "There can be circumstances where a discharge to groundwater, or even a discharge to soil which eventually leads to groundwater, is so directly and immediately connected hydrologically to surface water that a NPDES permit is required…Accordingly, specific [discharges] can, under given circumstances, be found to be subject to NPDES permitting requirements."[744] (p. 49-51)

Agency Response: **EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of "waters of the United States."**

10.408 In numerous cases, federal courts around the country have reached similar conclusion as EPA and DOJ, upholding CWA jurisdiction over discharges of pollutants to surface waters that occur via groundwater.

As noted above, in *Waterkeeper Alliance, Inc. v. U.S. EPA*, the Second Circuit upheld EPA's requirements for the discharge of pollutants from CAFOs to surface water via groundwater to be regulated, "as necessary, on a case-by-case basis."[745] The court found "sufficient record support for EPA's determination that groundwater---related requirements are better imposed on a case-by-case basis," given "that variability in topography, climate, distance to surface water, and geologic factors influence whether and how pollutant discharges at a particular site enter surface water via groundwater."[746]

An overwhelming majority of other courts are in accord. At least 18 federal decisions have held that the CWA covers discharges to surface waters via hydrologically connected groundwater. The reasoning behind these decisions is clear: Congress did not intend to exempt from the CWA "the introduction of pollutants into the groundwater [that] adversely affects the adjoining surface waters."[747] As one court explained:

> "It would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank,

[743] Letter from Arvin Ganesan to Hon. John L. Mica, Enclosure at 1, dated Feb. 13, 2012 (internal footnotes omitted).
[744] EPA Mem. in Support of Def.'s Mtn. for Summ. Judgment at 18--- 19, filed in *Conservation Law Found. v. EPA*, No. 10--- cv--- 11455 (D. Mass., Sept. 21, 2012).
[745] *Waterkeeper Alliance*, 399 F.3d at 514--- 15 n.26.
[746] *Id*. at 515.
[747] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001).

> but not a polluter who dumps the same pollutants into a man---made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater."[748]

Notably after EPA's comprehensive discussion of the issue in its 2001 rulemaking, courts typically have deferred to that interpretation.[749]

The 18 federal court decisions of which we are aware, in addition to *Waterkeeper Alliance v. U.S. EPA*, finding that the CWA may cover discharges of pollutants to surface waters that occur via groundwater having a direct hydrologic connection are:

- *Dague v. City of Burlington*, 935 F.2d 1343, 1347, 1355 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992) (where a city allowed groundwater to flow through contaminants in its landfill and then to migrate beyond the landfill boundaries into a pond and wetlands that were waters of the United States, court of appeals held that "district court's conclusion that the city discharged pollutants into navigable waters from a point source properly applied the statute");
- *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (CWA "authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters"), overruled on other grounds by *City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983);
- *Hawai'i Wildlife Fund v. County of Maui*, No. 12---00198 SOM/BMK, 2014 U.S. Dist. LEXIS 74256, *35 (D. Hawaii May 30, 2014) ("liability arises even if the groundwater under the [sewage treatment facility] is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water");
- *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc*., No. 1:10-00084, 2011 U.S. Dist. LEXIS 39280, *49 (M.D. Tenn. Apr. 8, 2011) ("groundwater is subject to the CWA provided an impact [sic] on federal waters");
- *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) (referring to EPA's interpretation and stating "there is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to" the CWA);
- *Northwest Envtl. Def. Ctr. v. Grabhorn, Inc*., No. CV---08---548---ST, 2009 U.S. Dist. LEXIS 101359, *34 (D. Or. Oct. 30, 2009) ("In light of the EPA's regulatory pronouncements,…CWA covers discharges to navigable surface waters via hydrologically connected groundwater");

[748] *N. Cal. Riverwatch v. Mercer Fraser Co*., No. C--- 04--- 4620 SC, 2005 U.S. Dist. LEXIS 42997, *7 (N.D. Cal. Sept. 1, 2005).
[749] *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009).

- *Hernandez v. Esso Std. Oil Co*. (P.R.), 599 F. Supp. 2d 175, 181 (D.P.R. 2009) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States");
- *Coldani v. Hamm*, 2007 U.S. Dist. LEXIS 62644, *25 (E.D. Cal. Aug. 14, 2007) ("because Coldani has alleged that Lima Ranch polluted groundwater that is hydrologically connected to surface waters that constitute navigable waters, he has sufficiently alleged a claim within the purview of the CWA");
- *N. Cal. Riverwatch v. Mercer Fraser Co*., No. C-04-4620 SC, 2005 U.S. Dist. LEXIS 42997, *7 (N.D. Cal. Sept. 1, 2005) ("the regulations of the CWA do encompass the discharge of pollutants from wastewater basins to navigable waters via connecting groundwaters");
- *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States");
- *Mutual Life Ins. Co. of New York v. Mobil Corp*., No. 96-CV-1781, 1998 U.S. Dist. LEXIS 4513, at *6-*8 (N.D.N.Y. Mar. 31, 1998) (court denied motion to dismiss complaint alleging a hydrological connection, explaining that "plaintiff ultimately will have to prove a link between contaminated ground waters and navigable waters…");
- *Friends of the Coast Fork v. County of Lane*, No. 95-6105-TC, 1997 U.S. Dist. LEXIS 22705, *8 (D. Or. Jan. 31, 1997) ("Defendant violated the CWA by discharging pollutants…into the groundwater which is hydrologically connected to the surface water");
- *Williams Pipe Line Co. v. Bayer Corp*., 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) ("Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater");
- *Friends of Santa Fe Cnty. v. LAC Minerals, Inc*., 892 F. Supp. 1333, 1358 (D.N.M. 1995) ("[T]he Tenth Circuit's expansive construction of the Clean Water Act's jurisdictional reach…foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters");
- *Wash. Wilderness Coal. v. Hecla Mining Co*., 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation");
- *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("allegations that [defendant] has and continues to discharge pollutants into the soils and groundwater.which then make their way to [a surface water] through the groundwater state a cause of action under the Clean Water Act");
- *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988) (plaintiff can prevail by showing discharges into "groundwater

[that] is naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act"), vacated on other grounds, 47 F.3d 325 (9th Cir. 1995); and

- *New York v. United States,* 620 F. Supp. 374, 380---81 (E.D.N.Y. 1985) (where State of New York asserted a claim under the CWA for an unpermitted discharge to surface water occurring via groundwater, declined to reach defendant's argument that the CWA does not apply to groundwater, "since it is clear that plaintiff has alleged that the [subsurface discharges] threaten to contaminate… navigable waters").

While a few decisions have found groundwater-related claims to be beyond the reach of the CWA, most of those cases pre-date EPA's 2001 explanation of the CWA's authority over hydrologically connected groundwater. Furthermore, the few contrary cases typically arose in situations where a hydrological connection to surface water had not been pled, was remote or entirely unproven, the plaintiff claimed that the CWA applies to all discharges to groundwater, or the court construed the issue as such. The most notable pre-2001 case is *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc*.[750] But the holding in *Umatilla* depended heavily on the absence – at that time – of an authoritative statement from EPA.[751] Indeed, in the wake of EPA's 2001 determination, the same court (the District of Oregon) disavowed *Umatilla*: "contrary to Umatilla, the CWA covers discharges to navigable surface waters via hydrologically connected groundwater."[752]

The current rulemaking does not alter EPA's longstanding and consistent interpretation. The agencies should acknowledge that fact in their response to comments on the Proposed Definition. (p. 50-56)

Agency Response: **EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of "waters of the United States."**

Southeastern Legal Foundation, Inc. (Doc. #16592)

10.409 The question of how far a wetland can be from Traditional Waters and still be jurisdictional was addressed in Riverside (wetlands abutting Traditional Waters are jurisdictional), *SWANCC* (isolated, non-navigable waters are not jurisdictional), and *Rapanos*. In *Rapanos*, Justice Kennedy's concurrence was instructive on the question: "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote or insubstantial, that may eventually flow into traditionally navigable waters. The deference owed to the Corps' interpretation of the statute does not

[750] *Umatilla Waterquality Protective Ass'n. Inc. v. Smith Frozen Foods, Inc*., 962 F. Supp. 1312, 1316--- 20 (D. Or. 1997).
[751] See *id*. at 1317, 1319, 1320 ("these considerations … would not signify if Congress or EPA had clearly spoken to the issue of groundwater coverage.").
[752] *Northwest Envtl. Def. Ctr.v. Grabhorn, Inc*., 2009 U.S. Dist. LEXIS 101359, *34 (D. Or. Oct. 30, 2009).

extend so far."[753] Then, as if looking into a crystal ball, Justice Kennedy admonished the Corps for claiming what it now includes in the Proposed Rule. 'The Corps' theory of jurisdiction ...-adjacency to tributaries, however remote and insubstantial - raises concerns that go beyond the holding of *Riverside Bayview*…"[754]

The Proposed Rule defines adjacent as "bordering, contiguous, or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'" Nested within that definition is the concept of "neighboring" - a location distinct from both "bordering" and "contiguous." Neighboring is also a newly defined term. "The term neighboring, for purposes of the term 'adjacent' in this section, includes waters located within the riparian area or floodplain of [Traditional Waters or tributaries, as defined in the Proposed Rule], or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water."

As an initial matter, we know from *Rapanos* that wetlands adjacent to non-navigable tributaries are not necessarily jurisdictional. We also know that deference was not due to "the Corps' definition of 'adjacent,' which ... ha[d] been extended beyond reason.... "[755] Yet, that is exactly what the Proposed Rule intends: all waters adjacent to tributaries are per se jurisdictional with no further inquiry. For this reason alone, SLF submits that the Proposed Rule must be withdrawn.

In addition, a recent Sixth Circuit case struck down EPA's over-broad interpretation of the te1m "adjacent" in the Clean Air Act context.[756] EPA had been interpreting the term "adjacent" to include the notion of "functionally interrelated." Relying on *Rapanos*, the court held that "EPA's determination that the physical requirement of adjacency can be established through mere functional relatedness is unreasonable and contrary to the plain meaning of the term 'adjacent.'"[757] More to the point, "however ambiguous the term may be in the abstract, 'adjacent' ... is not ambiguous between physically proximate and merely functionally related. "'[758] The court noted that despite interpreting the term more broadly, EPA understood that it should view "adjacency in geographical, rather than operational, terms."[759] Applying the Summit court's logic to the definition of adjacent in the Proposed Rule, only one result could follow: the Agencies' definition of "adjacent" encompasses much more than its plain geographic meaning, therefore it cannot stand.

An additional problem with the definition of "adjacent" is the definition of "neighboring." While sometimes, adjacent- meaning abutting- waters can be jurisdictional,[760] neighboring waters (as defined in the Proposed Rule) fall beyond the Corps' authority and jurisdiction. Again, in what appears to be clairvoyance, the *Rapanos* plurality, when discussing *Riverside*, said "the case could not possibly have held that merely

[753] *Rapanos*, 547 U.S. at 778- 79.
[754] *Id*. at 780.
[755] *Id*. at 746.
[756] See *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).
[757] *Id* at 735.
[758] *Id*. at 743 (internal quotations omitted).
[759] *Id* at 748.
[760] See *Riverside*, 474 U.S.121.

'neighboring' wetlands come within the Corps' jurisdiction…the most natural reading of the opinion is that a wetlands' mere 'reasonable proximity' to [WOTUSJ is not enough to confer Corps jurisdiction."[761] "Neighboring" is not enough to turn an otherwise isolated water into a WOTUS.

The definition of "neighboring" itself contains several problems. First, the definition allows for jurisdiction established by "subsurface hydrologic connections." The Agencies cannot use groundwater, a water that falls outside of the purview of the CWA, as a link in the chain of establishing jurisdiction under the CW A. Second, further nesting of definitions, the definition of neighboring contains two newly defined terms: "riparian area" and "floodplain." As defined, neither riparian areas nor floodplains are themselves WOTUS or even water. Despite this, the Proposed Rule establishes jurisdiction over even the most isolated waters in both areas based solely on their "reasonable proximity" with no requirement for a "significant nexus" to be established. This vastly expands on the Agencies' current jurisdiction under the CWA. (p. 17-20)

Agency Response: **The Supreme Court has stated that the term "waters of the United States" is ambiguous in some respects. With this rule, the agencies interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court caselaw, the relevant and available science, and the agencies' technical expertise and experience. Technical Support Document, I. A and C and Preamble, III and IV. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII. The rule is consistent with caselaw. Techncial Support Document, I.C.**

Community Watersheds Clean Water Coalition, Inc. (Doc. #16935)

10.410 Prior to submitting new regulations based on *SWANCC*/*Rapanos*, the EPA and the ACOE should first consult with Congress regarding both their original and present interpretations of the 1972 Clean Water Act and its subsequent amendments. In addition, does Congress agree with the 1985 *Riverside*/*Bayview* unanimous Supreme Court interpretation that established federal jurisdiction over "adjacent wetlands", and made clear that "navigable waters" mean "waters of the U.S.", i.e., such waters are jurisdictional under the CWA? By 1987, the Court recognized that the CWA applied to a much more extensive collection of water-bodies. As a result, the EPA and the ACOE have, in the past, conformed their regulations to the 1972 Act with its 1977, 1981, and 1987 amendments.

[761] *Rapanos*, 547 U.S. at 741, n.10.

The regulation of activities that cause water pollution cannot rely on…artificial lines…but must focus on all waters that together form the entire aquatic system.

Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States-based as it is on the Corps' and EPA's technical expertise-is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulational waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined 5 as waters under the Act.

This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR § 320.4(b) (2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species." § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." (iv)

This broad interpretation of waters that are jurisdictional under the CWA reflects the mandate given to Congress under the Commerce Clause of the Constitution. Article I, Section 8 of the Constitution grants Congress the power "[t]o regulate Commerce…among the several States…" The Federal government has plenary control over interstate commerce and 'acknowledges no limitations other than are prescribed in the Constitution'". (v)

"The Commerce Clause has served as the basis for nearly every major environmental and public health law passed by Congress, including the Clean Water Act". (vi)

"Notwithstanding the Supreme Court's one-two punch to federal jurisdiction in *SWANCC* and *Rapanos*, any restriction that the justices imposed on the Clean Water Act is based on the Court's present understanding of Congressional intent in 1972, when Congress used the terms 'navigable waters' and 'waters of the United States' to characterize federal jurisdiction under the Act. Neither *SWANCC* nor *Rapanos* reaches, much less describes, the underlying constitutional question: namely, what is the scope of Congress's constitutional authority to protect the Nation's waters? So, regardless of prior disagreements about statutory interpretation or Congressional intent, Congress remains

free to convey, through a 'clear statement', the scope it intends (and originally intended) for the Act". (vii)

And again – "…in the landmark 1985 *Riverside Bayview* decision, a unanimous Court upheld federal jurisdiction over 'adjacent wetlands' finding that Congress, in re-defining the term 'navigable waters' to mean 'waters of the United States' had intended that the historical word 'navigable' to be of 'limited import'. Two years later, the Court would recognize that the Clean Water Act applies to virtually all bodies of water – a view by then long reflected in EPA and Corps regulations". (viii)

The two agencies, ACOE and EPA, are spending considerable effort and the public's effort, not to mention taxpayers' money, to determine the jurisdictional scope of two divided and confusing Supreme Court decisions that are sharply at odds with previous interpretations of the CWA. Before proceeding any further, we again urge the agencies to seek the original 1972 intent of Congress regarding its interpretation of the CWA, and the subsequent amendments of 1977 and 1987. (p. 4-5)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

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

10.411 According to a recent, consensus-based legal analysis provided to state environmental commissioners: "with the changes in the proposed rule, all waters that are located within the riparian area or flood plain are considered 'adjacent' and thus per se jurisdictional." This is based on the Agencies' finding that "all such adjacent waters necessarily have a significant nexus in terms of the chemical, physical, or biological integrity of the adjacent water body and then downstream to other water bodies…"[762] (p. 3)

Agency Response: The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, IV and Technical Support Document, I and VIII.

10.412 Recall that the factual basis of *SWANCC* involved an abandoned sand and gravel mining site that almost two dozen cities and villages in suburban Chicago wanted to convert to a landfill. Several pits had filled with water attracting over 121 species of birds, among them migratory ones. The Army Corps of Engineers claimed jurisdiction under section 404's "Migratory Bird Rule" and denied a permit to fill the ponds. On appeal the Supreme Court, in a 5-4 ruling, held that the Agencies could not use the Migratory Bird Rule to assert jurisdiction over intrastate, isolated waters.[763] The mining pits were non-adjacent to any navigable waters which was a distinguishing feature from *Riverside Bayview Homes* (1985) in which the Court did allow for jurisdiction for adjacent wetlands.

SWANCC is still controlling case law. It was not overruled by *Rapanos*. The Agencies have misconstrued the law by de-coupling the *SWANCC* decision from Justice Kennedy's

[762] American College of Environmental Lawyers (ACOEL), "Memorandum for ECOS [The Environmental Council the States] Concerning Waters of the United States, September 1l,2014, p. 112.
[763] *Solid Waste Agency of Northern Cook county v. U.S Army Corps of Engineers*, 531 U.S 159, 174 (2001).

opinion in *Rapanos*. The Agencies are receiving, and will continue to receive, voluminous legal commentary on this proposed rule. But one matter does deserve mention because it is fundamental to the approach they have taken to jurisdiction generally and "significant nexus" specifically. (p. 5)

Agency Response: The rule is consistent with the decisions of the Supreme Court. Technical Support Document, I.C.

Endangered Habitats League (Doc. #3384)

10.413 The two Supreme Court cases, *SWANCC* and *Rapanos*, have resulted in a lack of clarity when making CWA jurisdictional determinations, as well as a loss of CWA protections. Following *SWANCC* and the 2003 agency guidance, an estimated 20 million acres of so called "isolated" (non-floodplain) waters have gone unprotected. *Rapanos*, in particular, confused jurisdiction over adjacent wetlands and small streams. The *Rapanos* case produced five different opinions with no majority, as well as two different tests for determining CWA jurisdiction: relative permanence and significant nexus standards. The resulting confusion has especially impacted small headwater and intermittently flowing streams and adjacent wetlands. (p. 1)

Agency Response: The rule is consistent with caselaw and provides for increased clarity and certainty. Technical Support Document, I.C, Preamble, II and IV.

Coalition of Alabama Waterways (Doc. #15101)

10.414 The agencies assert jurisdiction too broadly over "adjacent" waters. The Proposed Rule includes within the scope of CWA jurisdiction "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment."[764]By declaring all adjacent waters—not simply adjacent wetlands, as the current rule and past guidance do—categorically jurisdictional, the Proposed Rule sweeps in many waters not previously subject to federal regulation, which is contrary to the agencies' assertion that the proposal does not expand jurisdiction. Furthermore, the definition of "adjacent" is overly broad, impermissibly relying on groundwater connections to capture "neighboring" waters that are not actually adjacent and otherwise would not fall within CWA jurisdiction.

The agencies propose to consider adjacent waters jurisdictional because the agencies find that they, categorically, have a significant nexus to jurisdictional waters. However, the agencies' scientific support for this finding is not yet final, and the agencies wrote the language without waiting for the outcome of the SAB review.[765] Thus the flawed bases of the Proposed Rule's impermissible expansion of CWA jurisdiction include not only the agencies' faulty construction of the significant nexus text, but also incomplete science and analysis.

Further, the Proposed Rule broadens the definition of "adjacent" to include waters that are not actually adjacent within the customary meaning of the word but rather are merely "neighboring," as defined. The result is not only overbroad, it is also unclear. The

[764] 79 Fed. Reg. at 22,198
[765] See, e.g., 79 Fed. Reg. at 21,196.

agencies propose to define "adjacent" as "bordering, contiguous or neighboring," and to cover "[w]aters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like" as "adjacent waters."[766] The term "neighboring" is defined for purposes of the term "adjacent" and with respect to "riparian area" and "floodplain," each of which would also be a defined term itself: "Neighboring" includes "waters located within the riparian area or floodplain of a [jurisdictional water], or waters with a shallow subsurface hydrologic connection to such a jurisdictional water."[767]

The terms "riparian area" and "floodplain" further define "neighboring" for purposes of the term "adjacent." "Floodplain" would be defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."[768] The definition of "riparian area" is especially troublesome for its breadth and ambiguity:

> "The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."[769]

The concept of "influenc[ing]" the ecosystem in the "area" bordering a water—by "surface or subsurface hydrology," no less—is an amorphous and potentially far-reaching standard. It is also an unworkable one likely to make case-specific determinations complicated, prolonged, and burdensome.

The Proposed Rule impermissibly relies on groundwater to establish jurisdiction, given that "[t]he agencies have never interpreted 'waters of the United States' to include groundwater and the proposed rule explicitly excludes groundwater . . . ."[770] It is not possible to rely on groundwater to establish jurisdiction without regulating the groundwater itself, which the agencies seem to acknowledge being beyond their authority. For example, suppose an activity with a discharge directly affecting only an area of shallow groundwater that provides some discernible hydrologic connection between a small upstream water and a jurisdictional area downstream. Under the Proposed Rule, the upstream water also must be jurisdictional. Is it the agencies' position that it is without power to regulate the groundwater between the two putatively jurisdictional areas? If so, then the area constitutes a separation that is analogous to the isolation of the ponds at issue in *SWANCC*. If the agencies believe they can regulate that area directly under the CWA, then they should so state in a straightforward manner (and be prepared to defend that position in the courts).

[766] Id. at 22,263
[767] Id.
[768] *Id*.
[769] *Id*.
[770] *Id*. At 22,218

Contrary to the customary meaning of "adjacent" ("not distant," "nearby," or "having a common endpoint or border"[771]), under the agencies' broadened interpretation, waters located a considerable distance from a tributary or other jurisdictional water may be considered adjacent waters. Again, Justice Kennedy identified that exact scenario as raising a problem for CWA jurisdiction. And far from making the identification of jurisdictional waters "less complicated and more efficient," the Proposed Rule creates greater confusion and will inevitably lead to more protracted litigation. (p. 8-10)

Agency Response: **The agencies disagree with the commenter's assertion that by changing "adjacent wetlands" to "adjacent waters," they have expanded the scope of the definition of "waters of the United States." Technical Support Document, I. The rule explicitly excludes groundwater from the definition of "waters of the United States." The rule does not include a provision defining adjacency and neighboring based on shallow subsurface flow. Preamble IV. The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. While the agencies acknowledge that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." Preamble IV. The rule is consistent with the caselaw. Technical Support Document, I. C. See Science Compendium and Process Compendium.**

Regulatory Environmental Group for Missouri (Doc. #16337.1)

10.415 The proposed definition of "adjacent" is at odd with the Supreme Court's *Rapanos* decision and therefore needs to be revised. It is often forgotten that the *Rapanos* decision is a consolidated case drew from two distinct fact patterns involving wetland jurisdiction: *Rapanos* and *Carabell*. The *Carabell* case pertained to the jurisdictional classification of a wetland that was separated from a jurisdictional drainage ditch by a man-made berm. The Corps determined that the wetland was jurisdictional. The Supreme Court vacated the Court of Appeals' ruling that supported the Corps classification and remanded the case back to the lower court to determine if the wetland possesses a "significant nexus" with the nearby classified ditch.

The Supreme Court's remand of the Corps' jurisdictional classification of the *Carabell* wetland is important because at the time the Corps' definition of what constitutes a "waters of the United States" included wetlands adjacent to jurisdictional waters and the definition of the term "adjacent" codified at 33 CFR §328.3(c) specifically provided that wetlands separated from a jurisdictional water, by a man-made berm, is an adjacent wetland. Thus according to this definition, the *Carabell's* wetland was jurisdictional because it was adjacent to the jurisdictional ditch and the man-made berm had no effect on the determination. Yet, contrary to this definition, the Court found that the waters

[771] Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/adjacent.

separated by a man-made berm were not de facto themselves waters of the United States. This is even though the justices were fully aware that the 4-foot-wide man-made berm allowed an occasional hydrological connection between the ditch and wetland when the ditch occasionally overflowed.[772] The *Rapanos* decision therefore invalidated the Corps definition of "adjacent" because the definition was inconsistent with the decision.

In the Proposed Rule (79 FR 22188, April 21, 2014), EPA proposes to revise the existing definition of the term "adjacent" by adding the words "Waters, including" to the beginning of the second sentence and changing the last word of the definition from "wetlands" to "waters." EPA however does not propose to make any other changes to the existing text of the current definition. The proposed revised definition reads in full:

> "The term adjacent means bordering, contiguous, or neighboring. Water, including wetlands, separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes and the like are ''adjacent waters.''

Since the existing definition of "adjacent" codified at 33 CFR §328.3(c) is flawed because it is inconsistent with the *Rapanos* decision, so too is EPA's proposed revision to the definition because it retains the same flawed criteria regarding berms, dikes, levees, and the like.

The EPA should therefore revise the proposed definition of the term "adjacent" to reflect the *Rapanos* decision by adding qualifier verbiage that states wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like may be ''adjacent wetlands" if a significant nexus is present. (p. 4-5)

Agency Response: **The rule is based on the agencies' careful examination of the science and the law to determine that adjacent waters seperated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like have a significant nexus with traditionally navigable waters, interstate waters, or the territorial seas. Preamble IV. The rule is consistent with decisions of the Supreme Court. I.C.**

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

10.416 The Proposed Rule includes within the scope of CWA jurisdiction "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment."[773] By declaring all adjacent waters- not simply adjacent wetlands, as the current rule and past guidance do-categorically jurisdictional, the Proposed Rule sweeps in many waters not previously subject to federal regulation, which is contrary to the agencies ' assertion that the proposal does not expand jurisdiction. Furthermore, the definition of "adjacent" is overly broad, impermissibly relying on groundwater connections to capture "neighboring" waters that are not actually adjacent and otherwise would not fall within CWA jurisdiction .

[772] *Rapanos*, p. 11
[773] 79 Fed. Reg. at 22,198.

The agencies propose to consider adjacent waters jurisdictional because the agencies find that they, categorically, have a significant nexus to jurisdiction al waters. However, the agencies ' scientific support for this finding is the still pending SAB report.[774] Thus the flawed bases of the Proposed Rule' s impermissible expansion of CWA jurisdiction include not only the agencies' faulty construction of the significant nexus text , but also incomplete science and analysis.

Further, the Proposed Rule broadens the definition of "adjacent" to include waters that are not actually adjacent within the customary meaning of the word but rather are merely "neighboring," as defined. The result is not only overbroad, it is also unclear. The agencies propose to define "adjacent" as "bordering, contiguous or neighboring," and to cover " [waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like" as "adjacent waters."[775] The term "neighboring" is defined for purposes of the term "adjacent" and with respect to "riparian area" and "floodplain," each of which would also be a defined term itself: " neighboring" includes "waters located within the riparian area or floodplain of a [jurisdictional water], or waters with a shallow subsurface hydrologic connection to such a jurisdictional water."[776]

The terms "riparian area" and "floodplain" further define "neighboring" for purposes of the term "adjacent." "Floodplain" would be defined as an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows. The definition of "riparian area" is especially troublesome for it breadth and ambiguity:

The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the eco logical processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.[777]

The concept of "influenc[ing]" the ecosystem in the "area" bordering a water- by "surface or subsurface hydro logy," no less-is an amorphous and potentially far-reaching standard. It is also an unworkable one likely to make case-specific determinations complicated , prolonged, and burdensome.

The Proposed Rule impermissibly relies on groundwater to establish jurisdiction, given that " [t]he agencies have never interpreted 'waters of the United States' to include groundwater and the proposed rule exp licitly exclude groundwater ...."[778] It is not possible to rely on groundwater to establish jurisdiction without regulating the groundwater itself, which the agencies seem to acknowledge to be beyond their authority. For example, suppose an activity with a discharge directly affecting only an area of shallow groundwater that provides some discernible hydrologic connection between a

[774] See, e.g. , 79 Fed. Reg. at 21,196.
[775] *Id*. at 22,263.
[776] *Id*.
[777] *Id*.
[778] *ld*. at 22,218.

small upstream water and a jurisdictional area downstream. Under the Proposed Rule, the upstream water also must be jurisdictional. Is it the agencies ' position that it is without power to regulate the groundwater between the two putatively jurisdictional areas? If so, then the area constitutes a separation that is analogous to the isolation of the ponds at issue in *SWANCC* . If the agencies believe they can regulate that area directly under the CWA, then they should so state in a straightforward manner (and be prepared to defend that position in the courts).

Contrary to the customary meaning of "adjacent" ("not distant," "nearby," or "having a common endpoint or border"[779]), under the agencies ' broadened interpretation, waters located a considerable distance from a tributary or other jurisdictional water may be considered adjacent waters. Again, Justice Kennedy identified that exact scenario as raising a problem for CWA jurisdiction. And far from making the identification of jurisdictional waters "less complicated and more efficient," the Proposed Rule creates greater confusion and will inevitably lead to more protracted litigation. (p. 7-9)

Agency Response: **The rule no longer provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection. While the agencies acknowledge that shallow subsurface flow may be an important factor in evaluating a water on a case-specific significant nexus determination this does not mean that shallow subsurface connections are themselves "waters of the United States." The rule explicitly excludes groundwater from the definition of "waters of the United States." Preamble IV.**

Consistent with Justice Kennedy's opinion, the rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV and Technical Support Document, I and VIII. The agencies responded to commenter's concerns expressed concern with the timing and sequencing of the SAB report. Science Compendium, Process Compendium.

10.3. OTHER WATERS

Agency Summary Response

In *Rapanos*, Justice Kennedy provides an approach for determining what constitutes a "significant nexus" that can serve as a basis for defining "waters of the United States" through regulation. Justice Kennedy concluded that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759 (*citing SWANCC*, 531 U.S. at 167, 172). Again,

[779] Merriam-Webster Online Dictionary , http://www.merriam-webster.com/dictionary/adjacent.

the four justices who signed on to Justice Stevens' opinion would have upheld jurisdiction under the agencies' existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy's opinion. Justice Kennedy stated that wetlands should be considered to possess the requisite nexus in the context of assessing whether wetlands are jurisdictional: "if the wetlands, either alone or in combination with similarly situated [wetlands] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. In light of *Rapanos* and *SWANCC*, the "significant nexus" standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands also can reasonably be applied to other waters such as ponds, lakes, and non-adjacent wetlands that may have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas. This provision does not render the rule broader in scope than the existing regulation for the reasons articulated in the Technical Support Document, I.B.

Specific Comments

Cass County Government (Doc. #5491)

10.417 In our view, the proposed rules seek to widely expand the jurisdiction of EPA and the Corps under the CWA, and to roll-back the outcome of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* 531 U.S 159 (2001). .While EPA contends the proposed rule does not seek to protect any new types of waters and does not broaden the coverage of the CWA, the clear language of the proposed rule revisions expands greatly on the proposed 2011 guidance document circulated by EPA and the Corps, and basically enacts a more expansive version of the migratory bird rule. In short, the new descriptions of "other waters" and "adjacent waters" in the proposed rules seek to render previously non-jurisdictional waters jurisdictional via the rulemaking process, and contrary to Supreme Court precedent. (p. 1)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with caselaw. Technical Support Document, I.B. and C. The rule is not based on the migratory bird rule.

Offices of the Attorney Generals of Oklahoma, West Virginia and Nebraska (Doc. #7988)

10.418 Even for waters that escape the Agencies' capacious *per se* categories, the Proposed Rule provides that such waters are covered by the CW A on a "case-by-case basis," so long as a particular water "in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" core water. Id. § 230.3(s)(7). The Rule defines this inquiry as whether these "similarly situated waters" "significantly affect the chemical, physical, or biological integrity" of a core water. Id. § 230.3(u)(7).[780] (p. 5)

Agency Response: While the rule continues to provide for case-specific significant nexus determinations, it has limited the provision from that in the proposal. Preamble, IV.

[780] *Id*. § 230.3(t). The Proposed Rule also includes several very narrow exceptions regarding waters that the Agencies have deemed never to have a "significant nexus" to core waters.

Arizona State Land Department (Doc. #14973)

10.419 Importantly, though the Proposed Change is, in effect, a mechanism with which to circumvent the judicial process, a judicial decision is being used to support its goals. Specifically, Justice Kennedy's 2006 *Rapanos v. U.S.* decision is incorrectly being heralded as unequivocal support of this endeavor.[781]

The *Rapanos* Court summarily dismissed the Army Corps of Engineers' (Corps) claim to seemingly unlimited authority over water use. The plurality, however, was unable to draw a bright line limiting this jurisdiction. Rather than respecting the separation of powers and allowing the courts to continue to unravel this question to the appropriate degree, the Environmental Protection Agency (EPA) and the Corps have taken this opportunity to unilaterally decide that Justice Kennedy's "significant nexus" test serves as the final authority on the question of how to determine what, exactly, constitutes "other waters." This step is misguided not only because it is outside the scope of the separation of powers but, also, because Justice Kennedy's test was not embraced by the majority; in fact, Justice Kennedy himself has since been viewed as moving away from the reasoning behind the test, which appears to be a central argument advanced in support of the Proposed Change.[782]

The "significant nexus" test is being touted as the obvious answer to the question of how to define "other waters."[783] If this had been the case, however, the *Rapanos* Court would have made that determination in 2006. In reality, the "significant nexus" test is merely one approach that has been offered. Not only did the Court also advance a test based on the "relative permanence" of bodies of water, but the appellate courts that have since reviewed the issue have not uniformly accepted one test over the other.[784] Moreover, while the viability of the Proposed Change relies heavily upon the misguided position that *Rapanos* somehow stands for the application of a "significant nexus" test, it fails to assess the impact of the Supreme Court's 2008-2009 Term on this argument.

During 2008-2009, the Court heard *Energy Corp. v. Riverkeeper, Inc*.[785] and *Coeur Alaska, Inc. v. Southwest Alaska Conservation Council*.[786] Both cases added to the Court's "lengthy CWA jurisprudence" and served to "stray[] far from the express congressional objective of the CWA."[787] This is important because Justice Kennedy has been credited with taking account of the CWA's objectives in his formulation of the "significant nexus" test.[788] Therefore, the fact that Justice Kennedy has joined the majority opinion in cases in which these objectives have not determined the Court's

[781] *Rapanos v. U.S.*, 547 U.S. 715 (2006).
[782] Mark L. Latham, The 2008-2009 Term and the Clean Water Act: Justice Kennedy Where Art Thou?, 44 New Eng. L. Rev. 293 (2010).
[783] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22193.
[784] U.S. Congressional Research Service. The Wetlands Coverage of the Clean Water Act (CWA): *Rapanos* and Beyond (RL33263; Sept. 3, 2014), by Robert Meltz and Claudia Copeland, http://nationalaglawcenter.org/wpcontent/uploads/assets/crs/RL33263.pdf.
[785] *Energy Corp. v. Riverkeeper, Inc*. 129 S. Ct. 1498 (2009).
[786] *Coeur Alaska, Inc. v. Southwest Alaska Conservation Council*, 129 S. Ct. 2458 (2009).
[787] *Latham, supra* note
[788] *Id*.

decisions calls into question the ability of the EPA and the Corps to use his 2006 "significant nexus" test to now advance the Proposed Change.

The Proposed Change is heavily supported by a misunderstanding of both *Rapanos* and the reasoning behind Justice Kennedy's "significant nexus" test. In reality, the Court has not made a consistent determination regarding "waters of the United States." Therefore, to allow a regulatory agency to misconstrue case law and then use that misinterpretation to advance its own goals would be irresponsible, at best. There has already been an evolution by the Court between the 2006 *Rapanos* case and the 2008-2009 Term. Thus, the Court should be allowed to continue its work unimpaired by the other branches of government and without being held to a standard that is already obsolete. (p. 4-6)

Agency Response: The rule is consistent with the statute and caselaw. Technical Support Document, I.A. and C. The agencies disagree that the cited cases addressed the scope of "waters of the United States" or have implications for Justice Kennedy's opinion in *Rapanos*.

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

10.420 The proposed definition of WOTUS violates the Commerce Clause of the United States Constitution. The Supreme Court has recognized limits to federal authority under the Commerce Clause in the context of the Clean Water Act most recently in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and *Rapanos v. United States*, 541 U.S. 715 (2006) ("Rapanos").

As recognized by the Court in both *Rapanos* and *SWANCC,* Congress's decision to link WOTUS to "navigable waters" is important. The Act defines "navigable waters" as "waters of the United States." U.S.C. § 1362 (7). Congress did not use the term "waters in the United States," which appears to be the assumption of the Federal Agencies, as there are few waters which are not pulled into federal jurisdiction by this rule.

In *SWANCC,* the Court examined the Corps' "Migratory Bird Rule," which purported to extend jurisdiction under the Act to any intrastate waters "which are or could be used as a habitat" by migratory birds. The *SWANCC* majority, of which Justice Kennedy was a part, held that Federal Agencies' authority did not extend to isolated sand and gravel pits under the Migratory Bird Rule because federal authority does not extend to "nonnavigable, isolated, intrastate waters." *SWANCC* at 171. In *Rapanos*, the Supreme Court examined federal jurisdiction over four separate wetlands, which were near ditches or man-made drains. The plurality held that WOTUS includes only "relatively permanent, standing or continuously flowing bodies of water" and adjacent wetlands that have a "continuous surface connection to bodies that are 'waters of the United States' in their own right." *Rapanos* at 739-42. The plurality made clear that WOTUS does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall," nor does it include "wetlands with only an intermittent, physically remote hydrologic connection to [WOTUS]." *Id* at 742.

Justice Kennedy's concurring opinion, upon which the EPA has chosen to rely, held that federal jurisdiction extends to waters that "are navigable in fact or that could reasonably be so made" or adjacent wetlands that have a "significant nexus" to such waters. *Id* at

779-80. Justice Kennedy added that a "significant nexus" exists when wetlands "alone or in combination with similarly situated lands in the region …significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." *Id* at 780. However, Justice Kennedy also criticized the dissenters for "reading the word "navigable" out of the statute, which he believed to be a "central requirement" of the Act. *Id* at 778-79.

The expansion of federal jurisdiction under EPA's proposed definition of WOTUS blatantly ignores the *Rapanos* plurality's requirement that adjacent waters have a "continuous surface connection" to WOTUS waters. As a result, EPA's claim on its website that the proposed rule is "consistent with the Supreme Court's more narrow reading of Clean Water Act jurisdiction," is simply untrue.

The proposed rule selectively relies on Justice Kennedy's concurring opinion to expand federal jurisdiction under the Act. The proposed rule ignores the Court's rejection of both ecological and hydrologic connectivity as a basis for federal jurisdiction of isolated waters. In fact, under the proposed rule, hydrologic and biological connectivity becomes the guidepost for jurisdiction. Under this rationale, federal jurisdiction would extend to all waters in the US and even dry land that is occasionally moist. However, if Justice Kennedy intended to establish a rule based on hydrologic connectivity alone in his concurring opinion, the dissenters in *Rapanos* would have become the majority. The Federal Agencies are not entitled to effect that reversal. In fact, Justice Kennedy expressly admonished the Sixth Circuit for basing its decision on hydrologic connectivity alone. *Id* at 784.

The "other waters" provision abuses the Court's precedent by allowing Federal Agencies to aggregate isolated bodies of water to determine if a significant nexus exists. The significance of the nexus in *Rapanos* was judged with respect to the particular body of water at issue, not by all similar bodies of waters collectively. Even in his concurrence, Justice Kennedy stated that "wetlands" could be considered "either alone or in combination with similarly situated lands" to determine whether those wetlands have a significant nexus to a traditionally navigable water. *Rapanos* at 780. Justice Kennedy envisioned consideration of the land surrounding the body of water at issue based on his view that a wetland' s "absence of an interchange" with other bodies of water and "filtering and runoff-control functions" may justify protection of the individual water. *Rapanos* at 775. However, there is no basis for EPA's authority to aggregate isolated bodies of water to determine whether a significant nexus exists for any individual body of water under the Scalia plurality opinion or the Kennedy concurrence.

Furthermore, under EPA' s proposed rule, there is no effective limitation on Federal Agencies' ability to aggregate isolated waters to determine whether a significant nexus exists. As written, the rule allows EPA to consider isolated bodies of water within an entire watershed that "perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on chemical, physical, or biological integrity" of a traditionally navigable water. Vague language, such as "similar functions" and "single landscape," combined with the alleged authority to aggregate isolated waters based on their proximity to each other regardless of their proximity to a traditional navigable water provides Federal Agencies unfettered discretion to assert their authority.

Additionally, the aggregated waters need only have more than a "speculative or insubstantial" effect on a traditionally navigable body of water. Still further, EPA has chosen to edit Justice Kennedy's written opinion by removing his use of "and" and replacing it with "or" so that, under the proposed rule, the aggregated affect need only affect the "chemical, physical, or biological integrity" of a traditionally navigable water. See *Rapanos* at 780. EPA has selectively relied on some portions of the Act and the Court's opinions at the expense of others to extend federal jurisdiction. It is patently misleading to claim, as the preamble does, that "the scope of regulatory jurisdiction of the CW A in this proposed rule is narrower than that under the existing regulations." 79 Fed. Reg. 22188, 22192. (p. 4-5)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the caselaw and the Constitution. Technical Support Document, I.B. and C. The agencies' significant nexus determinations are not based solely on hydrologic connections. Preamble, III; Technical Support Document, II.

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

10.421 The SAB review of the Report includes the following:

> "As used in the SAB review letter of the Report, the term downstream is used to refer broadly to connectivity that is both downstream and down gradient with the understanding that all water flows down gradient towards lesser hydraulic head than at the point of origin or point of interest."[789] The Report itself does not clearly define the term downstream or the term down gradient and appears to use the two terms interchangeably."

As used in a scientific report, this makes sense. However, the law requires that waters under consideration for federal jurisdiction under the CWA have a significant nexus to traditionally navigable waters, not just any water down gradient. Therefore, if SAB' s review of the Report and the Report's scientific conclusions are more broadly applied to any down gradient water, then EPA and the Corps must explain in great detail how they extended those same conclusions to just traditionally navigable waters. This same issue appears in the fact that, by definition, the Report utilizes a scientific definition for a wetland that requires only one of the three characteristics for a wetland that the federal regulation requires."[790]EPA and the Corps must describe how scientific conclusions with potentially broader application than the law would allow were utilized appropriately to draw legal conclusions required for the proposed rule. (p. 10)

Agency Response: See Preamble, III; Technical Support Document, II; Science Response to Comments Compendium

Indiana Department of Environmental Management (Doc. #16440)

10.422 We are concerned that the draft report relies on studies that conclude that waters are connected through the movement of birds, animals, and insects. In *Solid Waste Agency of Northern Cook County v, U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159, 174

[789] SAB Report Review Letter, at p. 1, fn. 1.
[790] Report, at p. 3-5; 3-6 and A-22.

(2001), the Supreme Court rejected this type of connection as a basis for federal jurisdiction, stating it "would result in a significant impingement of the States' traditional and primary power over land and water use." We are also concerned that the draft report relies on studies of the impacts of storing water to assert that water is connected. Storage of water implies choices regarding water allocation that Congress expressly left to the States under section 101(g) of the Clean Water Act. If the draft report is to be used as a basis for establishing the Waters of the United States rule, studies unrelated to water quality should be removed from the report. (p. 2)

Agency Response: **Under the significant nexus standard it is necessary and appropriate to assess whether waters significantly affect the biological integrity of traditional navigable waters, interstate waters, or the territorial seas and the agencies' assessment of biological data and information was based on any effects on biological integrity. Preamble, III and IV and Technical Support Document, I.C. and VII. To the extent the commenter is asserting that there is no biological or physical component of water quality, the agencies' disagree. *See e.g.* CWA Sections 101(a), 303.**

National Association of Conservation Districts (Doc. #12349)

10.423 As for isolated wetlands, EPA has been somewhat transparent in its intent to recapture many types of water bodies, Including isolated wetlands, no longer subject to federal jurisdiction under *SWANCC* and *Rapanos*. EPA argues that its proposal does not apply to waters not historically or ID previously regulated, which is partially correct. The "migratory bird rule" (MBR), struck down In SWANCC, authorized the government to assert jurisdiction broadly over isolated waters "which are or would be used as habitat by ... migratory birds that cross state lines." In theory, the "migratory bird rule" granted broad expansive authority that could have reached nearly any and all water bodies. We do not think these Isolated wetlands significantly Impact water quality in the United States and should therefore not be considered jurisdictional. (p. 6-7)

Agency Response: **The case-specific provision of the rule requires a determination of significant nexus, therefore a water that does not, alone or in combination, significantly effect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas will not be considered jurisdictional.**

10.424 For the last several decades, the Supreme Court has sought to clarify the concept of "waters of the U.S."; but in many respects, it has created greater confusion. Three seminal cases inform the current rulemaking: *U.S. v. Riverside Bayview,* 474 U.S. 121 *(1985), Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159 (2001), *and Rapanos v. United States,* 547 U.S. 715 (2006). The *Rapanos* case requires the government to establish a "significant nexus" (biological, chemical or physical) between non-navigable and traditionally navigable waters (TNWs) to establish CWA jurisdiction. The effect of the *SWANCC* and *Rapanos* decisions was to significantly limit the federal government's authority over certain waters historically deemed jurisdictional, including isolated, intrastate wetlands and wetlands adjacent to tributaries located remotely from TNWs. (p. 7)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C.**

10.425 This broadened jurisdiction would include water features on agricultural lands that have not been subject to CWA jurisdiction since before the *SWANCC* case in 2001. As noted above, EPA's authority prior to *SWANCC* based on the "migratory bird rule" was significantly broad in that any water used or potentially used by a migratory bird would be subject to jurisdiction. As a practical matter, this rule would reestablish jurisdiction over most waters on agricultural working lands lost under *SWANCC* and *Rapanos*. (p. 7)

Agency Response: **The agencies agree that jurisdiction under the "migratory bird rule" was very broad. The scope of the rule is narrower than the existing regulation. Technical Support Document, I.B.**

Parish of Jefferson (Doc. #14574.1)

10.426 *SWANCC* decided there are "isolated waters" (e.g., certain ponds) that are not regulated by the Commerce Clause, the sole source of the federal agencies' authority over non-federal territory under the Clean Water Act. It is only the water quality connection of wetlands to open bodies of navigable water that could justify federal wetland regulation of wetlands. However, not every wetland connection to any type of water, however remote (subsurface), strained (in combination with other wetlands) or expansive (any flood plain location) can justify federal regulation. Protection of wetlands bordering truly navigable waters is the key. In this vein, EPA references the draft report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2013) ("Report"). Although the Report exploits a general truism, that virtually everything is "connected", that alone is not a legal test for federal regulation under the Commerce Clause. (p. 4)

Agency Response: **The rule is consistent with the caselaw and the Constitution. Technical Support Document, I.C. The rule is based on the agencies' reasonable significant nexus determinations and is not based on a conclusion that "virtually everything is 'connected.'" Preamble, III; Technical Support Document, II.**

GBMC & Associates (Doc. #15770)

10.427 The proposed rule allows the agencies for the first time to make significant nexus determinations based on "aggregate" or "cumulative" affects of multiple tributaries or wetlands in a watershed (Sec.II.C., Sec. III.H. and Appendix A.) That is, one small tributary or wetland may not have a significant nexus to a TNW, but all the tributaries in the watershed combined do, and all the "adjacent" wetlands combined in the watershed do, so they all have a significant nexus. This does not appear to be in the spirit of the *Rapanos* decision and is not consistent with the functions of many headwater streams (see comments 3 and 4 above). If this proposed rule becomes law it is a greatexpansion of Section 404 jurisdiction and is not consistent with the *Rapanos* decision. (p. 5)

Agency Response: **The rule is narrower than the existing regulation and is consistent with caselaw. Technical Support Document, I.B and C. The Science Report, the Preamble, and the Technical Support Document document the functions of headwater streams and other waters that meet the definition of "tributary."**

Waters Advocacy Coalition (Doc. #17921.1)

10.428 The agencies' regulation of "other waters" as proposed violates the Supreme Court's decision in *SWANCC*. Under the proposed rule, CWA jurisdiction will extend to, "[o]n a casespecific basis, other waters, including wetlands, provided that those waters alone, or in A-8 combination with other similarly situated waters, including wetlands located in the same region, have a significant nexus" to traditional navigable waters, interstate waters, or territorial seas. 79 Fed. Reg. at 22,263. Contrary to the agencies' assertions, this is an expansion of jurisdiction from the current regulations.[791] As we have previously noted in comments, for all of the reasons articulated in *SWANCC*, it is unlawful for the agencies to assert jurisdiction over these "other waters."[792]

The *SWANCC* Court held that "nonnavigable, isolated, intrastate waters" – which, unlike the wetlands at issue in *Riverside Bayview*, did not actually abut a navigable waterway – were not jurisdictional under the CWA. 531 U.S. at 168. As discussed in section II.B., the *SWANCC* Court found that assertion of jurisdiction over such features would raise "significant constitutional questions" and "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id*. at 174. The Court's holding in *SWANCC*, including its rationale for rejecting jurisdiction in the case of non-navigable, isolated waters, was reaffirmed in Justice Kennedy's *Rapanos* concurrence. *Rapanos*, 547 U.S. at 767. The agencies should eliminate proposed paragraph (a)(7) regulating "other waters," and, consistent with *SWANCC*, all "other waters" should be excluded from jurisdiction by rule.

In *SWANCC*, there was no need to perform an elaborate analysis because the lack of proximity alone was sufficient to determine there was no meaningful connection to TNWs. Like the ponds at issue in *SWANCC*, "other waters" that do not fall within the broad scope of the agencies' proposed "tributary" and "adjacent waters" categories are truly isolated waters that are not jurisdictional under the CWA. (p. 105-106)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with caselaw. Technical Support Document, I.B. and C.

Coeur Mining Inc. (Doc. #16162)

10.429 Such farreaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow was not what Congress intended and goes far beyond even the broadest interpretation of recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006). (p. 3)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

[791] The agencies state that the current regulations assert jurisdiction over "other waters" "more broadly than what is proposed today." 79 Fed. Reg. at 22,212. But *SWANCC* invalidated the agencies' broad use of the 33 C.F.R. § 328(a)(3) "other waters" provision to assert jurisdiction.
[792] WAC Comments on 2011 Draft Guidance, Exhibit 1 at 87.

Pennsylvania Aggregates and Concrete Association (Doc. #16353)

10.430 .Over the years, the agencies have tried and failed to broaden the interpretation of what are jurisdictional waters. The proposed rule attempts to apply the "waters of the United States" definition to a litany of water features that are significantly different from traditional navigable waters and have little volume, including ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, and man-made drainage ditches. And once again, in concert with both the *SWANCC* and *Rapanos* decisions, are beyond the scope of federal jurisdiction.

The proposed rule does not faithfully implement *Rapanos* because it is not based on determining which waters would meet both tests. To abide by the *Rapanos* Decision, only those waters that would meet both the plurality and Kennedy tests can be deemed jurisdictional. (p. 4)

Agency Response: The rule is consistent with the caselaw. Technical Support Document. I.C. The rule explicitly excludes certain features, including for example ephemeral drainages that do not meet the definition of tributary. Preamble, IV.

Independent Petroleum Association of America, et al. (Doc. #18864)

10.431 The Agencies fail to follow the plurality opinion in *Rapanos* resulting in a proposed definition of Waters of The United States not supported by case law or statutory law. In 1985, the Supreme Court of the United States first considered whether the CWA, and the regulations promulgated under its authority by USACE, authorized USACE to require landowners to obtain permits from USACE before discharging fill materials into wetlands adjacent to navigable bodies of waters and their tributaries. *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 123 (1985). In *Riverside Bayview*, respondent Riverside owned eighty acres of low-lying marshy land in Michigan, and in 1976, began to place fill material on its property in preparation for the construction of a housing development. *Id*. at 124. USACE believed that the low-lying marshy land was an "adjacent wetland" under its jurisdiction as a "water of the United States." *ld*. USACE filed suit seeking to enjoin Riverside from filling the property without USACE's permission. *Id*.

The Court held that USACE's jurisdiction extended to all wetlands adjacent to navigable or interstate waters and their tributaries. *Id*. at 129. Wetlands are lands that "are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id*. (citing 33 C.F.R. § 323.2(c) (1985)). The Court opined that USACE has jurisdiction over adjacent wetlands, including those low-lying marshy areas of land on respondent's property. In short, the Court concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not found its source in the adjacent bodies of water. The Court did not conclude that the USACE's judgment on these matters was unreasonable, and it therefore concluded that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the USACE has jurisdiction is a permissible interpretation of the Act. *Id*. at 135. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in

this case. *Id*. at 135. *Riverside Bayview* established for the first time that wetlands that abut navigable waters could themselves be considered navigable waters under the CWA. (p. 15-16)

Agency Response: **The rule is consistent with the statute and caselaw. Technical Support Document, I.A and C.**

10.432 Following its decision in *Riverside Bayview*, the Supreme Court was asked to again determine USACE' s jurisdiction under the CWA. In *Solid Waste Agency of N. Cook Cnty*. ("*SW*ANCC'), twenty-three suburban Chicago cities and villages engaged in an effort to locate and develop a disposal site for nonhazardous solid waste. *Solid Waste Agency of N. Cook Cnty. v. US. Army Corps ofEng'rs*, 531 U.S. 159, 163 (2001). The cities and villages decided that a 533- acre parcel of land that was formerly a sand and gravel mining operation would be appropriate for the disposal of nonhazardous solid waste. *Id*. Because operation of the disposal site required the filling of permanent and seasonal ponds, SWANCC contacted USACE to determine if a permit was required under the CWA. *Id*.

USACE initially concluded that it had no jurisdiction over SWANCC because the site contained no wetlands or areas that "support vegetation typically adapted for life in saturated soil conditions." /d. at 164 (citing 33 C.F.R. § 328.3(b) (1999)). USACE later changed its decision, asserting jurisdiction under the "Migratory Bird Rule,

> "[T]he USACE formally "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States' ... based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed natural character; and (3) the waters areas are used as habitat by migratory bird [sic] which cross state lines." *Id*. at 164-65 (citing U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6).

The Court held the "Migratory Bird Rule" was not sufficient to establish USACE jurisdiction under the CW A. *Id*. at 167. The Court opined:

> "We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two lllinois counties, fall under§ 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import," 474 U.S. at 133, and went on to hold that§ 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that

> were or had been navigable in fact or which could reasonably be so made." *ld*. at 171-172 (citing *United States v. Appalachian Elec. Power Co*., 311 U.S. 377,407-08 (1940).

The use of the phrase "significant nexus" appeared in *SWANCC* for the first time. The Court held:

> "It was the "significant nexus" between the wetlands and "navigable waters" that informed our reading of the CW A in *Riverside Bayview Homes*; indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water…" *ld*. at 167 (citing *Riverside Bayview Homes, Inc.*, 474 U.S. at 131-32, n. 8).

Although the Court in *SWANCC* did not elaborate as to what constitutes a "significant nexus," the phrase becomes an important component in a later decision, *Rapanos v. U.S.*, and in the agencies' proposed rule for the definition of "waters of the United States." (p. 16-17)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

10.433 In 2006, the Supreme Court issued, *John A. Rapanos, et al. v. United States*, 547 U.S. 715 (2006), the most recent decision interpreting USACE's jurisdiction under the CWA. This decision, however, only muddied the waters, as it was a plurality decision, with the Court splitting 4-1-4. Justice Anthony Kennedy joined the Court only in its decision to remand the cases to the Sixth Circuit for further proceedings. The result from *Rapanos* is the emergence of two different standards that could be controlling: the plurality standard (Justice Scalia, The Chief Justice, Justice Thomas, and Justice Alito) and Justice Kennedy's "significant nexus" standard. It is the position of the Associations that the plurality opinion should govern implementation of the Clean Water Act "waters of the United States." The agencies have over-stated the Kennedy standard and have extended the proposed definition beyond the scope of the CWA.

In *Rapanos*, petitioner backfilled land that contained sometimes-saturated soil conditions. *Rapanos v. US*., 547 U.S. 715, 720 (2006). "The nearest body of navigable water was eleven to twenty miles away" from the saturated lands, yet petitioner was informed by USACE that his saturated lands were "waters of the United States," and he would need a permit to fill said lands. *Id*. The Supreme Court granted certiorari in order to determine if USACE had jurisdiction over the petitioner's saturated lands.

The plurality in *Rapanos* held that channels through which water flows intermittently or ephemerally, or those channels that periodically allow drainage of rainfall, are not "waters of the United States.":

> "In sum, on its only plausible interpretation, the phrase, "waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams . . . oceans, rivers, and lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for

> rainfall. The Corps' expansive interpretation of the "waters of the United States" is thus not 'based on a permissible construction of the statute.'" *Id*. at 739 (citing Chevron US.A. Inc. v. Natural Res. Def Council, Inc. 467 U.S. 837, 843 (1984)).

The Associations direct the agencies' attention to the plurality's guidance in which they found that the USACE's authority to regulate limited "waters of the United States" constituted those waters that were "relatively permanent, standing or flowing bodies of water ... forming geologic features" and not "ordinary dry channels through which water occasionally or intermittently flows." *Id*. at 732-33. The plurality excluded from the definition "streams that flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id* at 739. The plurality also considered whether a wetland may be considered "adjacent to" remote "waters of the United States," because of mere hydrologic connection to them:

> "[O]nly those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*." *ld*. at 742 (citing *Solid Waste Agency ofN Cook Cnty*., 531 U.S. at 167).

The proposed expansion of the definition of "waters of the United States" to include "other waters" extends far beyond the plurality ruling of the Court. The "significant nexus" that the plurality alludes to from *SWANCC* is the standard advanced by Justice Kennedy in his concurring opinion. It is clear from the proposal that the agencies ignore the plurality opinion reasoning and instead selectively read only the "significant nexus" test as discussed further below.

The "significant nexus" standard Justice Kennedy determined that the *Rapanos* decision required the Court to determine "whether the term 'navigable waters' in the CWA extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact." *Id*. at 759 (citing *Solid Waste Agency of N. Cook Cnty*, 531 U.S. at 159). In Justice Kennedy's view, it is the "significant nexus," first mentioned in *SWANCC*, which is the determining factor.

In his concurrence, Justice Kennedy holds that "[u]nder the Corps' regulations, wetlands are adjacent to tributaries, and thus covered by the [CWA], even if they are 'separated from other "waters of the United States" by man-made dikes or barriers, natural river berms, beach dunes, and the like.'" *ld*. at 762 (citing 33 C.F.R. § 328.3(c)). A "significant nexus" standard must be applied in order to determine if a connection between a nonnavigable water or wetland is significant enough to deem the water or wetland a "navigable water" under the CWA. *Id*. at 767.

> "[T]he connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act In other instances, as exemplified by

> *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking." *Id*.

Justice Kennedy's "significant nexus" standard is based upon *SWANCC* and *Riverside Bayview* is qualified by the term "navigable." The required nexus must be assessed in terms of the statute's goal and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§1311(a), 1362(12). With respect to wetlands, the rationale for CWA regulation is, as the USACE has recognized, that wetlands can perform critical functions related to the integrity of other waters-functions such as pollutant trapping, flood control, and runoff storage. 33 C.F.R. § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When in contrast, wetlands' effects on water quality are speculative or insubstantial; they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Id*. at 780.

Finally, Justice Kennedy stated:

> "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." *Id*. at 782.

The "significant nexus" standard expounded by Justice Kennedy in his concurrence in *Rapanos* is what the EPA and USACE rely upon in creating the "other waters" category in the proposed rule for the definition of "waters of the United States" under the CWA. *Rapanos v. US*., 547 U.S. 715, 767 (2006). The Associations disagree that the "significant nexus" standard is the applicable standard. EPA and US ACE have gone beyond the bounds of the "significant nexus" standard with the proposed rulemaking. (p. 17-20)

Agency Response: **No Court of Appeals has concluded that the plurality standard is the only jurisdictional standard. The rule is consistent with the caselaw. Technical Support Document, I.C.**

10.434 The EPA and US ACE are proposing to add a new category to the definition of "waters of the United States." This "other waters" category will not be jurisdictional as a single category, but will instead be jurisdictional if found, on a case-specific basis, to have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. *Id*. at 22188. These "other waters" will be evaluated either individually or as a group of waters when they are determined to be similarly situated in the region. *Id*.

In creating this "other waters" category, the agencies have provided several key definitions for interpreting waters that may become classified as "other waters" under the proposed rule. The proposed rule provides that the term "waters of the United States" means, on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same regions, have a significant nexus to traditional navigable water. *Id*. at 22263. First, "other waters" will be similarly situated "where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water." *Id*. at 22211 . Whether these "other waters" are aggregated enough to be evaluated under a "significant nexus" standard "depends on the functions they perform and their spatial arrangement within the 'region' or watershed." *Id*. These "other waters" may be aggregated into a single category if they perform similar functions that significantly affect the physical, chemical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. *Id*. 9

Second, "significant nexus" is proposed to be "defined to mean that a water, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas." *Id*. The effect these "other waters" have on traditional navigable waters, interstate waters, or the territorial seas may not be speculative or insubstantial. *Id*.

Finally, "region" is defined to be the "watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas." *Id*. This determination is critical in understanding the proposal's aggregation of similarly situated "other waters." With a basic understanding of the agencies' proposed "other waters" category, we can now begin distinguishing Justice Kennedy's "significant nexus" standard from the standard proposed by the EPA and USACE. (p. 20-21)

Agency Response: **In response to comment, the agencies have modified the case specific provision of the rule and the definition of significant nexus. Preamble, IV.**

10.435 *In Rapanos v. U.S.*, Justice Kennedy applied the "significant nexus" standard to a single category of water-wetlands. The agencies propose to extend this standard to "other waters," including wetlands. *Id*. at 22211. Examples of "other waters" are not provided, as the agencies instead remove a previous clarifying list of "other waters" for the adoption of a case-specific analysis approach to all "other waters." *Id*. at 22212. In his *Rapanos* concurrence, it does not appear that Justice Kennedy intended for the "significant nexus" standard to extend to waters other than wetlands.

Justice Kennedy opines that USACE has shown that wetlands "can perform critical functions related to the integrity of other waters-functions such as pollutant trapping, flood control, and runoff storage." *Rapanos* at 779. Because wetlands have been shown to perform such critical functions, wetlands:

> "[P]ossess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. When, in contrast, wetlands affect on water quality are speculative or

> insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Id*. at 780.

The "other waters" category proposed by the agencies does not provide any examples of "other waters" and does not support the proposition that these "other waters" can perform critical functions such as pollutant trapping, flood control, and runoff storage. Under the agencies proposal, all waters that are not already jurisdictional by category are evaluated under a "significant nexus" standard even if they have not been shown to perform critical functions like those of wetlands. The agencies' reasoned that application of the "significant nexus" standard to "other waters" not previously identified to perform critical functions seems to "leave wide-room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it . ... " *Id*. at 781. This type of standard is what Justice Kennedy was seeking to avoid, as he stated that waters such as drains, ditches, and streams might "appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC." *Id*. at 782.Without a showing that the proposed "other waters" category can perform critical functions like those performed by wetlands, it would appear that the application of the "significant nexus" standard for waters other than wetlands is beyond the scope of what Justice Kennedy was proposing in *Rapanos*. (p. 21-22)

<u>Agency Response:</u> Waters under the case-specific provision of the rule will be analyzed consistent with the rule to determine if they have a significant nexus. Preamble, IV. The rule is consistent with caselaw. Technical Support Document, I.C.

10.436 In *Rapanos*, Justice Kennedy opines:

> "[W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable". Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. *Id*. at 780.

The agencies propose that "other waters" are similarly situated if those waters: "[P]erform similar functions and they are either (1) located sufficiently close together so they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, and biological integrity of a traditional navigable water, interstate water, or the territorial seas; or (2) located sufficiently close to a "water of the United States" for such an evaluation on their effect." *ld* at 22211. The term "region" is proposed to be the "watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas." *Id*. Thus, "other waters" are similarly situated "when they are within a contiguous area of land with relatively homogenous soils, vegetation, and landform." *Id*. "Other waters" that are similarly situated under the proposed rule are required to perform similar functions pertaining to habitat, water storage, sediment retention, and pollution sequestration. *Id*. at 22213.

In light of Justice Kennedy's concurrence in *Rapanos* and past Supreme Court precedent established in *SWANCC*, this proposal for similarly situated waters in the region appears

to encompass a much broader spectrum of "adjacent waters" than what Justice Kennedy envisioned in his concurrence. Justice Kennedy only mentioned the aggregation of similarly situated wetlands. Most wetlands will share functional characteristics to include any or all of the following: flow, pollutant trapping, flood control, and run-off storage. Because wetlands tend to perform this set of functions, Justice Kennedy felt, from an administrative convenience standpoint, that aggregation of similarly situated wetlands was appropriate. Under the "other waters" category, one may have many different types of waters that perform substantially different functions, yet still share some characteristics to others within the region. Classifying all "other waters" within a similarly situated region may result in many "other waters" being classified as "waters of the United States" when these "other waters" may actually lack the requisite nexus to have a chemical, physical, or biological impact on a traditional navigable water, interstate water, or the territorial seas. (p. 22)

Agency Response: **The definition of significant nexus in the rule includes a definition of "similarly situated" and the rule establishes limitations on the waters subject to the case-specific provision. Preamble, IV.**

10.437 The proposed rule misinterprets the "significant nexus" standard as being satisfied when the impact is more than speculative or insubstantial. In the proposed rule, the agencies state, "[W]aters with a "significant nexus" must significantly affect the chemical, physical, or biological integrity of downstream navigable waters and the requisite nexus must be more than speculative or insubstantial." *Id*. With nothing further stated as to what is considered speculative or insubstantial, the proposed rule implies that "other waters" satisfy the "significant nexus" standard when "other waters" are determined to not be speculative or insubstantial. Justice Kennedy's use of the phrase "speculative and insubstantial," is as follows:

> "[W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effect on water quality is speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Rapanos*, 547 U.S. at 780.

Justice Kennedy intended for the standard to be applied to determine if the waters significantly affect the chemical, physical, or biological integrity of navigable waters. The effect will not be significant if it is speculative or insubstantial. An interpretation of the agencies' proposal purports to create "speculative or insubstantial" as the only criteria that matters when determining whether the "other waters" have a "significant" nexus to traditional navigable waters, interstate waters, or the territorial seas, and does not place any weight on the effect the "other waters" have on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. (p. 23)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document, I.C.**

National Cattlemen's Beef Association (Doc. #8674)

10.438 Additionally, ACCW assert that the agencies cannot rely on the *Connectivity* report because it has not been fully reviewed by the Scientific Advisory Board (SAB). At the time of publication in the federal register, the *Connectivity* report is a draft report, without incorporating the suggestions of the SAB panel. It is extremely troublesome that the agencies did not allow their own science to inform their rulemaking. It seems like the proposed rule was written before EPA's ORD department even assembled the *Connectivity* report. If that were not the case then the agencies would have waited to propose a rule until the SAB review of the report was completed. As it stands, the public will not have a meaningful opportunity to comment on a proposed rule that was informed by the final *Connectivity* report. The only logical reason to do this is if the agencies knew they would not have a final report that was different from the draft report. This is a brave assumption from the agencies, and shows that more likely, the agencies had the proposed rule written and then fit the science to meet its proposed rule. ACCW again assert that the agencies cannot rely on the draft *Connectivity* report for the reasons described above to support their proposed rule. (p. 15)

Agency Response: The Science Report is a twice peer-reviewed review and synthesis of peer-reviewed scientific literature. The rule reflects the agencies' interpretation of "waters of the United States" in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience. Preamble, III and Technical Support Document, II.

California Association of Winegrape Growers (Doc. #14593)

10.439 The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a)), In countless places, however, the Proposed Rule examines these three connective media not as a unity, but rather separately and in isolation from one another. In other words, the Proposed Rule appears to view the presence of any measurable connection having a bearing on any of the three mentioned types of attributes to itself afford sufficient evidence of the requisite "connection" to guide Agency policy on Agency jurisdiction under the CWA. (See, e.g., 79 Fed. Reg. 22213.) While this may be scientifically sound, it may well be legally infirm. In particular, for example, if there is only some biological or chemical connection, yet no hydrological connection, it would appear difficult to sustain that the requisite connection exists, between two separate waters, where there is no actual connection via some more or less continuous aqueous medium. Indeed, the *SWANCC* case would appear to stand for precisely this proposition. Addressing this question in his concurring opinion in *Rapanos*, Justice Kennedy requires that wetlands must "significantly affect the chemical, physical, and, biological integrity of other covered waters" in order to find a nexus. (*Rapanos*, *supra*, 547 U.S. 780.) Specifically, Justice Kennedy concluded: The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--

functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." (Rapanos, supra, 547 U.S. 779-80.)

The Proposed Rule's examination of separate chemical, biological, and hydrological connection, especially in the preamble's discussion of "other waters," ignores the Supreme Court's earlier direction in *SWANCC*, as well as Justice Kennedy's test for a significant nexus in *Rapanos*. (p. 5-6)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

County of San Diego (Doc. #14782)

10.440 The significant nexus determination should be applied consistent with the language in the *Rapanos* decision and retain the use of "and". The agencies acknowledge in referencing *Rapanos*, Justice Kennedy concluded that wetlands are Waters of the U.S. "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." In the Proposed Rule, the agencies propose to apply the "Kennedy standard" when determining significant nexus for "adjacent waters" and "other waters." Consistent with the "Kennedy standard," the agencies conclude that all "adjacent waters" meet the significant nexus test owing to a combination of physical, chemical and biological connections. However, the agencies propose to deviate from the Kennedy standard in their approach to "other waters" by determining that effects on either the chemical, biological, or physical integrity will be sufficient to establish significant nexus. In the agencies proposed rule, the word "and" from Justice Kennedy's quote was swapped with the word "or," which clearly has a drastically different meaning. By using the word "and," the significant nexus standard is held to a higher and more realistic threshold of needing to show three types of affects to the integrity of the downstream navigable water. On the other hand, using the word "or" greatly diminishes the need for a clear influence as it only requires one of the three affects to occur. The County requests that the new rule be revised to define interpretation of the significant nexus standard consistent with Justice Kennedy's opinion, including use of the word "and" when referring to the effect on the chemical, physical, and biological integrity.

EXAMPLE: If the rule is determined using chemical, physical, or biological integrity as the threshold, the scope of potential Waters of the U.S. could be much broader. A biological connection could be determined for areas where birds perch temporarily during migrations, or seeds are dispersed along a momentary flow. This could cause puddles, potholes, and small ponds to be considered significant by determination. By remaining consistent with Kennedy's interpretation of chemical, physical, and biological integrity, a

more defined focus of what is considered significant could be identified, addressed, and managed. (p. 9)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Ingram Barge Company (Doc. #14796)

10.441 Additionally, the Proposed Rule includes within the scope of CWA jurisdiction "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment." [793] By declaring all adjacent waters-not simply adjacent wetlands, as the current rule and past guidance do—categorically jurisdictional, the Proposed Rule sweeps in many waters not previously subject to federal regulation, which impermissibly expands jurisdiction. Also, by including "neighboring" waters, the Proposed Rule creates lack of clarity as to its overbroad coverage, as it includes "waters located within the riparian area or floodplain of a [jurisdictional water], or waters with a shallow subsurface hydrologic connection to such a jurisdictional water." [794] Thus, the Proposed Rule impermissibly relies on groundwater to establish jurisdiction, which it additionally notes it cannot regulate, as regulating groundwater is beyond the authority of the Agencies. Furthermore, the Proposed Rule classifies tributaries as jurisdictional, impermissibly finding that all tributaries have a significant nexus to jurisdictional waters. The Proposed Rule does exclude two types of ditches from CWA jurisdiction; [795] ditches that do not meet the criteria for exclusion could be considered waters of the United States, which by the narrowness of the exclusions shows how expansively the Proposed Rule can be applied. Therefore, the Proposed Rule is too broad and over-expansive in its coverage, and it impermissibly expands the proper scope of the Agencies' authority as provided by the CWA and subsequently clarified by the courts. 12 79 Fed. Reg. at 22,263. 13 *Rapanos*, 541 U.S. at 778-79 ("[T]he word 'navigable' in 'navigable waters' [must] be given some importance [and] some effect."). (p. 14)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

National Wildlife Federation (Doc. #15020)

10.442 The Final Rule should define categories of non-adjacent waters as “waters of the United States” where the scientific evidence of connectivity satisfies Justice Kennedy’s Significant Nexus Test.

The proposed rule significantly limits the scope of jurisdictional “other waters,” is far more restrictive than the limits set by the Supreme Court, ignores the scientific evidence of connectivity, and runs counter to the goals of the Clean Water Act. As the agencies recognize, the “other waters,” (a)(3) provision of the regulations remains in effect. The *SWANCC* decision specifically addressed only the presence of migratory birds as a basis for asserting jurisdiction, and not the validity of the (a)(3) provisions generally.[796] It is

[793] 79 Fed. Reg. at 22,198.
[794] *Id.*
[795] 79 Fed. Reg. at 22,263
[796] See discussion of SWANCC, supra, at Section II

simply incorrect to assert the *SWANCC* Court held that any category of waters, other than the specific ponds at issue in the case, was outside of the government's Clean Water Act jurisdiction. The *SWANCC* Court merely held the Corps could not assert jurisdiction over waters based solely on the migratory bird test. The Court did not hold isolated waters could not be regulated under the Clean Water Act when there are other bases for jurisdiction.

We agree with the agencies' basic premises that "current regulations assert jurisdiction more broadly," than the proposed rule, and that the Supreme Court decisions in *SWANCC* and Ra*p*anos placed limits on the scope of "other waters" that may be determined to be jurisdictional.79 Fed. Reg. at 22212. As the agencies note, Justice Kennedy explained the Court's *SWANCC* decision, and the limits on the scope of "other waters" it articulated, as follows: "In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. citing 547 U.S. at 759.

The agencies properly read *SWANCC* and Justice Kennedy's concurring opinion in *Rapanos* as supporting the application of Kennedy's significant nexus standard to the "other waters" included in the agencies' long-standing definition of "waters of the U.S." and at issue in *SWANCC*.[797] Justice Kennedy, in his concurring opinion in *Rapanos*, stressed that hydrologically separated waters can collectively filter pollutants, prevent or reduce flooding and perform many other functions that may establish a "significant nexus" to other waters covered by the Act.[798] It follows from Justice Kennedy's *Rapanos* concurrence, when read in conjunction with the Court's *SWANCC* decision, that Justice Kennedy would not dismiss protection of so-called isolated waters out-of-hand, but at the least protect those that have a significant nexus to TNWs and IWs.

We agree that if an "other water" is demonstrated to have a significant nexus to a TNW or IW, then it also (easily) satisfies the current regulatory requirement that the water is one "the use, degradation or destruction of which could affect interstate or foreign commerce."[799]

However, the agencies' proposal to require case-specific significant nexus determinations for all "other waters" goes far beyond the limits set by *SWANCC* and *Rapanos*, and ignores the scientific evidence in the record. 79 Fed. Reg. at 22212. This case-specific requirement for all "other waters" effectively creates a seriously flawed regulatory

[797] 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3); see also 40 C.F.R. § 122.2 ("waters of the U.S." (c)).
[798] See discussion of *SWANCC*, supra, at Section II.; *Rapanos*, supra, at 547 U.S. at 786.
[799] See e.g., Kennedy concurring opinion at 547 U.S. 782 quoting *Oklahoma ex rel Phillips v. Guy F. Atkinson Co*., 313 U.S. 508, 524-525 (1941)("[T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce"). Justice Kennedy also indicates that regulation of waters having significant nexus are well within the Congress's authority and waters that meet the significant nexus test avoid any federalism or constitutional concerns: In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications-those involving waters without a significant nexus-that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. *Rapanos*, 547 U.S. at 776.

presumption that all "other waters" lack a significant nexus with TNWs, IWs, and territorial seas, and have no influence on the integrity of these waters. This presumption ignores the scientific evidence of connectivity that is in the rulemaking record.

For example, the SAB's review of the proposed rule finds:

> There is also adequate scientific evidence to support a determination that certain subcategories and types of 'other waters' in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus could be considered waters of the United States. Furthermore, as the science continues to develop, other sets of wetlands may be identified as 'similarly situated.' SAB Rule Letter at 3. (p. 55-56)

Agency Response: **The agencies disagree that the case-specific analysis provision creates a presumption that waters that fit within the provision lack a significant nexus; such waters that are determined to have a significant nexus are jurisdictional. The agencies have concluded that the five specified waters are similarly situated. Preamble, IV.**

Environmental Defense Fund (Doc. #15352)

10.443 The final rule must protect all intrastate waters that have a significant nexus to navigable waters to achieve the goals of the CWA.[800] The objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[801] This cannot be achieved if the CWA fails to protect upstream waters that have a significant nexus to downstream navigable waters. In holding that intrastate adjacent wetlands are protected by the CWA, the Supreme Court observed "Congress recognized" that "[p]rotection of aquatic ecosystems" required "broad federal authority to control pollution for '[w]ater moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source.'[802]

In *SWANCC*, the Supreme Court reversed the "Migratory Bird Rule" as a test of which intrastate waters could be protected by the CWA. The Court observed that, in Riverside, it had upheld the agencies' authority to protect intrastate, adjacent wetlands because "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate 'wetlands inseparably bound up' with the 'waters of the United States'" and because "the significant nexus between the wetlands and 'navigable waters'" influenced the Court's interpretation of the Clean Water Act.[803] In *Rapanos*, Justice

[800] The proposed rule does not, and should not, change the long-standing protection of navigable waters which include traditionally navigable waters (33 CFR 328.3(a)(1)), interstate waters (33 CFR 328.3(a)(2)), and the territorial seas (33 CFR 328.3(a)(3)). Accordingly, EDF does not address the regulation of these (a)(1)-(3) waters in our comments, but we fully support their continued protection

[801] 33 U.S.C. 1251(a).

[802] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (citing S.Rep No. 92-414, p.77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742.

[803] 531 U.S. at 167.

Kennedy noted that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[804]A four-justice plurality agreed that the CWA extends beyond traditional concepts of navigable waters, but relied upon whether these waters were "relatively permanent, standing or continuously flowing bodies of water" connected to navigable waters and wetlands with "a continuous surface connection" to navigable waters.[805] However, they clarified that "relatively permanent" waters could include, for example, "seasonal rivers."[806]In the wake of these decisions, the U.S. Courts of Appeals have either relied solely upon Justice Kennedy's significant nexus test or upon this test plus the four justice plurality test. None have relied only on the plurality test.

The agencies employed a sound reading of the case law in restoring CWA protection to those intrastate waters that have a significant nexus to navigable waters. The agencies reasonably define "significant nexus" as a water, including wetlands, that, alone or in combination with other similarly situated waters in the watershed that drains to the nearest navigable water, significantly affects the chemical, physical or biological integrity of the navigable water. For an effect to be significant, it must be "more than speculative or insubstantial."[807] This exactly comports with J. Kennedy's language in *Rapanos*.[808]

The agencies rely upon strong evidence of connectivity impacting the chemical, physical and/or biological integrity of navigable waters.[809] This clearly extends beyond a finding of mere physical connection. The agencies have grounded protection of adjacent intrastate waters and tributaries—including seasonal, headwater streams and wetlands—on extensive, peer reviewed, scientific documentation of chemical, physical and biological connections between these waters and navigable waters.[810] (p. 3-4)

Agency Response: **The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies' assessment of the importance of certain specified waters to the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. Preamble, IV. The agencies agree the rule is consistent with the caselaw and grounded in the science.**

Waterkeeper Alliance, et al. (Doc. #16413)

10.444 EPA does not have the authority to exempt waters of the United States from coverage under the Clean Water Act. The waste treatment system exemption is in direct conflict with the CWA and fails Step One and Step Two of the *Chevron* test. The plain language of the proposed waste treatment system exclusion is that a waste treatment system

[804] 547 U.S. at 759.
[805] *Id*. at 742.
[806] *Id*. at 732 n.5
[807] *Id*. at 780.
[808] *Id*. at 779 ("The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); 780 ("if the wetlands, either alone or in combination with other similarly situated [wetlands] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'")
[809] 17 See e.g., 79 Fed. Reg. 22195-22198, 22201-22217, 22222-22252 (Appendix A).
[810] *Id*.

designed to meet the requirements of the Clean Water Act is not a water of the United States even if it is created by impounding waters of the United States.[811] The proposed regulation states that "notwithstanding whether they meet the terms of paragraphs (a)(1) through (a)(3) of this definition," "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act."[812] Without the second part of the waste treatment system definition—"This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." – the broad exclusion for waste treatment systems from CWA jurisdiction is directly contrary to the CWA and decades of law holding that once a body of water is a waters of the United States, it is always a waters of the United States.

While "waters of the United States" itself may be an ambiguous term that EPA is charged with promulgating regulations to define, it is clear from legislative history and decades of case law that Congress did not intend for EPA to allow our nation's rivers, streams, and lakes to be used as private sewers for the utility industry and other polluters. Under Chevron v. Natural Res. Def. Council, courts examine "the intent of Congress" in creating the statue.[813] If the intent is clear, a court "gives effect to the unambiguously expressed intent of Congress."[814] If, however, the statute is ambiguous, a court will defer to an agency's interpretation of the statute if it is a "permissible construction."[815]

Here, senate reports speak directly to this issue and the general common law rule prior to the enactment of the CWA was that a body of water forever remains a waters of the United States once it has been identified as a waters of the United States.[816] Thus, the waste treatment system exclusion fails Step One.

There is no doubt that Congress intended the broadest possible reach of the CWA. The original conferees stated that "the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[817] The Senate Committee on Public Works, in approving the Federal Water Pollution Control Act Amendments of 1971 explicitly found that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable."[818] Several years later, another Senate Report stated that the CWA "stipulated that the Nation's fresh and marine waters would not be an element of the waste treatment process. That continues to be national policy."[819] There appear to be no contrary statements in the legislative history.

[811] See 79 Fed. Reg. at 22,268.
[812] *Id*.
[813] 467 U.S. 837, 842 (1984).
[814] *Id*. at 842--- 43.
[815] *Id*. at 843.
[816] See, e.g., *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 408 (1940) ("When once found to be navigable, a waterway remains so.").
[817] S. Rep. No. 92--- 1236, at 45 (1972) (Conf. Rep.), reprinted in 1972 U.S.C.C.A.N. 3776, 3822.
[818] S. Rep. No. 92--- 414, at 7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674.
[819] S. Rep. No. 95--- 370, at 4 (1977) reprinted in 1977 U.S.C.C.A.N. 4326, 4330.

In addition to legislative history that makes clear that the waste treatment system exclusion is contrary to Congressional intent, it is settled law that once a body of water is found to be waters of the United States, it always remains waters of the United States.[820]

While some of these decisions examined the term "navigable waters" as opposed to "waters of the United States," the Clean Water Act defines "navigable waters" as "the waters of the United States . . . ."[821] "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'"[822]

In this case, there is no evidence Congress intended to depart from well settled law to allow EPA to remove bodies of water that fall squarely within the definition of "waters of the United States" from the reach of the CWA, especially where those "waters of the United States" are impounded to create a private dump for a utility or other industrial operation.[823] Further, it is difficult to justify a claim that navigable waters retain a protected status forever, while waters of the United States – by definition also "navigable waters" – can be excluded from protection when they are impounded for the purposes of creating a dump.[824] (p. 68-71)

Agency Response: **The existing regulations contain the waste treatment system exclusion provision and EPA did not seek comment on this provision.**

10.445 Even if a court did find that the issue is ambiguous, EPA's charge to define "waters of the United States" is not without bounds. EPA's definition of "waters of the United States" is permissible so long as it is not "arbitrary, capricious, or manifestly contrary to the statute."[825] In this case, the broad waste treatment system exclusion is directly contrary to the statute, and is arbitrary and capricious because the legislative history and decades of common law make clear that EPA cannot carve out "waters of the United States" from the scope of the CWA to create waste disposal sites, which is precisely what the waste treatment system exclusion does.[826]

EPA has asserted that the waste treatment system exemption is not really as broad as the plain language suggests because it interprets the regulation to exclude only older waste

[820] See Scott Snyder, Note, The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA's Definition of "Waters of the United States", 21 N.Y.U. Envtl. L.J. 504, 522--- 23 (2014) (providing overview of federal cases prior to the enactment of the Clean Water Act holding that once a body of water has been classified as a waters of the U.S., it remains a waters of the U.S. forever).
[821] 33 U.S.C. § 1362(7).
[822] *Carter v. United States*, 530 U.S. 255, 264 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952); See also Scott Snyder, Note, The Waste Treatment Exclusion and the Dubious Legal Foundation for the EPA's Definition of "Waters of the United States", 21 N.Y.U. Envtl. L.J. 504, 523, 523 n. 95 (2014).
[823] *Id*. at 523
[824] *Id*. at 522--- 23.
[825] *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).
[826] See discussion *infra*.

treatment systems constructed from waters of the United States. Generally, an agency's interpretation of its own regulations is subject to judicial deference unless it is "plainly erroneous or inconsistent with the regulation."[827] In this case, the agency's interpretation conflicts with the plain language of the regulation, and EPA has also advanced a second interpretation that does exclude newly created waste treatment systems in some circumstances.

When it first finalized the waste treatment system definition in 1980, EPA stated that Congress did not intend for the CWA to exempt waste treatment systems created by impounding waters of the United States.[828] Specifically, EPA said:

> "[b]ecause CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States. Manmade waste treatment systems are not waters of the United States, however, solely because they are created by industries engaged in, or affecting interstate or foreign commerce."[829]

Even when the agency suspended the final sentence of the regulation, it reiterated its purposes, noting that "[t]he Agency's purpose in the new last sentence was to ensure that dischargers did not escape treatment requirement by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands."[830]

After promulgating a rule that reflected the intent of Congress that our nation's rivers, lakes, and streams not be used as private dumps and then backtracking, EPA came up with a new spin on how to treat coal ash and other industrial impoundments instead of following through on its promise to revisit the suspension. In a 1986 memorandum, EPA stated that it evaluates what is an exempt waste treatment system on a case-by-case basis, treating "newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments as 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S."[831] EPA states that, in fact, it suspended the last sentence of the waste treatment

[827] *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
[828] 45 Fed. Reg. at 33,298
[829] *Id*.
[830] 45 Fed. Reg. at 48,620.
[831] Memo from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarborough, EPA Region IV Residuals Management Branch Chief, at 7 (Apr. 2, 1986).

system in order to allow for such case-by-case decisions.[832] EPA has echoed the interpretation articulated in the 1986 memorandum in various scenarios.[833]

The fact of the matter is that the proposed waste treatment exemption does not include any language limiting the exclusion to treatment systems created by impounding waters of the United States, that have been in existence "for many years" or for any other time period. Further, it is illogical—and courts have held as much—to suggest that a waste impoundment created prior to the CWA has been designed to meet the requirements of the CWA.[834] In any event, the plain language of the proposed regulation arguably exempts all waste treatment systems designed to meet the requirements of the CWA created by impounding waters of the United States regardless of when the treatment systems are constructed.[835]

In fact, EPA and the Corps have attempted to reverse this interpretation in recent years to exclude newly created waste treatment systems from "waters of the United States." See, e.g., Jon Devine et al., The Intended Scope of the Clean Water Act, 41 Envtl. L. Rep. News & Analysis 11,118, 11,125 (2011) (noting that the agencies have advanced this broader interpretation in a 1998 Federal Register notice, a 2000 guidance document, and by the Corps in recent litigation. "Under the agencies' revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is covered by a § 404 permit; that way, the system is 'designed to meet the requirements of the Act,' as required by the regulation."[836]

EPA's interpretation of the regulation does not make the proposed waste treatment system exemption a permissible construction of the CWA. EPA's interpretation is inconsistent with the language of the regulation itself, and EPA has advanced a broader interpretation that does exclude newly created impoundments. For all these reasons, the waste treatment system exclusion is illegal and fails Step One and Step Two of the *Chevron* test.

For all of the reasons set forth above, the Commenters strongly urge EPA and the Corps to eliminate the exclusion or publish a revised definition of waste treatment system that complies with the CWA. At a minimum, EPA must provide full notice and comment rulemaking for the proposed waste treatment system exclusion. (p. 71-74)

[832] *Id*. (noting that EPA suspended the sentence in order to "restor[e] the ambiguity of the earlier regulations, so that each case must be decided on its own facts"). This is, of course, contrary to the purpose EPA provided when it suspended the sentence. 45 Fed. Reg. at 48,620 (noting that EPA would re-examine the waste treatment system definition and "promptly . . . develop a revised definition and to publish it as a proposed rule for public comment").
[833] Jon Devine et al., The Intended Scope of Clean Water Act Jurisdiction, 41 Envtl. L. Rep. News & Analysis 11,118, 11,125 (2011) (citing Letter from Lisa P. Jackson, Administrator, EPA, to Rep. James L. Oberstar at 1 (Apr. 30, 2010)). EPA has taken the same position in litigation. See *W. Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-- 90 (S.D. W. Va. 1989), aff'd, 932 F.2d 964 (4th Cir. 1991).
[834] See, e.g., *California Sportfishing Prot. Alliance v. Cal. Ammonia Co*., 2007 WL 273847, *6 (E.D. Cal 2007) (noting that the fact that a waste treatment impoundment is created prior to the Clean Water Act is evidence that it is not "designed to meet the requirements of the Clean Water Act").
[835] 79 Fed. Reg. at 22,268.
[836] *Id*.

Agency Response: **These comments are beyond the scope of the rule; the agencies did not seek comment on the existing provision for waste treatment system exclusions.**

Sierra Club, Cumberland Chapter (Doc. # 15466)

10.446 1. The proposed rulemaking will help harmonize existing regulatory definitions with the mandate of Justice Kennedy in the US Supreme Court plurality decision in *Rapanos v United States*, 547 U.S. 715 (2006). We would prefer a broader definition more consistent with EPA and Corps practice from 1972 through the unanimous opinion of the Supreme Court in *United States v Riverside Bayview Homes*, 474 U.S. 121 (1985). Unfortunately, that broad definition which *Bayview* held to be Congressional intent, was reduced with Supreme court opinion in *SWANCC v U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Rapanos added more uncertainty, making this Proposed Rule necessary.

Contrary to the myths propounded by the American Farm Bureau Federation and others, the WOTUS rule is not regulatory overreach – it is a regulatory change to be consistent with the "significant nexus" requirement discussed by Justice Kennedy.

These Supreme Court decisions created new uncertainty within the agencies, the regulated community, and the environmental community concerning what waters the Clean Water Act covers and what waters it does not. Current practice involves a time consuming investigation to determine the "connectivity" between headwaters and wetlands and downstream navigable rivers. EPA and the Corps determined that it was better use of resources to assemble the scientific studies on "connectivity" and use those studies to add additional definition to WOTUS. In essence, the proposed rule will define all water bodies, including wetlands that are located in a floodplain or a riparian area as "waters of the US" without further proof. Upland water bodies, called "other waters" outside the floodplain or riparian area, will still receive the "case-by-case" investigation to establish a "significant nexus" in order to receive Clean Water Act protection. (p. 2)

Agency Response: **The agencies agree the rule will provide needed clarity and is consistent with the caselaw. Technical Support Document, I.C.**

Coalition of Alabama Waterways (Doc. #15101)

10.447 The agencies assert jurisdiction too broadly over "adjacent" waters. The Proposed Rule includes within the scope of CWA jurisdiction "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment."[837] By declaring all adjacent waters—not simply adjacent wetlands, as the current rule and past guidance do—categorically jurisdictional, the Proposed Rule sweeps in many waters not previously subject to federal regulation, which is contrary to the agencies' assertion that the proposal does not expand jurisdiction. Furthermore, the definition of "adjacent" is overly broad, impermissibly relying on groundwater connections to capture "neighboring" waters that are not actually adjacent and otherwise would not fall within CWA jurisdiction.

[837] 79 Fed. Reg. at 22, 198.

The agencies propose to consider adjacent waters jurisdictional because the agencies find that they, categorically, have a significant nexus to jurisdictional waters. However, the agencies' scientific support for this finding is not yet final, and the agencies wrote the language without waiting for the outcome of the SAB review.[838] Thus the flawed bases of the Proposed Rule's impermissible expansion of CWA jurisdiction include not only the agencies' faulty construction of the significant nexus text, but also incomplete science and analysis.

Further, the Proposed Rule broadens the definition of "adjacent" to include waters that are not actually adjacent within the customary meaning of the word but rather are merely "neighboring," as defined. The result is not only overbroad, it is also unclear. The agencies propose to define "adjacent" as "bordering, contiguous or neighboring," and to cover "[w]aters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like" as "adjacent waters."[839] The term "neighboring" is defined for purposes of the term "adjacent" and with respect to "riparian area" and "floodplain," each of which would also be a defined term itself: "Neighboring" includes "waters located within the riparian area or floodplain of a [jurisdictional water], or waters with a shallow subsurface hydrologic connection to such a jurisdictional water."[840]

The terms "riparian area" and "floodplain" further define "neighboring" for purposes of the term "adjacent." "Floodplain" would be defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."[841] The definition of "riparian area" is especially troublesome for its breadth and ambiguity:

> "The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."[842]

The concept of "influenc[ing]" the ecosystem in the "area" bordering a water—by "surface or subsurface hydrology," no less—is an amorphous and potentially farreaching standard. It is also an unworkable one likely to make case-specific determinations complicated, prolonged, and burdensome.

The Proposed Rule impermissibly relies on groundwater to establish jurisdiction, given that "[t]he agencies have never interpreted 'waters of the United States' to include groundwater and the proposed rule explicitly excludes groundwater…"[843] It is not possible to rely on groundwater to establish jurisdiction without regulating the groundwater itself, which the agencies seem to acknowledge being beyond their

[838] See, e.g., 79 Fed. Reg. at 21,196
[839] *Id*. at 22,263
[840] *Id*.
[841] *Id*.
[842] *Id*.
[843] *Id*. at 22,218

authority. For example, suppose an activity with a discharge directly affecting only an area of shallow groundwater that provides some discernible hydrologic connection between a small upstream water and a jurisdictional area downstream. Under the Proposed Rule, the upstream water also must be jurisdictional. Is it the agencies' position that it is without power to regulate the groundwater between the two putatively jurisdictional areas? If so, then the area constitutes a separation that is analogous to the isolation of the ponds at issue in *SWANCC*. If the agencies believe they can regulate that area directly under the CWA, then they should so state in a straightforward manner (and be prepared to defend that position in the courts).

Contrary to the customary meaning of "adjacent" ("not distant," "nearby," or "having a common endpoint or border"[844]), under the agencies' broadened interpretation, waters located a considerable distance from a tributary or other jurisdictional water may be considered adjacent waters. Again, Justice Kennedy identified that exact scenario as raising a problem for CWA jurisdiction. And far from making the identification of jurisdictional waters "less complicated and more efficient," the Proposed Rule creates greater confusion and will inevitably lead to more protracted litigation (p. 8-10)

Agency Response: The rule's definition of "adjacent waters" does not rely on groundwater connections. Preamble, IV. The agencies considered functional relationships and proximity in making significant nexus determinations in support of the rule. Preamble, III.

Center for Environmental Law and Policy (Doc. #15431)

10.448 EPA fails to take into consideration the special import of CWA citizen suits that have worked to unsettle what is considered settled agency interpretation. Under section 505 of the CWA, any citizen may bring suit against those who violate a CWA effluent standard or limitation, or a state or EPA order. Section 505 also allows for suit against the EPA Administrator for failing perform a nondiscretionary duty or act.[845] The citizen suit provision in the Clean Water Act is far-reaching and works in conjunction with federal regulatory efforts to fully effectuate congressional goals. "[I]f the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action [under the CWA]."[846] Thus, the citizen suit provision supplements agency action.[847] Citizen suits often unsettle what is considered settled agency interpretation. Citizen suits allow outside technical expertise and local knowledge to be integrated into CWA's regulatory structure through citizen suits.[848] As one court held: "The presence of the citizen suit provision [in the CWA] demonstrates

[844] Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/adjacent.
[845] 33 U.S.C. § 1365(a).
[846][846] S. Rep. No. 92-414, at 64 (1972).
[847] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found*., 484 U.S. 49, 60 (1987); see also *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (finding that citizen suits ensure the "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.").
[848] See Henry N. Bulter & Jonathan R. Macey, Using Federalism to Improve Environmental Policy 27 (1996) ("Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources.").

that Congress believed courts were competent to make fact-sensitive determinations over whether a particular discharge requires a permit."[849] It is been largely through citizen suits that have groundwater has been found to fall under the purview of the CWA.[850] EPA should not overlook the successful efforts made by private litigants to advance to inclusion of groundwater in the CWA.

The legislative history of the CWA indicates Congressional intent for jurisdiction under the Act to extend to the constitutional limit of the Commerce Clause. The legislative history of the CWA indicates that Congress intended jurisdiction under the Act to extend to the maximum extent possible under the Commerce Clause. Two separate references in the legislative history demonstrate this intention. The first reference appears in a Senate Report that recognized a desire to move away from the more restrictive definition of "navigable waters."[851] The Senate Report recognized that "water moves in hydrologic cycles," and in order to control pollution the definition of waters must be extended to include pollutants entering "navigable waters, portions thereof, and their tributaries."[852] The second reference arose in a Conference Report that advocated that the term "navigable waters" be given the "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[853] Some federal courts that have considered the legislative history of the CWA have interpreted Congress's rejection of the so-called "Aspin Amendment" to indicate Congressional refusal to bring groundwater within the purview of the Act.[854] However, other Federal Courts considering the issue have disagreed with this interpretation.[855] The proposed amendment would have included the phrase "any pollutant to ground waters, from any point source" within the definition of "discharge of a pollutant."[856] By rejecting the amendment and choosing not to extend CWA protection to all groundwater, including isolated groundwater, it does not follow that Congress intended to exclude all groundwater from CWA jurisdiction. Crucially, the proposed amendment would also have eliminated an exemption for oil and gas related well injections into groundwater.[857] This portion of the amendment was highly divisive and

[849] *Hawai'i Wildlife Fund v. County of Maui*, CIV. 12-00198 SOM/BM, 2014 WL 2451565, at *8 (D. Haw. May 30, 2014).
[850] See *infra* III.B.2.
[851] 2 Envtl. L. (West) § 4:12 (citing Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1971, S.Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), in 2 Leg. Hist. at 1495).
[852] 2 Envtl. L. (West) § 4:12 (citing Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1971, S.Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), in 2 Leg. Hist. at 1495).
[853] *Id*. (citing Comm. of Conference, Federal Water Pollution Control Act Amendments of 1972, S.Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) in 3 Legis. Hist. at 327).
[854] See *Exxon Corp. v. Train*, 554 F.2d 1310, 1327 (5th Cir. 1977); Vill. of *Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 965 (7th Cir. 1994); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc*., 962 F. Supp. 1312, 1318 (D. Or. 1997); *Patterson Farm, Inc. v. City of Britton, S.D.*, 1998 DSD 34, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998).
[855] See *infra* III.B.2.
[856] Wood, Mary Christina, Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 Harv. Envtl. L. Rev. 569, 613 (1988) (citing Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print. 1973) at 589).
[857] Wood, at 613-14.

likely led to its rejection.[858] As the Supreme Court has noted, "a bill can be proposed or rejected for any number of reasons."[859] The rejection of the Aspin Amendment does not decisively indicate a Congressional intent to exclude groundwater from the CWA. The agencies have failed to address this strong argument for a broad reading of the CWA under the Commerce Clause. As the Supreme Court has held that groundwater is an article of commerce and subject to Congressional regulation under the Commerce Clause, the EPA should explain precisely why groundwater is excluded from the intended broad reading of that Constitutional power under the CWA.[860]

While the EPA states that they have never interpreted "waters of the United States" to include groundwater, the judicial branch has ruled that groundwater can be jurisdictional. The Seventh and Tenth Circuits have considered the question, but no circuit court of appeals has definitively answered the question.[861] Several district courts, however, have ruled that groundwater is covered under the CWA, particularly when there is a hydrological connection conveying pollutants from groundwater to jurisdictional waters. Earlier this year in *Hawai'i Wildlife Fund v. County of Maui*[862] the court held that pollutants injected into groundwater and conveyed to the ocean were covered by the CWA and required a NPDES permit. And this is only the most recent addition to a long list of district courts that have interpreted the CWA to include groundwater.[863] The

[858] Wood, at 613-14.
[859] *SWANCC*, 531 U.S. at 159 (citations omitted).
[860] *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 941 (1982).
[861] See *Inland Steel Co. v. Envtl. Protection Agency*, 901 F.2d 1419, 1422 (7th Cir. 1990) ("[S]ince the legal concept of navigable waters might include ground waters connected to surface waters… a well that ended in such connected ground waters might be within the scope of the Act"); *Quivera Mining Co. v. US Envtl. Prot. Agency*, 765 F.2d 126, 129 (10th Cir. 1985) (finding CWA jurisdiction for a creek and gully given a surface water connection to 'navigable-in-fact streams' after intense rainfall, and that the discharge of pollutants continues "through underground aquifers fed by the surface flow…into navigable-in-fact streams").
[862] *Hawai'i Wildlife Fund v. County of Maui*, __ F.Supp.2d __ (D.Haw. 2014) 2014 WL 2451565
[863] See *Association Concerned Over Resources and Nature, Inc. v. Tennessee Aluminum Processors, Inc*., 2011 WL 1357690 at *18 (M.D.Tenn. Apr. 11, 2011) (required the plaintiffs to show only "a link between contaminated ground waters and navigable waters"); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180-1181 (D. Idaho 2001) (court holds that the CWA extends federal jurisdiction over discharges from defendant's dairy into the groundwater that is hydrologically connected to surface waters that are themselves waters of the United States); *Mutual Life Ins. Co. v. Mobil Corp*., No. Civ. A. 96–CV1781, 1998 WL 160820, at *3 (N.D.N.Y. 1998) (complaint alleging "a hydrological connection between the contaminated ground water and navigable waters" sufficient to state a claim); *Williams Pipe Line Co. v. Bayer Corp*., 964 F.Supp. 1300, 1319-20 (S.D.Iowa 1997) ("Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater."); *Friends of Santa Fe County v. LAC Minerals, Inc*., 892 F.Supp. 1333, 1357-58 (D.N.M. 1995) (stating that the CWA applies to waters that travel through groundwater, and that "most courts to have considered the issue have held that hydrologically connected groundwaters are regulated waters of the United States"); *Washington Wilderness Coal. v. Hecla Min. Co*., 870 F.Supp. 983, 990 (E.D.Wash. 1994) ("[S]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit"); *Sierra Club v. Colorado* Ref. Co., 838 F.Supp. 1428, 1434 (D.Colo.1993) (holding "the [CWA's] preclusion of the discharge of any pollutant into 'navigable waters' includes such discharges which reaches 'navigable waters' through groundwater"); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1196 (E.D.Cal. 1988), rev'd on other grounds (finding that while it is clear that "Congress did not intend to require permits for discharges to isolated groundwater, it is also clear that Congress did mean to limit discharges of pollutants that could affect surface waters of the United States" and that Plaintiff should be given the opportunity to "establish that the

proposed rule offers no recognition of this substantial body of precedent. That the judicial branch has failed to reach a unified view of the scope of groundwater inclusion under the CWA requires more justification, not less, for a groundwater exclusion by rule. The agency has not explained how the CWA forbids or restricts groundwater as a water of the United States—an especially important discussion in light of the substantial case law on this point. If the agency interprets the Act to grant EPA discretion in treating groundwater as a water of the United States, then the agency should more clearly explain its rationale for granting an exclusion that is so extraordinary and expansive. The agency has been charged by the CWA with "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[864] If the EPA is using discretion in defining waters of the United States, the agency should clearly explain how a total groundwater exclusion is a suitable means to achieving that national objective. It is also clear from the cases cited above that courts have differentiated between types of groundwater when considering CWA jurisdiction. If the agency believes that it has different obligations under the CWA to different types of groundwater, the agency should delineate that clearly.

Supreme Court precedent does not require exclusion of groundwater from the CWA. The Supreme Court has consistently held that Congress intended to define navigable waters broadly under the CWA.[865] Additionally, the Court has recognized that Congress, with the goal of improving and maintaining water quality, intended to exercise the Commerce Clause power to extend the reach of the CWA to regulate waters not encompassed by prior Congressional acts.[866]

The Supreme Court's decision in *Rapanos v. United States* does not require groundwater exclusion.[867] Because the Supreme Court failed to reach a majority decision in *Rapanos*, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[868] As the Seventh, Ninth and Eleventh circuits have recognized, Justice Kennedy's concurrence and the significant nexus test provide the controlling rule.[869] In his concurrence, Justice Kennedy rejected two limitations imposed by the plurality's test: 1) that waters of the U.S. must be relatively permanent, standing or flowing bodies of water and 2) that they require a continuous surface connection.[870] Thus, Justice Kennedy did not foreclose the possibility

groundwater is naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act"); State of N.Y. v. U.S., 620 F.Supp. 374, 381 (E.D.N.Y 1985) (court declines to dismiss plaintiff's CWA §301 cause of action "as applied to groundwaters, since it is clear that plaintiff has alleged that the pollutants threaten to contaminate… navigable waters").

[864] 33 U.S.C. §1251(a) (2014).

[865] See *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 133 (1985); Solid *Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers,* 531 U.S. 159, 175 (2001) (Hereinafter SWANCC); *Rapanos v. United States*,
547 U.S. 715, 731 (2006).

[866] *Riverside Bayview*, 474 U.S. at 133.

[867] 547 U.S. 715 (2006).

[868] *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

[869] *United States v. Gerke Excavating, Inc*., 464 F.3d 723, 724 (7th Cir. 2006); *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007).

[870] *Rapanos*, 547 U.S. at 768-69 (Kenndy, J., concurring).

of CWA jurisdiction extending to groundwater in instances where a significant nexus exists between groundwater and traditionally defined waters of the U.S. The agencies have failed to explain the necessity of, or rationale for, total groundwater exclusion when Supreme Court precedent does not require it.

The agencies have expressed an intention to comply with the Supreme Court holdings in *Rapanos*, and to implement Justice Kennedy's significant nexus test. However, the complete categorical exclusion of groundwater does not comport with the case-by-case interpretation required under the significant nexus test, nor does it fulfill the purpose of the CWA.[871] (p. 15-18)

Agency Response: The agencies have never interpreted the CWA to include groundwater, also shallow subsurface flow, as a "water of the United States." However, consistent with many of the cases cited in the comment, EPA continues to interpret point source discharges of pollutants to "waters of the United States" via groundwater with a direct hydrologic connection to surface waters to be discharges subject to the CWA. *See* Concentrated Animal Feeding Operation Proposed Rule, 66 FR 2960, 3015 (Jan. 12, 2001). The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agency has never considered the groundwater itself to be a "water of the United States."

Nucor Corp. (Doc. #14963)

10.449 The Plurality rejected jurisdiction over "ephemeral streams , wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert." *ld*. at 734 (plurality). The Plurality and Justice Kennedy also limited jurisdiction over wetlands, rejecting the idea that a mere hydrological connection between a non-adjacent wetland and a TNW was sufficient to establish jurisdiction. The Plurality differed from Justice Kennedy in that it believed jurisdiction should be limited to wetlands with a "continuous surface connection" (*ld*. At 742) whereas Justice Kennedy established the "significant nexus" criterion (*ld*. at 780). In light of the disagreement between the Plurality and Justice Kennedy, the Agencies must establish a Comments on the U.S. EPA and U.S. Army Corps of Engineers Proposed Rule Regarding Definition of "Waters of the United States" Under the Clean Water Act rule that takes into account the common jurisdictional thread in *Rapanos* , and must not pick whichever standards suits their jurisdictional grab. (p. 5)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

[871] EPA and Army Corp of Engineers, Questions and Answers: Waters of the US Proposal, available at http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf.

10.4. SIGNIFICANT NEXUS

Agency Summary Response:

With this rule, the agencies interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience. The key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: waters are "waters of the United States" if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas. The agencies interpret specific aspects of the significant nexus standard in light of the science, the law, and the agencies' technical expertise: the scope of the region in which to evaluate waters when making a significant nexus determination; the waters to evaluate in combination with each other; and the functions provided by waters and strength of those functions, and when such waters significantly affect the chemical, physical, or biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas. Preamble III, Technical Support Document, II.

Specific Comments

Office of the Governor of Iowa (Doc. #8377)

10.450 The proposed redefining of the phrase "waters of the U.S." is undertaken with disregard for the applicable statutory and constitutional framework and the case law that has arisen from the interpretation of this phrase. EPA and the Corps have ignored the Supreme Court's prior admonishments and attempted to expand Justice Kennedy's significant nexus test to the ultimate extent of its logic. As Justice Scalia points out in *Rapanos*, the significant nexus test is susceptible to the interpretation that anything that affects "waters of the U.S." is "waters of the U.S." *Rapanos*, 547 U.S at 755. The proposed rule takes that idea and runs with it.

In doing so, the proposed rule untethers from any rational tie to the language of the CWA and the constitutional underpinnings thereof. The CWA is premised upon the Federal government's authority to regulate commerce, which is why the act specifically applies to "navigable waters" which it then defines as "waters of the U.S." The Supreme Court has acknowledged in *SWANCC and Rapanos* that the traditional term "navigable waters"—even though defined as "the waters of the United States"—carries *some* of its original substance: "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S at 172. That limited effect includes, at bare minimum, the ordinary presence of water. See Plurality Opinion, *Rapanos*, 547 U.S at 734. The proposed rule's expansion of jurisdiction without attempting to provide a foundation in the regulation of commerce or impacts on actual navigation ignores the case law that has been developed to date and the origin of Federal jurisdiction - the Commerce Clause.

The result is a rule that treats Justice Kennedy's concurring opinion in *Rapanos* as overruling the prior cases of *Riverside Bayview*[872] and *SWANCC*. Justice Kennedy took pains to avoid that very result and wrote at length to explain the test in the context of these prior decisions. See *Rapanos*, 547 U.S. at 766-774. Even if the agencies are able to craft a rule that provides the clarity sought by all parties, that rule must continue to comply with the existing legal framework. (p. 6-7)

Agency Response: The rule is consistent with the statute, the caselaw and the Constitution. Technical Support Document, I.A. and C.

Florida Department of Agriculture (Doc. #10260)

10.451 Justice Kennedy's concurring opinion, which suggests the "significant nexus" test, appears to have been relied upon heavily by the EPA and the Corps in drafting these revisions to the rule. Justice Kennedy states that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (quoting *SWANCC*, 531 U.S. at 167).Justice Kennedy then revises the usage of the term "significant nexus" by stating that it requires establishment, on a case-by-case basis, that bodies of water or wetlands have a significant nexus if, either alone or in combination with similarly situated lands in the region, they significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. *Id*. at 782 However, Justice Stevens recognized that which is most problematic with the proposed rule when he noted in his dissent that "Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they will need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications." *Id*. at 809.Uncertainty is one of the chief complaints made regarding the proposed rule and it is also its most significant flaw.

Justice Kennedy's concurring opinion recommended remand of the *Rapanos* case back to the Sixth Circuit Court of Appeals to consider all the factors necessary to determine whether the wetlands in question had the requisite nexus with the navigable waters. *Id*. at 787. The plurality opinion takes exception to this test, stating:

> 'Only by ignoring the text of the statute and by assuming that the phrase of *SWANCC* ("significant nexus") can properly be interpreted in isolation from that text does Justice Kennedy reach the conclusion he has arrived at. Instead of limiting its meaning by reference to the text it was applying, he purports to do so by reference to what he calls the "purpose" of the statute. Its purpose is to clean up the waters of the United States, and therefore anything that might "significantly affect" the purity of those waters bears a "significant nexus" to those waters and thus (he never says this but the text of the statute demands that he mean it) *is* those waters.' *Id* at 755.

[872] *U.S. v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985).

Justice Scalia highlights the inaccuracy of attributing the "significant nexus" case-by-case application to *Riverside Bayview*, where the Court explicitly held that the determination of ecological significance rests on whether a wetland is contiguous, or physically connected, with a "water of the U.S.," rather than any independent ecological determination. *Id* at 753-54. (citing *Riverside Bayview*, 474 U.s at 134-35). Justice Scalia then reiterates that the Supreme Court's usage of "significant nexus" was to specifically hold that "[w]etlands are 'waters of the United States' if they bear the "significant nexus" of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States."*Id* at 755 (emphasis in the original). (p. 66-67)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document. I.C.**

10.452 Justice Kennedy's concurring opinion recognizes that waters, which are themselves nonnavigable in the traditional sense and the jurisdiction of which is questionable, would fall into two categories:

1. Where the connection between the navigable and the non-navigable water or wetland is so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act; or
2. Where there is little or no connection between the traditional navigable water and the non-navigable water or wetland.

Id. at 767. This analysis should bear in mind, however, the Court's often repeated reminder that the Act uses the term "navigable" and that the term must be given some meaning, not simply interpreted in such a way that its presence in the Act is rendered meaningless. See *SWANCC*, 531 U.S. at 172. (p. 67-68)

Agency Response: **The rule is consistent with the caselaw. Technical Support Document. I.C.**

10.453 Further, as both Justice Kennedy in *Rapanos* and the court in *Riverside Bayview* note, the Act reserves unto each state the power to issue permits for "the discharge of dredged or fill material into the navigable waters . . .in its jurisdiction," excepting those navigable waters used or susceptible to use in interstate commerce, "including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto." 33 U.S.C. § 1344(g)(l) (emphasis added). Clearly, some wetlands fall under the scope of the tenn "navigable waters," provided they are adjacent to a traditional navigable water or its tributary. *Rapanos*, 547 U.S. at 768. *Riverside Bayyiew* makes it clear that wetlands adjacent to traditionally navigable waters are properly included in the Act's jurisdiction for two reasons: 1) the uncertainty of clear delineation where "waters" end and uplands begin; and 2) the Corps's ecological judgment about the relationship between waters and their adjacent wetlands provided an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act. 474 U.S. 121, 132-34 (2006). However, the relationship does not require that an adjacent wetland be inundated or flooded by the related "waters of the U.S." to be jurisdictional. "[S]aturation by either surface or ground water is sufficient to bring an area within the category of wetlands," provided that the saturation is sufficient, as defined in the regulation, to support

"vegetation typically adapted for life in saturated soil" and the wetland area is actually connected to a navigable wate1way. *Id*. at 129- 31. The proposed rule seems to misconstrue the language used by the Supreme Court regarding the source of the saturation to justify reaching beyond adjacency to otherwise isolated wetlands or waters. The proposed rule's definition of "neighboring" uses confined surface hydrologic connection (surface water) and shallow subsurface hydrologic connection (groundwater) out of context to establish adjacency and therefore jurisdiction. But the critical aspect of establishing adjacency is that the waters or wetlands are abutting or actually connected to a "water of the U.S." (p. 68).

Agency Response: The rule does not define neighboring based on surface hydrologic connections or shallow subsurface hydrologic connections. Preamble, IV.

Washington State Senate (Doc. #10871)

10.454 We also believe the proposed rule's "significant nexus" standard for seasonal, intermittent, and ephemeral streams and wetlands aligns very closely with the rulings of the Supreme Court under the *Rapanos v. U.S* decision and two earlier decisions reviewed in the rule's background statement. That standard, set out in Justice Kennedy's concurrence in the *Rapanos* case, received the support of the four dissenting justices in that case. While concurring in the result articulated in the plurality opinion by Justice Scalia, Justice Kennedy did not concur in the plurality opinion's standard that would have eliminated any streams from the Act's jurisdiction that are not "relatively permanent, standing or continuously flowing bodies of water." (p. 2)

Agency Response: The agencies agree that the rule is consistent with the caselaw.

Texas Comptroller of Public Accounts (Doc. #10952)

10.455 Through the proposed regulatory amendments, the agencies attempt to assume plenary authority to define the limits of their own jurisdiction. This is contrary to the holdings in *U.S. v. Riverside Bayview, SWANCC* and *Rapanos*. See, Section II. A., page 22191. The conclusory statement on Page 22192 indicates that the agencies determine that "it is reasonable and appropriate to apply the 'significant nexus' standard". This is contrary to the ruling of the Court. This is reinforced on page 22200. (p. 5)

Agency Response: The rule is consistent with the caselaw. Technical Support Document. I.C.

Department of Justice, State of Montana (Doc. #13625)

10.456 Your own proposal seems to acknowledge the extension when, again at page 22192, you state that "Because Justice Kennedy identified 'significant nexus' as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the 'significant nexus' standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well…to determine whether they are subject to CWA jurisdiction."

I cannot agree it is appropriate to apply the "significant nexus" standard to other categories of water bodies. As the majority of the Supreme Court said in the *SWANCC* case: "We said in *Riverside Bayview* that the word 'navigable' in the statute was of

'limited import,'... 474 U.s at 133. But it is one thing to give a word limited effect and quite another to give it no effect whatever." This statement was confirmed by Justice Kennedy in his concurring opinion in the *Rapanos* case'. "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable . . . . Nevertheless, the word 'navigable' in the Act must be given some effect. See *SWANCC, supra*, at 172 547 U.S 779. I believe that your proposed regulations would completely untether the scope of your agencies' jurisdiction from the statutory requirement of navigability, and I think this is proven by comparing your proposal to what Justice Kennedy would allow:

> "Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." 547 U.S 715, 780, 781. (p. 2-3)

Agency Response: The rule is consistent with the statute, caselaw and Constitution. Technical Support Document, I.A and C.

Attorney General of Texas (Doc. #5143)

10.457 From a legal standpoint, the federal agencies have chosen the wrong test. While it is in the agencies' purview to invoke *Rapanos*, their guide should have been the plurality's narrower hydrographic test, not Justice Kennedy's "significant nexus" test. See *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) ("the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ... ") (p. 5)

Agency Response: No Circuit Court has held that jurisdiction may be found only under the plurality standard. The rule is consistent with the caselaw. Technical Support Document, I.C.

10.458 In comparing the two theories, it is clear that there are certain waters that would pass Justice Kennedy's significant nexus test—and therefore be included as "waters of the United States"—but would fail the plurality's hydrographic test. For example, an isolated pond in a 100-year flood plain—which would be a water of the United States under the proposed rule—would likely pass Kennedy's test but fail the plurality's narrower construction.

The federal agencies' expansive definition also runs counter to recent guidance provided by the United States Supreme Court to the EPA when defining the limits of its authority. In *Utility Air Reg. Group v. EPA*, the Supreme Court cautioned that "[w]hen an agency claims to discover in along-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." Thus, if anything, the plurality's hydrographic test should have been adopted by the federal agencies, both because it garnered the most support from the Supreme Court and because it represents a narrower interpretation of the federal government's powers. *Util. Air Reg. Group v. Environmental Protection Agency*, No. 12-1146, slip op. (U.S. June 23, 2014). (p. 5)

Agency Response: **No Circuit Court has held that jurisdiction may be found only under the plurality standard. The rule is consistent with the caselaw. Technical Support Document, I.C.**

State of Idaho (Doc. #9834)

10.459 Any effort to clarify CWA jurisdiction should recognize that the "significant nexus" test Justice Kennedy set forth in *Rapanos v. United States* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. Idaho supports efforts to quantify "significant" in order to ensure the term's usage does not extend jurisdiction to waters with a *de minimis* connection to jurisdictional waters. Idaho appreciates language in the Proposed Rule which states that effects on jurisdictional waters must be "more than speculative or insubstantial." However, further work is needed to quantify the concept of significance, particularly the term "significantly affects" in 40 CFR 328.3 (c)(7), and to flesh out a transparent process for the agencies to use when making significance determinations. (p. 2-3)

Agency Response: **The agencies agree that the effects on traditional navigable waters, interstate waters, or the territorial seas must be more than speculative or insubstantial and have continued to define significant nexus using Justice Kennedy's language. The agencies have provided additional clarity by identifying in the rule the functions the agencies will assess for significant nexus determinations. Preamble, III and IV; Technical Support Document, II.**

Office of the Governor, State of Wyoming (Doc. #14584)

10.460 The proposed rule misapplies Justice Kennedy's "significant nexus" test. Justice Kennedy used the "significant nexus" test to define the limits of connectivity. The Agencies use it to reach beyond jurisdictional limits. "Rivers, streams, and other hydrographic features" identifiable as "waters" are the focus of the Act. Justice Kennedy used "nexus" to address wetlands that were relatively close, while refusing to find jurisdiction over "remote and insubstantial waters" that "may flow into traditional navigable waters." 54 7 U.S. at 778. The concept of connectivity was used to "trim" the tributaries and wetlands that were under federal jurisdiction (not enlarge them), so only those with a "significant nexus" to traditional navigable waters would be federally regulated. This is consistent with the plurality opinion, which declined to find jurisdiction beyond "relatively permanent, standing or continuous flowing bodies of water," specifically excluding "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739. The proposed rule uses "nexus" differently. 79 Fed. Reg. 22204. Any relationship that can affect the chemical, physical, or biological condition, no matter how minute, is used by the Agencies to claim connectivity and therefore federal jurisdiction. This approach disregards Justice Kennedy's opinion. Whereas Justice Ke1medy held that the nexus must exist and be significant for jurisdiction, 547 U.S. at 779-80, the Agencies' stance is that a nexus exists (no matter how remote), so it must be significant. (p. 6)

Agency Response: **The agencies disagree that the rule is based on any connection no matter how minute. The agencies' significant nexus determinations are consistent with the caselaw and available science. Preamble, III and Technical Support Document, II, VI-IX.**

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

10.461 The Proposed Rule continues to use the "ordinary high water mark" as an indicator for determining a tributary despite the fact that the plurality of the Supreme Court and Justice Kennedy have stated specifically it is not a reliable standard.[873] Both Justice Scalia's plurality and Justice Kennedy's opinions reject the idea of using an ordinary high water mark as a means of determining a signification nexus. Justice Kennedy said that the use of the ordinary high water mark would expand the breadth of jurisdiction so that it would allow for the "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it."[874] As much of the Proposed Rule seems to rest upon Justice Kennedy's opinion in *Rapanos*, it is conveniently odd to ignore his opinion on an ordinary high water mark. The use of the ordinary high water mark vastly expands the jurisdiction of the CWA and should not be relied upon as a standard. (p. 9)

Agency Response: **The agencies disagree with the characterization of Justice Kennedy's opinion with respect to the use of the ordinary high water mark to identify tributaries. The definition is narrower than the existing rule and is consistent with the statute and the caselaw. Technical Support Document, I.B. and C.**

Arizona State Land Department (Doc. #16903)

10.462 The Proposed Change is heavily supported by a misunderstanding of both *Rapanos* and the reasoning behind Justice Kennedy's "significant nexus" test. In reality, the Court has not made a consistent determination regarding "waters of the United States." Therefore, to allow a regulatory agency to misconstrue case law and then use that misinterpretation to advance its own goals would be irresponsible, at best. There has already been an evolution by the Court between the 2006 *Rapanos* case and the 2008-2009 Term. Thus, the Court should be allowed to continue its work unimpaired by the other branches of government and without being held to a standard that is already obsolete.

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

Florida League of Cities, Inc. (Doc. #14466)

10.463 In the Supreme Court's most recent ruling on the matter, *Rapanos v, United States*,[875] the plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites, Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.[876] The court was split in its concurrence as ,Justice Kennedy specifically rejected the notion that wetlands have a continuous

[873] *See Rapanos*, at 725, 781.
[874] *Rapanos*, at 781.
[875] 547 U.S. 715 (2006).
[876] http://www.naco.org/legislation/Documents/Waters-of-tlle-US-Coirnty-Analysis.pdf.

surface connection to a continuously flowing body of water to be covered under the CWA, mere adjacency to a tributary of a navigable water is not sufficient. Thus was born the ambiguous term "significant nexus."[877]

The newly proposed rule makes an effort to resolve the confusion by broadening the scope of EPA's jurisdiction. The most alarming expansion comes from the plain language of the proposed rule, "all waters, including wetlands adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and on a case-specific basis, other waters.[878] Allowing for a case by c.ase determination of "other waters," in the broadest interpretation of the term, coupled with the ill-defined and vague term, significant nexus, leaves regulated permitees and especially local governments with great uncertainty. The current language leaves open to interpretation whether or not ditches, ephemeral drains and conveyances that only receive flowing water upon significant rain events are jurisdictional under the proposed rule. In light of this confusion, it is important to narrowly define the term "significant nexus." (p. 4)

Agency Response: **The rule provides additional clarity to the definition of significant nexus and establishes limits on the waters for which the agencies will perform case-specific significant nexus determinations. Preamble, IV. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

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

10.464 The Proposed Rule exceeds the scope of federal authority under the United States Constitution. The CWA was enacted pursuant to Congressional authority to regulate interstate commerce under Article I, section 8, clause 3 of the United States Constitution—i.e. the "Commerce Clause," which states that Congress may "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." See *Riverside Bayview Homes*, 474 U.S. at 133 ("In adopting th[e] definition of navigable waters, Congress evidently intended to repudiate the limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause."). Accordingly, the scope of jurisdictional authority under the CWA is limited to the scope of federal authority under the Commerce Clause.

Supreme Court precedents concerning the scope of authority under the Commerce Clause read, collectively, to mean that "Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebellius*, 132 S. Ct. 2566, 2578 (2012) (citing *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Historically, the power over the latter category has been read expansively and held to authorize "federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop." *Id*. at 2578–79 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971)).

[877] See *Rapanos*, 547 U.S. 715, 722 (2006).
[878] 79 Fed. Reg, 76. 22,193 (Apr. 21, 2014).

It does remain, however, that to regulate local, intrastate and isolated activities (or waters) the activity (or waters) must have a "substantial effect" on interstate commerce. See *United States v. Darby*, 312 U.S. 100, 119–20 (1941). Additionally, more recent examinations concerning the outer limits of Congress's authority to regulate interstate commerce make clear that the authority is not unlimited. See *Nat'l Fed'n of Indep. Bus*., 132 S. Ct. at 2589 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968*); Goudy-Bachman v. U.S. Dept. of Health and Human Services*, 811 F.Supp.2d 1086, 1105 (M.D. Penn. 2011) (the Supreme Court's recent opinions "caution that 'the scope of interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and so remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'") (internal citations omitted). Finally, the Supreme Court's analysis in *SWANCC* and *Rapanos*—the most recent opinions analyzing the meaning of the "waters of the United States"—stand out for their resolve to reign in federal authority and curtail the continued expansion of federal jurisdiction under the CWA. See *SWANCC*, 531 U.S. at 171–72 (declining the expansion of the Corps' authority under § 404(a)'s definition of "navigable waters" to "isolated ponds, some only seasonal, [and] wholly located within two Illinois counties"); *Rapanos*, 547 U.S. at 757, 787 (where both the plurality opinion and Justice Kennedy's concurring opinion make clear that the Corps' determination of jurisdiction over certain wetlands was vacated and remanded with instruction for more restrictive interpretations).

In spite of the continuing trend toward a more limited view of the Commerce Clause and two consecutive repudiations of their expanded interpretations of authority, the agencies now come forward with arguably their most expansive definition of the "waters of the United States." For example, the Proposed Rule now defines "tributary," a category jurisdictional by rule, to mean anything with a bed, banks and ordinary high water mark that contributes flow either directly or through a series of other waters to a more traditional waters. See 79 Fed. Reg. 22,202 ("As the definition makes clear, the water may contribute flow directly or may contribute flow to another water or waters which eventually flow into an (a)(1) through (a)(4) water."). The same is jurisdictional water regardless of whether it flows once a year or maintains a continuous surface connection, if only because it is presumed to have a significant nexus to the traditional "water." Similarly, an isolated pond with no connection to traditional "waters" will automatically fall under the agencies' jurisdiction, if only because it sits in the floodplain a tributary of a traditional "waters." Again, the presumption is that it maintains a significant nexus, even if the nexus is not investigated, established and substantiated with documentation.

The establishment of "automatic jurisdiction" or "jurisdiction by rule" despite any water specific substantiation runs counter to logic, law and Justice Kennedy's own requirements—whose opinion serves as almost the entire basis of support. See *Rapanos*, 547 U.S. at 781 (repudiating the ordinary high water mark standard as an appropriate factor for determining that tributaries are "waters of the United States" because "the breadth of th[e] standard … leave[s] room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it."); *id*. at 781–82 (noting that "wetlands adjacent to" a tributary—as defined by the Corps—might appear "little more related to navigable-in-fact waters than were the

isolated ponds held to fall beyond the Act's scope in *SWANCC*"); *id*. at 784–85 (noting that even a direct hydrologic connection may not prove sufficient to establish the required nexus); *id*. at 786 (explaining that court's reviewing significant nexus determinations "must identify substantial evidence supporting the Corps' claims.").

Here, the agencies' Proposed Rule runs counter to fact specific investigations and determinations of significant nexus, or even actual connection, and applies jurisdiction by rule to broad categories of waters. "Similar to the 'piling of inferences' necessary to connect the regulated activity in *Lopez* and *Morrison*," the nexus between navigable-in-fact or interstate waters and everything automatically included in the newly proposed definition of "tributary" and "adjacent waters" is clearly wanting. See *Goudy-Bachman*, 811 F.Supp.2d at 1105. Furthermore, this is not the case where a "regulation ensnar[ing] some purely intrastate activity is of no moment" or "the de minimis character of individual instances arising under the statute is of no consequence." *Gonzalez v. Raich*, 545 U.S. 1, 17 and 22. Rather, this is the case where the agencies are attempting to codify a regulation that specifically targets "purely intrastate activity" and "individual instances." Such efforts are beyond the limits envisioned by the Commerce Clause and cannot stand under the weight of even the most minimal of scrutiny. As such, the agencies Proposed Rule should be withdrawn in favor of more circumscribed ambition. (p. 9-11)

Agency Response: **The rule is consistent with the statute, the caselaw and the Constitution. Technical Support Document, I.A and C.**

10.465 The Proposed Rule will promote greater uncertainty concerning the general public's understanding of the scope of CWA jurisdictional authority. The rule relies almost entirely on Justice Kennedy's formulation of the "significant nexus" test as the basis of its scientific and legal authority. See 79 Fed. Reg. 22,259, app. B (relying on Justice Kennedy at least 12 separate times to support the proposed definition of "tributary"). As a matter of public policy, reliance on a standard developed and articulated by a single justice in a concurring opinion seems altogether unreliable for such a sweeping expansion of federal authority into the lives (and property) of so many Americans. Legally, the utilization of the "significant nexus" test is also inappropriate and should at least be replaced with the narrowest of potential interpretations from Court. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) ("the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest of grounds …").

"Significant nexus" has no basis in statutory text, no previous explanation in regulatory use, and has no observable qualities. That the phrase—now serving as the basis for all jurisdiction over "the waters of the United States"—appears nowhere in the text of the CWA should give pause and be reviewed with hesitation. See *Utility Air Reg. Group v. EPA*, No. 12-1146, slip op. (U.S. Jun. 23, 2014) (cautioning that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") The now common phrase is actually derived from the misplaced language in a Supreme Court opinion. See *Rapanos*, 547 U.S. at 754–55 (it "is taken from *SWANCC's* cryptic characterization of the holding of *Riverside Bayview*"); *id*. at 754 ("Justice Kennedy misreads *SWANCC's* 'significant nexus' statement as

mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance.").

The use of "significant nexus" is also dubious from a practical standpoint, as it has no observable qualities and cannot be easily established. To use such a standard for the basis of jurisdiction does little to ease the work of landowners or bureaucrats. For example, under the now proposed definition of "the waters of the United States," a water adjacent to an intermittent ditch that flows into another ditch before finally emptying into the larger tributary of a navigable-in-fact water is itself a "tributary" and, therefore, "jurisdictional by rule." However, the typical farmer or rancher is not going to know of these connections and will find it necessary to work with the bureaucrat. The bureaucrat will also not know the connections and will need to conduct the appropriate on-the-ground investigation, analysis and determination of all connections; unless, the agencies intend to utilize a pre-determined map of all jurisdictional waters. See United States House or Representatives Committee on Science, Space and Technology, EPA State and National Maps of Waters and Wetlands, http://science.house.gov/epa-maps-state-2013 ; see also Letter from Lamar Smith, Chairman of House Committee on Science, Space and Technology, to the Honorable Gina McCarthy, Administrator of the EPA (Aug. 27, 2014) available at http://science.house.gov/epa-maps-state-2013.

Therefore, at best, the regulated community must still rely on the EPA or USACE to investigate and determine: (i) whether a water is jurisdictional by rule; (ii) if not, whether the water is an "other" water; and (iii) whether any exceptions apply. This is not a predictable, consistent or clear process and in the end it remains unclear whether a "significant nexus" actually exist. See *Rapanos*, 547 U.S. at 786 (explaining that court's reviewing significant nexus determinations "must identify substantial evidence supporting the Corps' claims."). (p. 12-13)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.**

City of Newport News (Doc. #10956)

10.466 The City questions the legal basis for this definition. The definition is based almost solely upon a "significant nexus" theory, which comes from the concurring opinion of a single Supreme Court justice in *Rapanos v. United States*, 547 U.S. 715, cited in the definition. The definition almost totally ignores the determinations of the four justice plurality and the limitation cited therein. The following examples demonstrate this infirmity.

The plurality determined that WOUS applies to navigable waters and conditioned these as those waters which are relatively permanent, standing or continuously flowing bodies of water, not to exclude streams, rivers and lakes that might dry up in extraordinary circumstances, such as drought. In spite of this EPA and USACE instead turn to Justice Kennedy's concurring opinion, which employs the "significant nexus" test, which requires proof that the area in question is within CWA jurisdiction is it "either alone or in combination with similarly situated wetlands, significantly affect the chemical, physical and biological integrity of other covered waters. Kennedy states that the relationship must be more than "speculative or insubstantial". The definition as proposed would include speculative and insubstantial connections. (p. 1-2)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble III and IV, Technical Support Document, II and VI-IX.**

Riverside County Flood Control and Water Conservation District (Doc. #14581)

10.467 We note that the Agencies ground the Proposed Rule on Justice Kennedy's opinion in the *Rapanos* decision, and its emphasis on "significant nexus". Indeed, the Proposed Rule would make significant nexus "the touchstone for CWA jurisdiction". However, the Proposed Rule is not consistent with Justice Kennedy's opinion and would extend his analysis beyond the situations discussed in *Rapanos*. In particular, Justice Kennedy based his "significant nexus" test on a water that "significantly affects the chemical, physical, and biological integrity" of another water. The Proposed Rule instead would base such a nexus on any one of those factors, using "or" instead of the "and" specified in Justice Kennedy's opinion. Justice Kennedy also made clear in *Rapanos* that there was no such nexus between jurisdictional waters and isolated waters, which might be separated some distance from the jurisdictional water. The Proposed Rule, however, ignores the rigor inherent in Justice Kennedy's opinion in favor of generally finding such a nexus in the absence of true connections. The intent of Justice Kennedy's opinion (and also that of the plurality opinion) was to place sensible limits upon, and not to expand, the scope of jurisdictional waters. However, the Proposed Rule would institute such an expansion through its new definitions and establishing connectivity through subterranean waters, which are not WOTUS. (p. 2)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.**

Waters of the United States Coalition (Doc. #14589)

10.468 The Proposed Rule's definition of "significant nexus" would improperly classify isolated waters as waters of the United States based on a flawed reading of Justice Kennedy's decision in the *Rapanos* case. In *Rapanos*, Justice Kennedy's concurring opinion held that based on the Court's prior decision in *SWANCC*, a water will be considered waters of the United States if it has a significant nexus to traditional navigable waters. Justice Kennedy defined a significant nexus stating:

> "Wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[879]

The Proposed Rule is based in large part on Justice Kennedy's concurring opinion in *Rapanos*, yet the Proposed Rule's definition of "significant nexus" proposes to expand the definition of waters of the United States:

[879] *Rapanos* at 780.

> "(7) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ''water of the United States'' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section."[880]

The Proposed Rule has substituted an "or" for an "and" in key language from the Supreme Court's decisions in *SWANCC* and *Rapanos*. The preamble states that this was intentional:

> "The proposed rule includes a definition of significant nexus that is consistent with Justice Kennedy's significant nexus standard. In characterizing the significant nexus standard, Justice Kennedy stated: ''the required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'…'' 547 U.S. at 779. It's clear that Congress intended the CWA to ''restore and maintain'' all three forms of ''integrity,'' 33 U.S.C. 1251(a), so if any one form is compromised then that is contrary to the statute's stated objective. It would subvert the intent if the CWA only protected waters upon a showing that they had effects on every attribute of a traditional navigable water, interstate water, or territorial sea. Therefore, a showing of a significant chemical, physical, or biological affect should satisfy the significant nexus standard."[881]

The EPA and ACOE's rationale has no support in the law. The Clean Water Act is designed to restore and maintain the chemical, physical, and biological integrity of the Waters of the United States. This statement of intent from Congress unquestionably applies to waters of the United States. Neither the Act, its legislative history, or the Supreme Court's decisions defining the scope of the Act support this definition of the term:

> "*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in Riverside Bayview--and upon which the dissent repeatedly relies today, see post, at 796, 797-798, 798-799, 800, 803, 806, 807, 809-810, 165 L. Ed. 2d, at 213, 214, 215, 216, 218, 220, 222--provided an independent basis for including entities like "wetlands" (or "ephemeral streams") within the phrase "the waters of the United States." *SWANCC* found such ecological considerations

[880] 79 FR 22263.
[881] 79 FR 22261.

> irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction."[882]

The Proposed Rule would therefore expand the universe of waters encompassed by Justice Kennedy's significant nexus test in a manner that far exceeds the plain language of his opinion. For that reason, the definition is flawed must be revised. (p. 44-46)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

San Joaquin Tributaries Authority (Doc. #14992)

10.469 The expansion of EPA and Corps jurisdiction over hydrologic features is not supported by the recent Supreme Court decisions. Specifically, the Proposed Rule relies on "significant nexus" language, which would greatly expand the jurisdiction of the EPA and Corps over hydrological features. However, the significant nexus language was endorsed by only one Supreme Court Justice in *Rapanos* and is not supported by any other Supreme Court precedent.

The Supreme Court has interpreted the definition of WOTUS on only three occasions. The Supreme Court first confronted this definition in *United States v. Riverside Bayview Homes, Inc*. (1985) 474 U.S. 121 ("*Riverside Bayview*"). That decision upheld the Corps' jurisdiction over wetlands adjacent to other covered waters, and includes no discussion of the "significant nexus test" adopted by the EPA in the Proposed Rule.

The "significant nexus" language first appears in Supreme Court case law in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (2001) 531 U.S. 159 ("*SWANCC*"). The *SWANCC* Court used the term only once: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." (*SWANCC*, at 167.) The *SWANCC* Court did not employ the "significant nexus" test in making its decision; it merely used the term in analyzing a prior decision. Justice Scalia noted that neither *SWANCC* nor *Riverside Bayview* endorsed a case-by-case determination ofa hydrological feature's "significant nexus," or ecological significance, to a covered waterway to determine whether it falls under the EPA or Corps' jurisdiction under the CWA. (*Id*, at 754 ["Justice Kennedy misreads *SWANCC's* 'significant nexus' statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance"].)

The EPA draws its greatest support for the use of the "significant nexus" test from Justice Kennedy's concurring opinion in *Rapanos*. *Rapanos* is the most recent Supreme Court decision regarding the definition of WOTUS; it was a plurality opinion, in which Justice Scalia wrote for four justices joining the plurality, Justice Kennedy wrote an opinion concurring with the plurality, and Justice Stevens wrote for four justices dissenting from the plurality. Only Justice Kennedy supported the "significant nexus" test; all other eight justices would have applied a different test to determine the jurisdiction of the EPA under the CWA.

[882] *Rapanos* at 741-742.

Both Justice Scalia and Justice Stevens were highly critical of Justice Kennedy's use of the "significant nexus" test in *Rapanos*. Justice Scalia, writing for three other justices, felt the "significant nexus" test was overly broad and not supported by Supreme Court precedent. He criticized the potential for a broadened scope of Corps jurisdiction specifically warning the "significant nexus" test could regulate improperly irrigation and drainage ditches. (*Rapanos*, at 734 ["in applying the definition to ... manmade drainage ditches ... the Corps has stretched the term beyond parody."].)

Justice Stevens, on the other hand, criticized Kennedy's "significant nexus" test for its ambiguity and lack of efficiency. He wrote, "Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get§ 404 permits or not. (*Id*, at 809.)

Justice Scalia and Justice Stevens also questioned the precedential support for the "significant nexus" test. Justice Scalia wrote that "Justice Kennedy's reading of 'significant nexus' bears no easily recognizable relation to either the case that used it (*SWANCC*) or to the earlier case that that case purports to be interpreting (*Riverside Bayview*)." (*Id*., at 753.)

For these reasons, 'the "significant nexus" test has no precedential value, and is not appropriate to use as a basis for the Proposed Rule. In cases where there is no single rationale behind the plurality opinion, such as in *Rapanos*, no particular standard is binding because none has received the support of a majority of the Supreme Court. (*Commonwealth Edison*, at 39, citing *Texas v. Brown* (1983) 460 U.S. 730, 737.) Therefore, the "significant nexus" test adopted by the EPA and Corps is not the controlling rule and the Proposed Rule proposes to regulate in a manner that was flatly criticized by eight of the nine justices. (p. 3-4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

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

10.470 Justice Kennedy, in his concurring opinion in the *Rapanos* Supreme Court case established the significant nexus standard that determines CWA jurisdiction. The significant nexus standard tested whether an area in question significantly affected the chemical, physical and biological integrity of downstream waters. However, throughout the proposed rule's preamble and definition, EPA deviates from Justice Kennedy's key criteria and relies on conclusion from effects to "chemical, physical or biological integrity." The simple deviation from Supreme Court language greatly lowers the threshold for significant nexus and will expand the CWA jurisdiction. We request EPA remain consistent with Justice Kennedy's significant nexus standard and rely on effects to "chemical, physical and biological integrity" for conclusions of navigable waters. (p. 2)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

Utah Association of Counties (Doc. #14756)

10.471 33 CFR 328.3 Current Rule: (e) The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

UAC Proposed Change to 33 CFR 328.3: **INSERT THE FOLLOWING AS SUBSECTION (c)(2) AND RENUMBER SUBSEQUENT SUBSECTIONS ACCORDINGLY: The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.**

Agency Response: The agencies did not propose any changes to the existing definition of ordinary high water mark so this comment is beyond the scope of the rule.

10.472 UAC Proposed Change to 33 CFR 328.3: ~~**(6)**~~ **(5)** Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

~~**(7)**~~ **(6) (a) A water, including wetlands adjacent to a navigable water, per se has a significant nexus to a navigable water only if ~~the means that~~ a water, including wetlands, meets all of the following conditions: ~~either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ''water of the United States'' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. a~~**

(i) the water, including wetlands, is adjacent to a navigable water body regardless of whether there is continuous surface flow between the subject water, including wetland, and the navigable water;

(ii) (ii) including the subject water, including wetlands, in "the waters of the U.S." will significantly affect the Clean Water Act policy objective, namely "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), and at the same time do no harm to the second CWA policy objective, namely to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

eliminate pollution, [and] to plan the development and use . . . of land and water resources," 33 U. S. C. § 1251(b). Failure to satisfy both objectives means the water, including wetlands, fails the significant nexus test.

(iii) The hydrologic connection between the water, including wetlands, and the navigable water must be substantial enough that the subject wetland is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands that meet this requirement are generally swamps, marshes, bogs, and similar areas." Factors to weigh when answering this inquiry are: (A) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (B) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (C) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years.

(iv) (The connection between the subject wetland and navigable body of water must be readily apparent to the average observer. Hence non-adjacent wetlands that lay alongside non-navigable ditches or drains, isolated ponds and mudflats are non-jurisdictional, even if water from them may eventually flow into a traditional navigable water body.

(b) A water, including wetlands adjacent to a navigable water, per se does not have a significant nexus to a navigable water if (i) the water if a tributary does not have a readily ascertainable ordinary high water mark or bank to have a sufficient nexus a navigable water. However the mere presence of an ordinary highwater mark does not automatically qualify it for inclusion in "the waters of the United States;" (ii) the water is a drain, ditches, or stream remote from any navigable-in-fact water and carrying only minor water volumes toward it.

(c) All other cases not fitting the description of neither subsection (6)(a) and 6(b) above, will be decided by the agency on a case by case basis. (p. 18-23)

Agency Response: While the rule has been revised to provide additional clarity, the agencies did not make these changes to the rule. Preamble, IV.

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

10.473 Reliance of the mere presence or absence of purported nexus indicators absent a mandated and defined consideration of the respective indicator's significance is fatally reminiscent of the agencies' "any hydrologic connection" test resoundingly rejected by five justices in *Rapanos*. See *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring). The failure to include a test or even consideration of significance in its analysis itself deals a

fatal blow to the sole basis for categorically designating both the newly defined "tributaries" and "adjacent waters," i.e., the Connectivity Report.

Indeed, Justice Kennedy, the father of the purported significant nexus test, repeatedly cautioned that "remote," "insubstantial," "speculative," or "minor" connections will not suffice to establish a significant nexus. See, e.g., *Rapanos*, 547 U.S. at 778-79. Further, Justice Kennedy's test was a site-specific and fact-specific (as opposed to a sweeping categorical inclusion) examination considering such factors as distance, quality, and regularity of flow for each wetland under consideration. *Id*. at 784-87. The notion of categorical inclusion of a vast universe of features nationwide based upon vague and undefined criteria in no way resembles or emulates the exacting examination articulated by Justice Kennedy.

The Proposed Rule provides: "For an effect to be significant, it must be more than speculative or insubstantial." 79 Fed. Reg. at 22,263. However, Justice Kennedy's statement that a nexus must be more than "insubstantial" or "speculative," *Rapanos* at 784 (Kennedy, J., concurring), does NOT mean that any alleged nexus that is "more than speculative or insubstantial" definitionally qualifies as "significant," as established in the Proposed Rule. This would utterly disregard any common sense or plain language notion of "significant." (p. 25)

Agency Response: The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.

Coalition of Local Governments (Doc. #15516)

10.474 The Proposed Rule misinterprets the "significant nexus" standard set forth in Justice Kennedy's concurring opinion in *Rapanos*. EPA and the Corps maintain that the "significant nexus" means "a water, including wetlands, either alone or in combination with other similarly situated waters in the region…significantly affects the chemical, physical, or biological integrity of" the "waters of the United States." 79 Fed. Reg. at 22213, 22261, 22263. However, Justice Kennedy used the conjunctive "and," not the disjunctive "or," when describing the effects that must be shown to have a "significant nexus." *Rapanos*, 547 U.S. at 780 ("wetlands possess the requisite nexus…[if they] significantly affect the chemical, physical, and biological integrity of other covered waters."). See *N. Cali. River Watch v. Healdsburg*, 496 F.3d 993, 1000-1001 (9 Cir. 2007) (Court found evidence of the significant affects on the chemical, physical, and biological integrity of the Russian River.). The purpose of the CWA is also to restore and maintain the "chemical, physical and biological integrity" of the United States' waters. 33 U.S.C. §1251(a).

The Proposed Rule also states that for an effect to be significant, it must be more than "speculative or insubstantial." 79 Fed. Reg. at 22213, 22263. The EPA and Corps claim that this is the precise terms that Justice Kennedy used to define "significant nexus." *Id*. at 22213. However, Justice Kennedy wrote:

> Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the

> chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Rapanos*, 547 U.S. at 780).

Therefore, the definition of "significant nexus" requires documentation of some significance. Justice Kennedy noted that the Corps should document the significance of tributaries to which wetlands are connected, the significance of the hydrologic connection for downstream water quality, and/or the quality or regularity of flow in any adjacent tributaries in order to prove there is a "significant nexus*." Precon Dev. Corp. v. United States Army Corps of Engineers*, 633 F.3d 278, 289 (4 Cir. 2011) (citing *Rapanos*, 547 U.S. at 784, 786). (p. 12-13)

Agency Response: The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.

Salinas Valley Water Coalition (Doc. #15625)

10.475 The Proposed Rule impermissibly expands the scope of the federal agencies' regulatory authority by misinterpreting and misapplying the U.S. Supreme Court's decision in *Rapanos v. United States* (2006) 547 U.S. 715. The decision produced a 4-vote plurality holding that "navigable waters", as regulated under the Clean Water Act, is defined as follows:

> "[T]he waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes "and "bodies" of , water "forming geographical features." All of these terms connect' continuously present, fixed bodies of ' water," as opposed to ordinarily dry channels through which water occasionally or intermittently flows." (*Id*. at p. 732-733)

Under the 4-vote plurality decision, "the waters of the United States" are not: channels containing intermittent or ephemeral flow, ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos. (*Id* at p. 733.)

Even if the "significant nexus" `test is followed to define' "the waters of the United States" as set forth in Justice Kennedy's opinion in concurring in the judgment, the Proposed Rule goes too far. Justice Kennedy's opinion sets limitations on the definition to ensure that waters with less significant connection with actual navigable waters would not be subject to federal jurisdiction:

> "[T]he Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries. Given the potential over-breath of the Corps' regulations, this showing is necessary to avoid unreasonable application of the statute." (*Id* at p. 782.)

Expressing concerns of over-reaching federal jurisdiction, Justice Kennedy stated that there must be specific findings before water becomes jurisdictional water. These findings include, but are not limited to, a determination that the water (1) "significantly affect the chemical, physical, and biological integrity of other covered water" and (2) is "significant

enough ...to perform important functions for an aquatic system incorporating navigable waters." (*Id*. at p. 779-780.) Plainly stated, there must be sufficient scientific basis to support significant effect to jurisdictional waters, and the federal agencies cannot simply rely on mere adjacency or intermittent and inconsequential flow to jurisdictional water to pass the significant nexus test.

Ignoring that part of Justice Kenney's opinion, the Proposed Rule makes a careless assumption that "significant nexus" exists for entire categories of water (i.e., "tributaries", "adjacent waters" and "other waters", which include those that are dry and/or covered) to assert federal jurisdiction, without providing the required scientific finding for each water flow to justify that they do in fact have significant effect on jurisdictional waters. Under the Proposed Rule, the USEPA and USACE will perform cursory reviews based on aerial photographs, U.S. Geological Survey maps, National Wetlands Inventory Maps and other maps to make a determination out of whole cloth that these waters have significant effect on jurisdictional waters. (p. 2-3)

Agency Response: **The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.**

John Deere & Company (Doc. #14136.1)

10.476 It must be noted that a succession of recent, notable Supreme Court decisions interpreting the precise meaning of "navigable waters" for the purpose of defining the CWA's jurisdictional waters have resulted in a narrower rather than expanded definition of 'waters of the United States'. In its 2001 decision *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) the Supreme Court considered the application of the Corp's "Migratory Bird Rule" to an abandoned sand and gravel pit in northern Illinois. In this decision the Court held that non-navigable, isolated, intrastate waters, which do not actually abut on a navigable waterway, are not included as waters of the United States.[883]

In *Rapanos v. United States* the Supreme Court's plurality found that federal regulatory authority only extended to "relatively permanent, standing or continuously flowing bodies of water" known as "streams, oceans, rivers and lakes".[884] The Court's plurality further held that by interpreting the plain statutory text to include "ephemeral streams" and "drainage ditches" with an "ordinary high water mark" as "tributaries" under their jurisdiction, the Corps further overstepped its regulatory authority.

Unfortunately, the agencies have extended the "significant nexus" standard found in Justice Kennedy's concurring opinion in *Rapanos* into the proposed rule, applying it not only to adjacent wetlands (at issue in *Rapanos*), but to other categories of water bodies,

[883] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
[884] *Rapanos v. United States*, 547 U.S. 715 (2006)

such as tributaries of traditional navigable waters or interstate waters, and to "other waters" (that is, waters not fitting in another category).[885]

The significant nexus concept grew out of the Court's decision in *United States v. Riverside Bayview Homes* in which wetlands "inseparably bound" to traditionally navigable waters were found to be jurisdictional. The Supreme Court expressed reluctance to extending CWA jurisdiction over "lands" not so situated — even those that are wet.[886] Indeed, in *Riverside Bayview* the Court stated that "navigable waters" referred primarily to "rivers, streams, and other hydrographic features more conventionally identifiable as "waters" than wetlands adjacent to such features." [887]

In all three of these decisions the Court has sought to give effect to the phrase "navigable waters," which is defined in the CWA as "the waters of the United States".[888] Contrary to the proposed rule, these decisions have narrowed, not expanded, the agencies definition of waters of the United States. (p. 16-17)

Agency Response: The rule is narrower in scope than the existing rule. The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A, B. and C, II.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

10.477 The proposal…includes "significant nexus" provisions that allow the agencies to determine on a case by case basis, that waters that are not traditional navigable waters, are not tributaries to traditional navigable waters, and are not "adjacent" to either (so-called "isolated waters") are WOTUS. Further it provides that the significant nexus can be found based not only on the effect of the particular water at issue, but also the effect in combination with other similarly situated waters located in the same region. These provisions expand existing CWA jurisdiction and do not provide certainty or clarity—two of the agencies' stated goals for the rulemaking.

The concept of "significant nexus" was discussed by Justice Kennedy in the *Rapanos* case to test whether the four wetlands at issue "significantly affect the chemical, physical or biological integrity" of the navigable water miles away. In *Rapanos*, the effect of the 4 wetlands was only "speculative and insubstantial". The test suggested by Justice Kennedy is whether a water has a "significant nexus" to a navigable water that is substantial (i.e. can be proven) and is not speculative. However, the *Rapanos* case and its "significant nexus" test must be read in light of the *SWANCC* case, in which the Supreme Court held that the agencies could not use the Migratory Bird rule to assert jurisdiction over non-navigable, intrastate, isolated waters. The *Rapanos* case did not overrule that holding in the *SWANCC* case. In other words, even if there is a "significant nexus," the agencies cannot assert jurisdiction over those non-navigable, intrastate, isolated waters.

[885] Lesley Foxhall Pietras, EPA and Army Corps of Engineers Propose Significant Revisions to Definition of "Waters of the United States, http://www.theenergylawblog.com/2014/04/articles/environmental/epa-and-army-corps-of-engineerspropose-significant-revisions-to-definition-of-waters-of-the-united-states.
[886] EPA, Army Corps Propose New Rule to Govern Federal Clean Water Act Jurisdiction, Latham & Watkins Client Alert (April 8, 2014), Number 1673 at 2.
[887] *Riverside Bayview*, 474 U.S. at 131
[888] 33 U.S.C. §1362(7)

The use of the "significant nexus" in the proposal also does not take into account the limits articulated in the *Rapanos* case but rather expands the concept to where every drop of water can be ultimately connected to every other drop. Domtar recommends that if the "significant nexus" test is going to be used that it be better defined and follows the limits discussed in the *Rapanos* case. (p. 5)

Agency Response: The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.

Land Improvement Contractors of America (Doc. #8541)

10.478 Over the last several decades, the Supreme Court has sought to clarify the concept of WOTUS, but in many respects has created greater confusion. Three seminal cases inform the current rulemaking. The *Rapanos* case requires the government to establish a "significant nexus" (biological, chemical or physical) between non-navigable and Traditionally Navigable Waters (TNW's) to establish CWA jurisdiction. The effect of the *SWANCC* and *Rapanos* decisions was to significantly limit the federal government's authority over certain waters historically deemed jurisdictional, including isolated, intrastate wetlands and wetlands adjacent to tributaries located remotely from TNW's.

The significant nexus test must not be used as a method of taking the Connectivity Report and using every hydrological connection as a legal connection for determining "significant." To be significant, or "more than speculative or insubstantial," must mean that the expansion of jurisdiction beyond the Supreme Court decisions is not allowed, otherwise too many waterways in the country will be subjected to the full force of federal CWA, in an era with limited federal resources available to address CWA goals. LICA supports the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments. (p. 2)

Agency Response: The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.

10.479 As drafted the PR would substantially expand CWA jurisdiction post-*Rapanos*, granting EPA and the U.S. Army Corps of Engineers (USACE) broad authority and discretion to regulate wetlands and other water bodies remote from TNW's. The amount of expansion is difficult to predict with any meaningful precision, but if the proposal were to pick up all adjacent waters and most isolated wetlands and ditches, the expansion would be significantly greater than 3% as estimated by EPA, including expanding jurisdiction to water features on agricultural lands that have not been subject to CWA jurisdiction since before the *SWANCC* case in 2001. (p. 2)

Agency Response: The rule is narrower than the existing rule. Technical Support Document, I.B. The Economic Analysis explains the methodology and results of the analysis.

Clearwater Watershed District, et al. (Doc. #9560.1)

10.480 The Agencies again twist logic in attempt to gain back what Court precedent has consistently curtailed. The newly proposed rule offers new language and terms that

depart from the nomenclature used in the Clean Water Act, historical regulations, and existing case-law precedence. (p. 2)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.**

10.481 The proposed rule defines significant nexus as an ideological measurement of the chemical, physical, or biological effects that waters perform individually or together with all similarly situated waters on traditional navigable waters. But, case law demands more than a measurement of the nexus between a water and a traditional navigable water as part of the water cycle. As currently understood by the proposed rule, the agencies view "significant nexus" as the connection between water itself, and not as a measure of a wetland impact's effects on water quality. (p. 8)

Agency Response: **The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.**

10.482 The rule as proposed fails to recognize the Clean Water Act's legislative history, its statutory limits, and the restrictions authored by the courts. The United States Supreme Court has twice stated that the U.S. EPA and Army Corps must find meaning in Congress's use of the word "navigable." A review of the bills proposed by Congress since the Clean Water Act's enactment shows that there is not Congressional support for an expansion of the phrase "waters of the United States" being proposed by the agencies in this rule. Section 101 (b) of the Clean Water Act states Congress's policy is to preserve the primary responsibility and rights of states to prevent, reduce, and eliminate pollution, to plan the develop and use of land and water resources, and to consult with the Administrator with respect to exercise of the Administrator's authority under the CWA. (p. 12)

Agency Response: **The rule is consistent with the statute and the caslaw. Technical Support Document, I.A. and C.**

U.S. Chamber of Commerce, et al. (Doc. #14115)

10.483 Justice Kennedy…acknowledged that the Court's concept of a "significant nexus" was tied to Riverside, in which wetlands actually abutting navigable waters were deemed to be within the Act's jurisdiction because they are "integral parts of the aquatic environment" that Congress expressly chose to regulate.[889] The *SWANCC* majority (including Justice Kennedy) had made the same point, and had concluded that ponds with no hydrologic connection, but with a very strong biological connection, to navigable waters were not subject to the Act's jurisdiction.[890] Justice Kennedy concluded with the general statement that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[891]

[889] *Rapanos* at 779 (quoting Riverside, 474 U.S. at 135).
[890] *SWANCC* at 172
[891] *Id*. at 779. Elsewhere in his *Rapanos* opinion, Justice Kennedy mischaracterized the Court's decision in *SWANCC*, saying the Court there had held that "to constitute 'navigable waters' under the Act, a water or wetland

Justice Kennedy maintained that, for jurisdiction over wetlands, the requisite nexus must be significant effects on "the chemical, physical and biological integrity of the covered waters more readily understood as 'navigable'."[892] He posits this standard in a factual vacuum, ignoring that this standard, adopted by the Court in *Riverside*, pertained to wetlands actually abutting navigable waters such that a demarcation between waters and wetlands could not easily be discerned. Divorced from that significant fact, Justice Kennedy's standard is expansive. It could be applied to many isolated waters, including those held to be non-jurisdictional in *SWANCC*. It was the physical – i.e., hydrologic – connection that led the Court in Riverside to conclude that wetlands were "inseparably bound up with" navigable waters, and thus had a significant nexus to them. And it was the lack of such a connection that led the Court in *SWANCC* (including Justice Kennedy) to conclude that physically isolated ponds had no such significant nexus. Nothing in the facts before the Court in Rapanos could justify this departure from the Court's precedent or legitimize Justice Kennedy's broad over-statement of the significant nexus principle.

Justice Kennedy also creates out of whole cloth the notion that a wetland can be found to have a significant nexus with "covered waters" if it has the requisite effects on the integrity of those waters "in combination with similarly situated lands in the region."[893] Nothing in the Court's jurisprudence or the statute suggests that Congress intended to enact a "cumulative impacts" standard for determining federal jurisdiction over a particular water body. Such a standard is unworkable in any event because the "in combination with" assessment allows certain wetlands – e.g., those directly abutting on navigable waters – to sweep into the Act's jurisdiction other wetlands in the region that contribute little to the "combined" impacts owing to the lack of any physical connection or proximity of those wetlands to navigable waters. Again, nothing in the facts of *Rapanos* even calls for consideration of this cumulative impacts principle.

Finally, Justice Kennedy offers his view of what is not a "significant nexus" – i.e. "wetlands' effects on water quality [that] are speculative or insubstantial."[894] Justice Kennedy appears to mean that "speculative or insubstantial" effects cannot be deemed "significant," a proposition few would dispute. Justice Kennedy likely did not mean that effects which are shown to be non-speculative and/or somewhat more tangible than insubstantial should automatically rise to the level of "significant," as he offers no support for such a proposition. It is also worth remembering that Justice Kennedy was keenly interested in the factors that would strengthen or weaken any nexus between waters. These factors would include distance, volume of flow, and duration of flow. The Kennedy-type inquiry about whether a significant relationship truly exists between a

must possess a 'significant nexus'…." *Id*. 759 (quoting SWANCC, 531 U.S. 159 at 167, 172). The referenced passages in *SWANCC* refer to the prior holding in *Riverside* concerning wetlands inseparably bound up with navigable waters on which they abut. They mention nothing about a "water" (e.g., a pond or lake) having a "significant nexus" to navigable waters. The Agencies have mistakenly relied upon this incorrect assertion by Justice Kennedy to confer CWA jurisdiction over all manner of "waters" that are physically disconnected from navigable waters. 79 Fed. Reg. at 22259-60

[892] *Id*. at 780.

[893] *Id*.

[894] *Id*.

given water and another water is largely absent in the Agencies' proposal. Under the proposed rule, the nexus is presumed to be both present and significant.

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

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

For the reasons discussed above, the Agencies' reliance on the *Rapanos* case holding, and the "significant nexus" concept articulated by Justice Kennedy in particular, does not provide a valid legal justification for the overly expansive definition of WOTUS in the proposed rule. The Agencies' proposal tortures the logic of *Rapanos* beyond the breaking point, making any theoretical effect of a wet area on distant navigable waters "significant" and completely abandoning Justice Kennedy's determination that the relationship, if any, would only be "speculative or insubstantial." For this reason, the Agencies' proposed WOTUS rule is fatally legally flawed. (p. 46-48)

Agency Response: **The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.**

Portland Cement Association (Doc. #13271)

10.484 The basis for jurisdiction over tributaries and adjacent waters is the Agencies' assertion that these waters always have a significant nexus to the core waters[895] – under the proposed rule, the Agencies are no longer utilizing the *Rapanos* plurality's "relatively permanent waters" test.

The end result is, essentially, that areas are always jurisdictional as far upstream as one can identify a bed and bank and ordinary high water mark, and as far outward from that

[895] See. e.g., 79 Fed. Reg. at 22193 ("With this proposed rule, the agencies conclude, based on existing science and the law, that a significant nexus exists between tributaries (as defined in the proposed rule) and the traditional navigable waters, interstate waters, and the territorial seas into which they flow; and between adjacent water bodies (as defined in the proposed rule) and traditional navigable waters, interstate waters, and the territorial seas, respectively.")

bed and bank as the water has "direct influence" on the area's ecology or is located in a sediment formation that is inundated by high flows.

The Agencies then propose to memorialize the significant nexus test, covering, on a case-by-case basis,

> "…water[s], including wetlands, [that] either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest [core] water. . .) significantly affect[] the chemical, physical, or biological integrity of a [core] water. . . Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a [core] water."

The end result is that the two tests proposed are similar to those currently being applied by the Agencies, but several new definitions result in the newly-proposed test being significantly more expansive than even the currently-used test. (p. 5)

Agency Response: The rule is narrower than the existing regulation and is consistent with the statute and the caselaw. Technical Support Document, I.A. B. and C.

10.485 PCA has a number of specific concerns about the proposed rule, most of which are rooted in its general concerns that the proposed rule is simultaneously beyond the scope of the Agencies' jurisdiction under the CWA and too unclear to provide a reasonable understanding of the regulated features. The result is overly expansive regulation and the permanent adoption of an impractical process based neither in science nor in the language of the CWA.

At their core, the tests outlined in the proposed rule are inconsistent with the two Supreme Court decisions clarifying the limitations on CWA jurisdiction. On close inspection, the proposed rule looks much like the interpretation the government argued, and lost, in *Rapanos*. In its *Rapanos* brief,[896] the government argued that "[t]he connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream." The government rejected the notion "that some tributaries may have such an attenuated connection to traditional navigable waters that federal protection of those tributaries would be unwarranted," because "petitioners offer[ed] no administrable or scientifically supported standard by which any such tributaries could be identified."

The Supreme Court, and Justice Kennedy in particular, ruled against the government, specifically rejecting many of the key assertions underpinning the proposed rule. In particular, Justice Kennedy stated that

[896] Available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs-_pdfs_05_06_04_1034_Respondent.authcheckdam.pdf.

> • "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics."
>
> • ". . . the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."

In short, Justice Kennedy ruled that the government cannot definitively state that a wetland has a significant nexus (and is therefore jurisdictional) solely because it is adjacent to an ordinary- high-water-mark tributary. Yet, in its proposed rule, the Agencies have done just that. As such, the portion of the rule related to adjacency is inconsistent with Justice Kennedy's significant nexus test and the government cannot claim that test ad the basis for their claim to jurisdiction.[897] As that is the government's only claim to jurisdiction, the rule as proposed cannot be finalized.

The proposed rule is also in conflict with the *SWANCC* decision. While that decision related solely to the applicability of the migratory bird rule, the *Rapanos* decision made clear that five Justices believe that the waters at issue in *SWANCC* are nonjurisdictional under any theory, including the significant nexus test.

The Scalia plurality summarized *SWANCC* as holding "that 'nonnavigable, isolated, intrastate waters,' id., at 171—which, unlike the wetlands at issue in *Riverside Bayview*,

[897] We note also that Justice Kennedy also stated that

> This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, but see U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, pp. 3-4 (Feb. 2004), http://www.gao.gov/new.items/d04297.pdf. (noting variation in results among Corps district offices), it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act.

Id. at 781. The Agencies cannot rely on this language in support of their definition of tributary for two reasons. First, this language does not reflect an actual decision by Justice Kennedy - he states that it "presumably" provides a rough measure and "may well" provide a reasonable measure. He therefore has not held anything. Moreover, Justice Kennedy's language contains a large caveat- that the test adopted by the government must be subject to reasonably consistent application - and then cites a reference suggesting that such consistency is lacking. The Agencies have done nothing in the rulemaking to suggest they have addressed this problem of inconsistent application. Thus, this portion of the test is also facially inconsistent with Justice Kennedy's opinion. More significantly, and as discussed more fully below, the Agencies have inserted a number of new factors into their proposed rule which would all tend to lead to further instances of inconsistent application. In short, the type of case-by-case tests proffered throughout the proposed rule inexorably conflicts with Justice Kennedy's decision.

did not 'actually abu[t] on a navigable waterway,' 531 U. S., at 167—were not included as 'waters of the United States'." As a result,

> only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of Riverside Bayview, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*.

Similarly, as described immediately above, Justice Kennedy deemed the waters "isolated ponds [that were] held to fall beyond the Act's scope."

Thus, five Justices deem the waters in *SWANCC* beyond the scope of CWA jurisdiction. Yet under the broad rule proposed by the Agencies, the waters at issue in *SWANCC* would almost certainly be considered jurisdictional. The map below, from Google Maps, depicting in red the area at issue in *SWANCC*. Surrounding it, identified in black are a variety of perennial tributaries of the Fox River, as well as surrounding wetlands. This map does not attempt to show the intermittent and ephemeral tributaries of the river or determine if the wetlands highlighted on the map are "adjacent" as defined by the rule. These tests would likely cause the red-blocked area at issue in the *SWANCC* case to be considered by the Agencies to be jurisdictional, at odds with the *SWANCC* decisions. We instead note that these wetlands would undoubtedly be viewed by the Agencies as jurisdictional under the "significant nexus" case-by-case test, as they aggregate together in the watershed that drains to the nearest navigable or interstate water or the territorial sea. They completely surround, as denoted in red, the area deemed by the court in *SWANCC* to be isolated and not subject to federal jurisdiction. (p. 5-8)

Agency Response: **The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II. It is beyond the scope of this rulemaking to provide detailed responses to site specific analyses of particular waters, nor is it feasible. This is a definitional rule that addresses the scope of waters covered by the Clean Water Act; the CWA permitting requirements are only triggered when a person discharges a pollutant to a covered water. For all of these reasons, drawing conclusions about the jurisdictional status of an individual water based on site-specific circumstances is beyond the scope of this rulemaking.**

10.486 In its public statement on the rule, the Agencies have stressed that an extensive draft study on the connectivity of stream and wetlands to downstream waters has been prepared and that the Agencies had asked a Scientific Advisory Board (SAB) for its views on the study and on the scientific basis for the rule. Neither the connectivity study nor the SAB's opinion on it or other scientific support for the rule is relevant to this rulemaking. This is because, as noted by the Agencies[898] and in the September 30, 2104

[898] 79 Fed. Reg. at 22193

letter from the SAB to Administrator McCarthy,[899] "'significant nexus' is a legal term, not a scientific term."[900] Thus, whether there is scientific connectivity between upstream wetlands or waters and downstream jurisdictional ones is not relevant to the question of whether the CWA regulates such upstream waters or whether such waters would be viewed by the Supreme Court as having a legally significant nexus to downstream ones. (p. 9)

Agency Response: **Significant nexus is not a purely a scientific determination. The opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright lines with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them. Preamble, III; Technical Support Document, II.**

10.487 As the Agencies are well aware, the CWA carries with it the potential for criminal penalties.[901] Indeed, the *Rapanos* decision was the civil portion of an enforcement effort that included a criminal prosecution.[902] Given that there is a minimal *mens rea* component in criminal cases, clarity is critical. In the absence of clarity, the government could potentially find an individual or entity criminally liable for violation the Act when that person made an honest mistake about the scope of its coverage. The rule at issue is far from clear and risks such a result.

The other reason the enforcement structure of the CWA requires a greater emphasis on clarity is that the Agencies are not always involved when courts determine the scope of their regulations. Given the CWA's citizen suit provision,[903] private citizens often directly sue alleged violators. As a result, numerous courts will be required to interpret this new, ambiguous rule in all manner of cases. Some will inevitably interpret these terms broadly, and those interpretations will be cited to other courts in other citizen suits, creating a situation where the rules may end up being broader – and more variable – than even the Agencies intend. The most effective way to avoid such a result is to promulgate clear rules, clearly explained. The Agencies have not done either in this rulemaking and,

[899] Titled "Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled 'Definition of Waters of the United States under the Clean Water Act'," and available at http://yosemite.epa.gov/sab/sabproduct.nsf/WebBoard/5 l 8D4909D94CB6E585257D63007 67D D6/$File/EPA-SAB-14-007+unsigned.pdf

[900] *Id*. at 4.

[901] To support a criminal action under the CWA, the government must establish that a knowing or negligent violation of the CWA occured. 33 U.S.C. § 1319(c)(l). Negligent violations of the CWA may lead to criminal penalties of up to $25,000 per day of discharge or up to one year of imprisonment or both. *Id.*

[902] Notably, notwithstanding the fact that the government lost the *Rapanos* civil case at the Supreme Court for failure to properly identify the wetlands at issue as jurisdictional , Mr. Rapanos' s criminal appeal was not successful and he was convicted of criminal violations of the Act. The full criminal case is 895 F. Supp. 165 (E.D. Mich. 1995), rev'd, 115 F.3d 367 (6th Cir. 1997), cert denied, 522 U.S. 917 (1997), appeal after remand, 235 F.3d 256 (6th Cir. 2000), cert granted, judgment vacated, 533 U.S. 913 (2001), on remand, 16 Fed.Appx. 345 (6th Cir. 2001), on remand, 190F. Supp. 2d 1011 (E.D. Mich. 2002), rev'd, 339 F.3d 447 (6th Cir. 2003), cert denied, 124 S. Ct.1875 (2004), aff'd, 376 F.3d 629 (6th Cir. 2004).

[903] 33 U.S.C §1365(a)(1).

as described above, only added additional opaque terms that require case-by-case analysis. (p. 30-31)

Agency Response: **In the final rule, EPA and the Corps clarify the scope of "waters of the United States" that are protected under the Clean Water Act (CWA), based upon 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. This rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources. Preamble.**

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

10.488 The Proposed Rule is at odds with the Fourth Circuit's interpretation of Kennedy's significant nexus test in *Precon Development Corp. v. Corps* NSSGA submits that an adequate evidentiary basis is required to assert CWA jurisdiction based on "significant nexus" and recommends that the agencies drop the "jurisdiction by rule" approach in favor of an evidence-based criterion to evaluate specific water or wetland's relationship to the closest traditionally navigable water. The decision of the United States Court of Appeals for the Fourth Circuit, *Precon Development Corp. v. Corps*, 633 F. 3d. 278 (4th Cir. 2011), is the most extensive analysis to date interpreting the nature and extent of the evidence needed to meet the "significant nexus" test of *Rapanos* and provides useful guidance for developing evidentiary criteria.[904]

In *Precon*, the Corps had asserted jurisdiction over 4.8 acres of wetlands which are more than seven miles from the nearest navigable water. The wetlands were adjacent to two drainage ditches that flowed approximately 3.11 miles to connect with a swamp that drained in to the Northwest River, a Traditionally Navigable Water (TNW) in Chesapeake Virginia. The Corps found that these ditches were "relatively permanent" tributaries to the River and then aggregated 448 acres of wetlands adjacent to the tributaries' watershed as "similarly situated wetlands" under Kennedy's test. The Corps also found that, although a berm had "severed the direct surface water connection" between the wetlands and the ditches, the "berm had a negligible effect on the overall ecological functions that…all of the adjacent wetlands provide to downstream [traditionally navigable waters]."[905] The Corps then asserted jurisdiction based on a quantitative and qualitative analysis of flow and storage capacity of the ditches, concluding that the ditches and their "similarly situated adjacent wetlands" cumulatively provided significant flood flow and filtering benefits to downstream traditionally navigable waters.[906] The district court upheld the Corps' jurisdictional findings.[907]

The Fourth Circuit reversed holding that, despite the Corps evidence of flow and function, the evidence did not support the "Corps determination that the nexus that exists between the 448 acres of similarly situated wetlands and the Northwest River is

[904] The Fourth Circuit covers the states of Maryland, Virginia, West Virginia, North Carolina and South Carolina.
[905] 633 F.3d. at 285
[906] *Id* at 285
[907] 658 F. Supp. 2d. 752 (E.D. Va. 2009).

significant."[908] The Court still upheld the Corps discretion to aggregate the 48 acres or wetlands as "similarly situated" under the Guidance, although questioning whether the Corps had precisely adhered to the *Rapanos* Guidance in identifying adjacent wetlands stretching over three miles downstream as "similarly situated."[909] However, it found that the record did not contain enough evidence to assess the effects of these wetlands on the ecology of the River. The Court then quoted Justice Kennedy's language that "the significant nexus test is a flexible ecological inquiry into the relationship between the wetlands at issue and the traditionally navigable water [noting that Justice Kennedy], clearly intended for some evidence of both a nexus and its significance to be presented."[910] The Precon court's views as to the necessary evidence are especially illustrated by the Court's comments about wetlands at issue in the case. Those wetlands were "lying along a ditch-but separated from the ditch by a man-made berm–which eventually drained into Lake St. Claire approximately one mile downstream."[911] The court noted, "We can imagine…that wetlands next to a tributary with minimal flow might be significant to a river one quarter mile away, whereas wetlands next to a tributary with much greater flow might have only insubstantial effects on a river located twenty miles away."[912] The court even cited the Corps' own guidance on the extent of evidence issue.[913] It logically follows that the more remote a wetlands is to a TNW in terms of distance, separation, and flow, the less likely the loss of that wetland would be the foreseeable "proximate cause" of impairment of the TNW's water quality and other functions. Following remand, the Corps provided additional documentation consistent with the 4th Circuit's guidance regarding the condition of the River, the flow of the tributaries and the function of the wetlands. The District Court then analyzed and upheld under the Fourth Circuit's evidentiary standards. 2013 U.S. Dist. LEXIS 164612 *12 (E.D. Va. 2013).

An analysis of the *Precon* Court's opinion provides a roadmap for assessing the nature of the evidence needed to support a significant nexus finding:

First, measurement of a tributary's flow in retaining floodwaters is insufficient, standing alone, without "additional information regarding its significance." Rather the inquiry

[908] 633 F.3d at 295.
[909] The Court stated that "we recognize that Justice Kennedy's instruction---that, "similarly situated lands in the region can be evaluated together--is a broad one, open for considerable interpretation and requiring some ecological expertise to administer." *Id*. at 292.
53 *Id*. at 294.
[910] *Id*. at 294
[911] 633 F.3d. at 296. The Court cited *Carabell v. Corps*, 126 S. Ct. 2208 (2006) the companion case to *Rapanos*, noting that the "geography of these wetlands at issue places them squarely in that category of wetlands over which jurisdiction is no longer assured." (noting that the wetlands were, "considerably more removed from traditionally navigable waters than the wetlands at issue in *Carabell*") *Id*.
[912] *Id*. at 294-295
[913] That guidance states, "As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with traditionally navigable water."

requires evidence "emphasiz[ing] the comparative relationship between the wetlands at the issue, the adjacent tributary, and the traditionally navigable waters."[914]

Second, there must be evidence in the record allowing review of whether the wetlands functions provide significant benefits for the TNW. For example, the *Precon* Court noted, "merely stating that the wetlands and their adjacent tributaries trap sediment and nitrogen and perform flood control functions is not sufficient without knowing if the River suffers from high levels of nitrogen or if it is prone to flooding."[915]

Third, the Corps cannot simply expect a reviewing court to defer to its significant nexus finding. Rather, while the Corps factual findings are entitled to deference under the APA's "arbitrary and capricious" standard the court held that, significant nexus is ultimately a legal determination for whether wetlands adjacent to non-navigable tributaries come within the CWA's definition of "navigable waters."[916] (p. 37-39)

Agency Response: The rule is consistent with the caselaw. Technical Support Document, I.C.

Tennessee Mining Association (Doc. #14582)

10.489 Since the Agencies have applied the significant nexus test to all other covered waters in addition to wetlands, in guidance and in the Proposed Rule, then it is essential that the Agencies properly define the limits of what constitutes a significant nexus not only from a scientific viewpoint but also from a legal and constitutional basis. The Agencies appear to be reframing Justice Kennedy's meaning of speculative or insubstantial by stating that the scientific application of speculative or insubstantial is not the same as a legal one. The excerpt below is very revealing in that regard:

> "It is important to note, however, that where Justice Kennedy viewed the language "more than speculative or insubstantial" to suggest an undue degree of speculation, scientists do not equate certain conditional language (such as "may" or "could") with speculation, not equate certain conditional language (such as "may" or "could") with speculation, but rather with the rigorous and precise language of science necessary when applying specific findings in another individual situation or more broadly across a variety of situations. Certain terms used in a scientific context do not have the same implications that they have in a legal or policy context. Scientists use cautionary language, such as ' 'may" or "could," when applying specific findings on a broader scale to avoid the appearance of overstating their research results and to avoid inserting bias into their findings (such that the reader may think the results of one study are applicable in all related studies). Words like "potential" are commonly used in the biological sciences, but when viewed under a legal and policy veil, may seem to mean the same as "speculative" or "insubstantial." Instead, potential in scientific terms means ability or capability. For example, when the term "potential" is used to describe how a wetland has the potential to act as a sink for floodwater and

[914] *Id*.
[915] *Id*. At 295.
[916] *Id*. At 296.

pollutants, scientists mean that wetlands in general do indeed perform those functions, but whether a particular wetland performs that function is dependent upon the circumstances that would create conditions for floodwater or pollutants in the watershed to reach that particular wetland to retain and transform. That does not mean, however, that this nexus to downstream waters is "speculative;" indeed the wetland would be expected to provide these functions under the proper circumstances." Proposed Rule at 22,262. (p. 5-6)

Agency Response: The statements are consistent with the Science Report. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Devon Energy Corporation (Doc. #14916)

10.490 The Proposed Rule does not comport with the Agencies' jurisdictional authority as set forth in the Clean Water Act and applicable Supreme Court decisions. The Agencies appears to base their Proposed Rule to a great extent on the technical conclusions and recommendations in its Connectivity Report and SAB Review. But the Agencies' jurisdiction over surface waters is determined by the language of the Clean Water Act and Supreme Court decisions interpreting that statutory language; not the Connectivity Report and subsequent SAB Review. To the extent the Agencies base their Proposed Rule on these technical reports and recommendations rather than the statute and case law that define its authority, this rule, if finalized, could be *ultra vires*.

The Agencies appear to rely exclusively on Justice Kennedy's concurring opinion in the *Rapanos v. United States*[917] decision as the legal basis for this 2014 Proposed Rule and to ignore the plurality opinion in that case. The Agencies' failure to conform its proposed rule to the *Rapanos* plurality opinion, which was supported by four-fifths of the majority in this case, as well as Justice Kennedy's concurring opinion, is arbitrary and capricious.

The Agencies fail to articulate their reasons for relying so heavily on Justice Kennedy's concurring opinion in Rapanos for this proposed rule. In failing to articulate a reasoned, rational basis for this exclusive reliance, the Agencies are acting in an arbitrary and capricious manner.

The Agencies expand Justice Kennedy's "significant nexus" test articulated in *Rapanos* to assert jurisdiction over adjacent waters other than adjacent wetlands. The Agencies also revise Justice Kennedy's significant nexus test in the proposed rule from requiring a significant effect on chemical, physical and biological integrity to requiring a significant effect on chemical, physical or biological integrity. Unilaterally expanding and revising Justice Kennedy's significant nexus test in this proposed rule is legally unsupportable and therefore arbitrary and capricious. (p. 4)

Agency Response: The rule is consistent with the statute and the caselaw and reasonably informed by the science. Preamble III; Technical Support Document, I.A and C, II.

[917] 547 U.S. 715 (2006).

American Petroleum Institute (Doc. #15115)

10.491 The appropriate test for jurisdiction under *Rapanos* implements the jurisdiction limiting principles articulated by both the plurality and Justice Kennedy The agencies are not free to ignore the limits that the *Rapanos* plurality recognized on the agencies' assertion of jurisdiction: "[t]he principal objective of the *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent. This objective requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produce results with which a majority of the Justices in the case articulating the standard would agree."[918] This principle becomes even more salient where, as here, the question is not jurisdiction over a single water body (as it would be in a judicial proceeding). Rather, the agencies propose an expansive administrative rulemaking that will apply Clean Water Act jurisdiction to countless different water bodies throughout the country under numerous Clean Water Act programs. It is therefore critical that the 2014 Proposed Rule embody the jurisdiction-limiting principles articulated by all of the Justices in the *Rapanos* majority.

A faithful application of the majority opinions in *Rapanos* would conclude that:

1) a non-navigable tributary is jurisdictional only if it has relatively permanent flow to a navigable water; and

2) a wetland is jurisdictional only if it has a continuous surface connection to a navigable water (either directly or through a relatively permanent tributary) and there is a demonstrated significant nexus between that wetland and the navigable water.

This test for jurisdiction over tributaries, adjacent waters, and "other waters" is faithful to both opinions constituting the majority opinion in *Rapanos* and should form the basis for this rulemaking with respect to tributaries, adjacent waters, and "other waters."

The application of this jurisdictional test would be clear and straightforward. For jurisdiction to exist, wetlands must have a continuous surface connection to a navigable water. If there is no such connection, there is no jurisdiction. If, however, there is a continuous surface connection, jurisdiction exists only when there is a determination by the Corps or other relevant permitting authority that the connection between the wetland and the navigable water has a "significant nexus" under Justice Kennedy's test.

This jurisdictional test is consistent with the Supreme Court's guidance on interpreting fractured opinions like *Rapanos*. First, it avoids reliance on dissenting Justices to reach "the holding" of *Rapanos*. Second, it avoids an interpretation of *Marks* that would allow *Rapanos* to have multiple, inconsistent holdings depending upon the particular water body to which it is applied.[919] Third, this approach addresses the main concern of the

[918] *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), aff'd in part and rev'd in part on other grounds, 505 U.S. 833 (1992).

[919] Under *Marks*, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. at 193. Use of the singular form in "the holding" and "the judgment" dictates that the judgments must be read in combination to produce a single holding in the case.

Rapanos majority—recognizing and implementing clear limits on the agencies' overbroad jurisdictional assertions under the Clean Water Act.

Looking beyond the interpretive principles set forth in Marks, it is fundamentally improper as a matter of judicial interpretation for the agencies to issue a rule that ignores the views of four of the five justices in the majority in *Rapanos*. Justice Kennedy wrote only for himself in articulating the significant nexus test.

API's proposed jurisdictional test not only faithfully implements the Supreme Court's majority opinion in *Rapanos*, it is clearer and more readily applied than the jurisdictional criteria set forth in the agencies' 2014 Proposed Rule. The agencies' 2014 Proposed Rule asserts jurisdiction over tributaries if they contain a bed, bank, and high water mark, and contribute flow to a navigable water. Jurisdiction may be readily determined if a bed, bank, and high water mark are clearly defined, but for many tributaries it will be difficult to discern the presence of these characteristics in the landscape. This is particularly true in the arid Western United States, where dry channels may appear and disappear over varying topography. Without the requirement of relatively permanent flow, it would often be unclear which dry channels meet the 2014 Proposed Rule's definition of tributary, and which do not.

Under API's proposed approach to determining jurisdiction over tributaries, the interpretive difficulties posed by the 2014 Proposed Rule would be avoided. Only relatively permanent tributaries to navigable waters would be jurisdictional. Continuous flow for at least three months of the year is a bright-line criterion that could be easily applied by landowners and the agencies. (p. 17-19)

Agency Response: **No Circuit Court has followed the approach to the *Rapanos* opinions recommended by the commenter. In the final rule, EPA and the Corps clarify the scope of "waters of the United States" that are protected under the Clean Water Act (CWA), based upon 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. This rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources. Preamble, Technical Support Document, I. A and C., VII.**

10.492 When EPA and the Corps finalized their guidance in 2008, their interpretation of *Rapanos* remained the same.[920] In 2011, when the agencies proposed revisions to their 2008 Guidance, their interpretation held constant: "The agencies continue to believe, as expressed in previous guidance, that it is most consistent with the *Rapanos* decision to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy

[920] See EPA and Corps, "Clean Water Act Jurisdiction Following the Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*" at 3, available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (2008 Guidance).

standard, since a majority of justices would support jurisdiction under either standard."[921] The 2014 Proposed Rule significantly changes the agencies' interpretation of *Rapanos* without explanation. Although the preamble mentions the *Rapanos* plurality in passing, the 2014 Proposed Rule disregards the jurisdictional limitations described in that opinion. Throughout the preamble, the agencies rely solely on Justice Kennedy's significant nexus test as the rationale for their assertion of jurisdiction over tributaries, adjacent waters, and other waters. Although the 2014 Proposed Rule does not explicitly apply the significant nexus test to tributaries and adjacent waters, the preamble clearly shows that the agencies have based their jurisdiction over those waters on the significant nexus test. (p. 34)

Agency Response: The rule is consistent with the caselaw and the agencies have explained their reasoning. Preamble, II; Technical Support Document, I.C.

10.493 For the past seven years, the United States has—in permitting decisions, litigation, and in official regulatory guidance—interpreted *Rapanos* to convey jurisdiction when either Justice Kennedy's or Justice Scalia's test is met.[922] Although this interpretation of *Rapanos* is itself erroneous, the agencies fail to explain their basis for dispensing with that interpretation and taking a very different approach in the 2014 Proposed Rule. Without any—let alone an adequate—reasoned explanation for adopting this new interpretation of *Rapanos*, the agencies' 2014 Proposed Rule is arbitrary and capricious. Deference is particularly inappropriate here given the agency's change in its position of the last seven years. The agencies cannot simply eschew any responsibility for their 2008 Guidance by claiming the guidance did not impose legally binding requirements on EPA, the Corps, or the regulated community.[923]

Although the agencies do not explain their change of heart, there are only two possible explanations. First, it is possible that the agencies now believe that a faithful interpretation of *Rapanos* results in the agencies being compelled to apply only the significant nexus test. Second—and more likely—the agencies believe that the fractured opinions in *Rapanos* allow them to choose whether to base jurisdiction on either the plurality's test or the significant nexus test.

As described in greater depth earlier in these comments, under either of these possible justifications, the 2014 Proposed Rule is arbitrary and capricious. If the agencies now indeed believe that the significant nexus test is the only controlling rule of law from *Rapanos*, the 2014 Proposed Rule must explain and justify that conclusion. Such a

[921] EPA and Corps, "Draft Guidance on Identifying Waters Protected by the Clean Water Act" (April 2011) (2011 Draft Guidance) at 2, available at http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf.
[922] 2007 Guidance at 3; 2008 Guidance at 3.
[923] 2008 Guidance at 4, n.17. The 2008 Guidance, which interpreted *Rapanos* broadly, was a legislative rule. The June 2007 Guidance was subject to public notice and comment as would a rulemaking: EPA and the Corps received over 66,000 public comments, and revised the Guidance in 2008 after considering these comments. 2008 Response to Comments at 1. The entire purpose of the 2008 Guidance was to "ensure that jurisdictional determinations, permitting actions, [administrative enforcement actions,] and other relevant agency actions are consistent with the [*Rapanos*] decision and supported by the administrative record." 2008 Guidance at 3, 4. Further, the agencies issued the guidance "to ensure nationwide consistency, reliability, and predictability in [their] administration of the statute." 2008 Guidance at 3, 4. The 2008 Guidance did not merely interpret *Rapanos*, but established new policy positions that the agencies would treat as binding when making jurisdictional determinations. Labeling the agencies' action as "guidance" does not make it so and does not change the fact that this was a legislative rule.

substantial interpretive change requires explanation under the APA and an opportunity for comment. If, rather, the agencies believe that *Rapanos* allows them to base jurisdictional on either the plurality's test or the significant nexus test, the agencies must explain why one test is a reasonable basis for rulemaking and the other is not, and why it would not be appropriate to apply the jurisdiction limiting principles articulated by both opinions. Indeed, to apply either the significant nexus test or the plurality test alone, without consideration of the other test, is to willfully ignore the totality of the *Rapanos* majority. (p. 35-36)

Agency Response: The rule is consistent with the caselaw and the agencies have explained their reasoning. Preamble, II; Technical Support Document, I.C.

Illinois Coal Association (Doc. #15517)

10.494 Based on the scope and breadth of the "significant nexus" test as construed by the Agencies, it is entirely conceivable and indeed likely that tributaries and wetlands remote from TNWs with an insubstantial and speculative connection to downstream TNWs could be deemed jurisdictional. This runs directly counter to the legal maxim articulated in *Rapanos* that "[f]or an effect to be "significant," it must be more than "speculative or insubstantial." See 547 U.S. at 780. Indeed, Justice Kennedy concluded that certain minor tributaries would necessarily lack a significant nexus because they were insubstantial. *Id*. at 781. Despite this judicial guidepost, the Agencies have nevertheless sought to deem all tributaries *per se* jurisdictional, even expanding the traditional meaning of "tributary" to features without bed and bank or OHWM. The Proposal thus leaves open the possibility that "drains, ditches, and streams remote from any navigable-in-fact water" may in fact be deemed jurisdictional, a result which subverts the outer limits on jurisdiction established by *Rapanos*. *Id*. Moreover, as mentioned above, the Proposal further contemplates the possibility of jurisdiction absent a hydrologic connection, based on, for example, a connection with aquatic birds, which in the *SWANCC* case then-Chief Justice Rehnquist, joined by Justice Kennedy, cautioned was a serious encroachment on the rights of states to manage land and water resources. See 531 U.S. at 172-74. (p. 15)

Agency Response: The rule is consistent with the caselaw and the agencies' significant nexus determinations are reasonable and consistent with the science. Preamble, III and IV, Technical Support Document, I, II, V-IX.

Gas Producers Association (Doc. #16340)

10.495 EPA and the Corps have proposed the rule in response to two U.S. Supreme Court decisions, where the Court held that the Corps applied the term "waters of the United States" too expansively. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 US. 159 (2001) (*SWANCC*); *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos v. United States*, the most recent of the decisions, at issue was whether the Corps could interpret "waters of the United States" broadly enough to exercise jurisdiction over a private landowner's "sometimes saturated" parcel of land located eleven to twenty miles from the nearest body of navigable water. The Corps deemed this proximity sufficiently "adjacent" to constitute it part of "the waters of the United States." The Sixth Circuit deferred to the Corps' interpretation, but the Supreme Court reversed, stating that "the Corps has stretched the term 'waters of the United

States' beyond parody. The plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734.

Although the majority of the justices of the Supreme Court agreed that the wetlands at issue in *Rapanos* were not "waters of the United States," the Court did not agree as to why that was the case. The plurality opinion, authored by Justice Scalia, concluded that "waters of the United States" means only those waters that contain a "relatively permanent" flow, not an "occasional," "intermittent," or "ephemeral" flow and that wetlands must possess a "continuous surface connection" to these waters; a mere "hydrological connection" is insufficient. *Id*. at 742, 757. Justice Kennedy, in his lone concurring opinion, argued for a broader "significant nexus" test to include waters that are not relatively permanent or do not have a continuous surface connection to a traditionally navigable water. See *Id*. at 780 (Kennedy, J., concurring). Justice Kennedy defined a significant nexus as a water that "either alone or in combination with similarly situated [waters] in the region, significantly affects the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id*.

The proposed rule relies heavily upon Justice Kennedy's judicially-created significant nexus concept. The proposed rule essentially makes Justice Kennedy's opinion the cornerstone for categorically asserting jurisdiction over many different types of hydrologic features (ephemeral drainages, or otherwise) that have only a tenuous hydrologic connection with traditionally navigable waters, interstate waters, or territorial seas. On a case-by-case basis, the proposed rule would apply the same significant nexus test to assert jurisdiction over features in the nebulous "other waters" category. The emphasis that EPA and the Corps place on the phrase "significant nexus" in formulating their proposed definition for waters of the United States imparts meaning to this phrase that is without consensus in the courts or the regulated community.

Of the nine Justices deciding *Rapanos*, only Justice Kennedy used the "significant nexus" test for defining waters of the United States. While his opinion is an important voice in establishing the scope of agency authority under the Clean Water Act, no other Justice joined his opinion–eight other justices saw the matter differently. In his dissent, Justice Stevens wrote, "I do not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*." *Id*. at 807 (Stevens, J., dissenting). Justice Breyer also took issue with Justice Kennedy's approach to have the Supreme Court legislate from the bench by adding "a 'nexus' requirement into the statute." See *Id*. at 811 (Breyer, J., dissenting). Justice Scalia was so unimpressed with Kennedy's significant nexus test that he disparaged the whole matter with a cutting "turtles all the way down" critique of the test's endless chain of logical inconsistencies. See Id. at 754. GPA agrees that the agencies need to revisit the regulatory definition of waters so that it conforms to *SWANCC* and *Rapanos*. EPA's and the Corps' approach in defining the waters of the United States, however, is inherently problematic. The agencies' emphatic reliance on the significant nexus test, which only one Justice chose to endorse, runs the risk of having the entire Clean Water Act framework for all wetlands and all tributaries fall apart during the inevitable siege of future court challenges. This entire effort will be in vain. (p. 2-3)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

Briscoe Ivester & Bazel LLP (Doc. # 17451)

10.496 The proposed Rule Is fundamentally flawed in that it is predicated on Kennedy's plainly wrong "significant nexus" invention. The EPA and Corps have made Justice Kennedy's "significant nexus" invention the touchstone for CWA jurisdiction in their Proposed Rule. (79 Fed.Reg. 22188, 22192, 22263.) Because that notion does not remotely reflect Congress's intent in the CWA, the Proposed Rule is fundamentally flawed.

Justice Kennedy's "significant nexus" idea is plainly wrong. First, as noted above, Justice Kennedy is the only justice on the Supreme Court who gives any credence to the idea. Moreover, this is not a circumstance where Justice Kennedy simply is the only one who has voiced approval of the idea while the others have expressed no opinion. To the contrary, all eight other justices have explicitly rejected the "significant nexus" notion as an invention solely of Justice Kennedy's making and not grounded in the CWA.

Second, the rejection of the "significant nexus" idea by eight justices operates with particular force in this instance because Justice Kennedy claims to derive the idea not from text in the CWA fashioned by Congress, but rather from text in an earlier Supreme Court decision, *SWANCC*, fashioned by the justices themselves. Among the eight justices who told Justice Kennedy in *Rapanos* that he misinterpreted the Court's use of the "significant nexus" phrase in *SWANNC*, six participated in that case. One can reasonably presume that they know their own meaning—and that meaning is not what Justice Kennedy says.

Third, there is no justification in law or logic to treat the view of one justice expressly rejected by all the others as the law of the land. This intuitively obvious conclusion is not in the least clouded or contradicted by any Supreme Court precedent on how to deal with fractured decisions in which no single opinion is supported by a majority of justices.

Some lower courts have looked to *Marks v. United States*, 330 U.S. 188 (1977), for guidance. In that case the Court noted:

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (*Id*. at 193.)

The various rationales offered by different justices in *Rapanos* though are not linear or logical subsets that lend themselves to identifying some "narrowest grounds" of the sort the *Marks* Court had in mind. If anything, the *Rapanos* plurality opinion is the closest to a narrowest ground in the sense that it generally encompasses the narrowest range of waters—a range that Justice Kennedy (as well as the four dissenters) would agree is within the scope of what Congress intended. Certainly, *Marks* does not warrant resorting to some simple vote-counting exercise. Even less does it justify employing a vote-counting rationale producing the perverse result that a single justice's view expressly rejected by all the other justices should be treated as the law of the land.

As the agencies have predicated the Proposed Rule on a single justice's misunderstanding of the Court's own words rather than any provision developed by Congress, they have no

reason to expect the Court to accord deference to their rulemaking if and when the Court later reviews it. (See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).)

Even if Kennedy's "significant nexus" notion properly served to determine which wetlands are part of jurisdictional waters, it has no bearing on determining whether waters themselves are jurisdictional. As noted above, the *Riverside* Court brushed aside the government's assertion that wetlands "adjacent" to waters of the United States should fall within CWA jurisdiction because Congress intended the Act to reach as far as the commerce power allows and, instead, held that Congress delegated to the agencies the function of drawing a line between land and water and the agencies' decision to include "adjacent wetlands" on the water side of the line was reasonable. The *SWANCC* Court later observed that it was the "significant nexus" between wetlands and navigable waters that informed its reading of the CWA in this regard. (*SWANCC*, 531 U.S. at 167 (2001).) In his concurring opinion in *Rapanos,* Justice Kennedy treated this observation as a test of sorts to determine which particular wetlands are sufficiently related to navigable waters to be embraced within such waters when the agencies draw the line separating land and water. (*Rapanos*, 547 U.S. at 759-787.)

Without explanation or justification, the agencies propose to repurpose the phrase "significant nexus" to serve as some sort of standard by which all waters are determined to be jurisdictional or not. Justice Kennedy, though, had no such purpose in mind when he devised his test for determining whether wetlands should be treated as jurisdictional waters. Indeed, the line drawing rationale underlying his concurring opinion in *Rapanos* and the Court's unanimous decision in *Riverside* has no bearing and no plausible application to the determination whether waters themselves are subject to the agencies' regulatory jurisdiction under the CWA.

The closest the agencies have come to explaining their attempt to use the "significant nexus" phrase in a way and context unrelated to how Justice Kennedy used it is to baldly assert: "While Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries." (79 Fed.Reg. 22188, 22204.) Why the agencies suppose this to be "reasonable," they do not say. Certainly, the line-drawing rationale has no application apart from ascertaining whether particular wetlands are part of waters, so how and why it is reasonable to "utilize" the significant nexus term in other contexts for other purposes is not apparent.

Moreover, removing the phrase from the context of drawing a line between land and water and proposing to use it for some different purpose raises questions about what the agencies suppose the phrase should mean in this different context. In repurposing the phrase, the agencies have rendered its meaning uncertain—even more uncertain than it already was.

In the process, the agencies have fashioned a rule that effectively reaches for the outer limits of the commerce power notwithstanding the Supreme Court's repeated rejection of that rationale. As the agencies explain:

> "The agencies also propose that all waters that meet the proposed definition of tributary are " waters of the United States" by rule, unless excluded under section (b), because tributaries and the ecological functions they provide, alone or in

> combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas." (79 Fed. Reg. 22201.)

The problem with this approach is that it includes too much. Uplands significantly affect waters of the United States. Rain falls on the land, flows across the land, and washes substances on the land into the waters. Rain washes into traditionally navigable waters dog droppings off urban streets, cow droppings off agricultural fields, and bear droppings from the woods. Rainwater flowing across the land- that is, across *uplands*----carries bacteria, nutrients, other organic matter, and sediment to these navigable waters, each of which under natural conditions contributed to the natural condition of the receiving water. When a drainage basin is developed, the types, amounts, and proportions of materials carried into traditionally navigable waters may change. The purpose of the stormwater program is to prevent these *upland* contributions from having too detrimental an effect on the ambient waters. But although it is indisputably true that matter washed in from uplands affect traditionally navigable waters, and that one could describe this effect as a "significant nexus" between uplands and waters, it would be foolish to say that because there is a significant nexus, all uplands must be classified as waters of the United States. (p. 6-9)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

Washington Farm Bureau (Doc. #3254.2)

10.497 Thus, Washington Farm Bureau strongly opposes these over-reaching proposals as they can, as drafted, be read to fundamentally expand federal agency jurisdiction beyond anything contemplated by the 1972 Congress that enacted the federal Clean Water Act (CWA). Two U.S. Supreme Court decisions (*SWANCC* in 2001, and *Rapanos* in 2006) have reaffirmed that federal CWA jurisdiction is limited to pollution of "navigable waters" of the United States and does *not* include *all* waters. The court roundly rejected the notion that "any" hydrological connection to navigable waters (no matter how tenuous) sufficed to trigger CWA jurisdiction, rejecting EPA's "land = waters" approach. (p. 1)

Agency Response: **The rule is not based on "any" hydrologic connection. Preamble, III and IV, Technical Support Document, II. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

National Sorghum Producers (Doc. #10847)

10.498 It is clear that this definition would not satisfy the plurality opinion in *Rapanos*. But, we also believe there is strong indication that neither would the definition satisfy Justice Kennedy. The parcels of land in question in *Rapanos* included: (1) wetlands with a surface water connection to tributaries of a river that flow into another river and ultimately into one of the Great Lakes; (2) wetlands with a surface water connection to a drain that carries water into a navigable river; (3) wetlands with a surface water connection to a river that flows into a Great Lake; (4) forested wetlands (located one mile from a popular boating and fishing lake that produces some 48 percent of the sport fish caught in the Great Lakes) separated from a ditch by a berm which ordinarily if not

always blocks surface water flow from the wetlands to the ditch. The ditch connects with a drain which carries water continuously throughout the year, emptying into a creek that empties into the popular lake. Under the proposed rule's definition of "tributaries" the case for jurisdiction over each of these seems clear cut. However, Justice Kennedy joined in a majority opinion in vacating the lower court's ruling because EPA and the Corps had not demonstrated a significant nexus between the lands in question in *Rapanos* and jurisdictional waters.

Justice Kennedy cited the ruling in *Solid Waste Agency v. United States Army Corp of Engineers (SWANCC)* in which the Court held that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." However, the proposed rule does not require a "significant nexus" test to be met with respect to "waters" to be brought under federal regulation when the basis for their inclusion is that they are "tributaries". This is notable given Justice Kennedy's opinion that the significant nexus test helped the Court in SWANCC avoid applications involving waters without a significant nexus "that appeared likely, as a category, to raise constitutional difficulties and federalism concerns."

In taking issue with an aspect of the plurality opinion, Justice Kennedy offers some important insight into his own views on the reaches of the Clean Water Act when he stated, "On the other hand, by saying the Act covers wetlands (however remote) possessing a surface water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach." The clear implication is that, in Justice Kennedy's view, the plurality opinion risked an over inclusive view of federal jurisdiction in that instance both because of the remoteness of the wetland and the insignificance of the stream. In reproaching the minority opinion, Justice Kennedy states, "Although the Court has held that the statute's language invokes Congress' traditional authority over waters navigable in fact or susceptible of being made so…the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." Yet, the reach of the proposed rule seems to blow right past Justice Kennedy's admonitions. (p. 2-3)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

10.499 EPA and the Corps may well intend to exercise discretion to taper the actual application of the proposed rule to something more approximate to Justice Kennedy's concurring opinion but, on its face, the proposed rule's reach appears to be nearly limitless and in this sense and only in this sense can it be said to add clarity. That is to say, every "water" is a water of the United States. This level of agency discretion is of deep concern particularly due to the civil and criminal penalties involved for a violation of the Clean Water Act. To read the rule as it is proposed but then to trust the EPA and the Corps to not fully exercise its jurisdiction to the full extent that the rule provides would require tremendous faith indeed. (p. 4)

Agency Response: **The agencies have provided additional clarity and limitations. The he rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C**

Missouri Agribusiness Association (Doc. #13025)

10.500 The new proposed rule should meet both the Kennedy and plurality opinions in *Rapanos* and the ruling in *SWANCC*. To be true to these opinions, the agencies should specifically follow this basic premise: WOTUS are extended to non-navigable waters only if they exhibit a relatively permanent flow and bear a "significant nexus" to a traditional navigable waterway; and, jurisdiction exists over wetlands only if a continuous surface water connection exists between it and a relatively permanent waterbody, and the wetland bears a "significant nexus" to a traditional navigable waterway. (p. 11)

Agency Response: **No Circuit Court has followed the recommendation of the commenter. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

National Cattlemen's Beef Association (Doc. #8674)

10.501 ACCW assert that the proposed rule expands the federal government's jurisdiction beyond the CWA's authority as provided by Congress. The proposed rule would expand the authority of the agencies to cover thousands, if not millions, of new features through the agencies' use of broad and ambiguous language, making it a limitless expansion of authority that cannot be supported by the CWA or the Commerce Clause of the U.S. Constitution.

Since the inception of the CWA the agencies' jurisdiction has been limited. In two relatively recent Supreme Court decisions, the agencies were told by the high court that their interpretation was beyond the scope of the CWA, but yet again the agencies are claiming limitless authority over the nation's waters. It is a blatant misrepresentation for the agencies to claim the proposed rule is not any more authority than the agencies have claimed in the past. Perhaps the agencies should be reminded that they were wrong in their belief of their scope of jurisdiction twice in the past fifteen years. In *SWANCC* and *Rapanos* the Supreme Court was clear that the agencies never had authority under the CWA to regulate all waters. The agencies' authority was never as broad as the Migratory Bird Rule, and the agencies' usage of such a rule was illegal. The proposed rule is an expansion from the current regulations and the agency should be transparent enough to admit it.

In the proposed rule the agencies have decided to run away with the Kennedy concurrence in *Rapanos* as their sole method of determining jurisdiction for non-navigable waters. While ACCW disagree that the agencies legally are allowed to completely disregard the plurality opinion authored by Justice Scalia, the agencies still failed to stay within the bounds of the Kennedy concurring opinion. In Kennedy's own words, "[i]n some instances, as exemplified by *Riverside Bayview*, the connection between a non-navigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act." (*Rapanos*, J. Kennedy at 10). It is a far cry from Justice Kennedy's "some instances" to wrap all ephemeral streams, isolated ponds, wetlands and ditches under the

CWA as per se jurisdictional through the tributaries and adjacent waters categories, or provide an Other Waters category that is so vague as to be an administratively convenient "catch all" category. Neither the plurality nor Kennedy's concurrence can support such a broad theory of jurisdiction. (p.4-5)

Agency Response: The rule is narrower than the scope of the existing rule and is consistent with the statute and the caselaw. Technical Support Document, I.

Western Growers Association (Doc. #14130)

10.502 In Justice Kennedy's concurring opinion in *Rapanos*, he submits that that the agencies could through regulation "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."[924] Yet in the *Rapanos* case, Kennedy notes that the Corps' "existing standard for tributaries, however, provides no such assurance."[925] Indeed, Justice Kennedy goes on to say with regard to the Corps' existing standard that "the breadth of this standard — which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it — precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[926] Justice Kennedy then briefly discusses an issue not before the Court, the issue of how the Corps might regulate wetlands that are not adjacent to navigable waters; he writes: "[a]bsent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute."[927] Taken together, Justice Kennedy's explanation is critical to understanding the framework into which the agencies define "significant nexus" as well as what level of specificity is required in applying that test. The agencies must clearly explain their claims of jurisdiction- whether wetlands adjacent to traditional navigable in fact waters OR wetlands adjacent to non-navigable waters constitutes a "significant nexus". In either case, Kennedy is clear that the standards created by the agencies cannot be overly broad. In applying Kennedy's admonition to the proposed application of significant nexus to the agencies' proposed analysis of how they would determine jurisdiction for cases under the 'other waters' category it appears that the agencies have gone beyond the Supreme Court's limits.

In writing the proposed rule the agencies adopt a concept of significant nexus in order to inform the how they will make jurisdictional determinations for land that falls outside any other category and thus falls into a catch-all "other waters" category.[928] More

[924] *Rapanos v. United States*, 547 U.S. 715, 781 (2006).
[925] *Id*.
[926] *Id*.
[927] *Id*. at 782.
[928] U.S. Army Corps of Engineers & U.S. EPA, Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,188, 22,211-14 (April 21, 2014). 57 *Id*. at 22,213.

specifically, the agencies propose that in making a determination that in part it will require "an evaluation of either a single water or group of waters (i.e., a single landscape unit) in the region that can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas….In determining whether groups of other waters perform ''similar functions'' the agencies would also consider functions such as habitat, water storage, sediment retention, and pollution sequestration. These and other relevant considerations would be used by the agencies to document the hydrologic, geomorphic and ecological characteristics and circumstances of the waters."[929] These factors would allow the agencies to examine not only a single specific unit but allow them to infinitely aggregate other "similarly situated" units in order to evaluate jurisdiction under the catch all "other waters" category.58 The agencies proposed description of how they will make evaluations provides absolutely no clarity to the regulated community and covers so many variables that nearly any body of water could be found jurisdictional. For practical purposes no limits would exist to a jurisdictional finding which would seem to directly contradict Justice Kennedy's aforementioned language in *Rapanos*. (p. 17-19)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The agencies have established additional clarity and limitations in the rule. Preamble.

National Alliance of Forest Owners (Doc. #15247)

10.503 First, the Agencies erroneously extend the "significant nexus" discussions in prior Supreme Court precedents to waters other than wetlands. Dating back to *Riverside Bayview*, the Supreme Court has only spoke of "significant nexus" when discussing the connection between wetlands and "navigable waters."[930] Not surprisingly then, Justice Kennedy's opinion in *Rapanos* focused on whether wetlands meet the significant nexus test.[931] Similarly, at least one federal appeals court has warned against extending application of the "significant nexus" beyond just wetlands, to cover all waters.[932] In light of these precedents, the Agencies cannot reasonably extend the significant nexus test to non-wetlands such as ephemeral streams or isolated ponds.

Second, the proposed rule does not identify any practical, scientifically-based methods for evaluating significance. There is no substantive discussion of either methods that could be developed to measure (i.e., quantify) connections among wetlands, waters, and traditional navigable waters or criteria that policy makers might select for distinguishing significant connections from other connections. Instead, the proposed rule either categorically concludes that "significance" is present or merely provides a laundry list of factors that might provide evidence of chemical, physical, or biological connections without explaining how the Agencies will determine significance based on those factors.[933] There are so many possible combinations of the different types of connections that may be present that regulators will have no problem concluding that a significant

[929] *Id*. at 22,213.
[930] See *Riverside Bayview*, 474 U.S. at 121; SWANCC, 531 U.S. at 167-68.
[931] See *Rapanos*, 547 U.S. at 779-80, 782.
[932] See *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007).
[933] See 79 Fed. Reg. at 22,213-14.

nexus exists. Distinguishing between insignificant and significant connections is of critical importance. Otherwise, if the Agencies can assert CWA jurisdiction over all connections, such a rule would reopen the door to the "any hydrological connection" standard that was struck down in *Rapanos*.

Third, the Agencies interpret the significant nexus language from Supreme Court precedents to allow for the aggregation of all "similarly situated" water features in a watershed.[934] This aggregation approach, however, does not appear to be supported by Justice Kennedy's opinion in *Rapanos*, and it certainly does not meet the standard espoused by the plurality. Justice Kennedy spoke approvingly of an aggregation analysis to determine the impact of wetlands on downstream waters because of wetlands' collective contribution in a given region to the specific functions of "pollutant trapping, flood control, and runoff storage."[935] Justice Kennedy gave no indication whatsoever that an aggregation analysis would be appropriate for other waters such as tributaries or ponds. The plurality, in turn, held that only wetlands with "a continuous surface connection" to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the CWA."[936] But even if the Agencies could appropriately aggregate more than just wetlands, such aggregation would still fail to meet the plurality's demand that a water of the United States have relatively permanent flow.[937] (p. 8-9)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Eddyann U. Filippini Family Trust (Doc. #18873)

10.504 The primary case on this issue is that of *Rapanos v. United States*.[938] This case involved wetlands near ditches that eventually drain to "traditional navigable waters." The United States brought suit against certain private individuals for backfilling some of the wetland areas without a permit. The District Court, and Sixth Circuit Court of Appeals found that the EPA had jurisdiction over the water, however, the United States Supreme Court reversed and found no jurisdiction existed. The plurality opinion found that only waters or wetlands with "relatively permanent, standing or continuously flowing bodies of water" such as "oceans, rivets, lakes," with connection to navigable waters could be under the jurisdiction of the EPA.[939] And the term "Waters of the United States" does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[940] Additionally, it was stated that water is not under the jurisdiction of the United States "based on a mere hydrologic connection."[941] Instead, there must be a "continuous surface connection."[942] The

[934] See *id*. at 22,204.
[935] 547 U.S. at 779.
[936] *Id*. at 742.
[937] *Id*. at 739.
[938] *Rapanos v. United States*, 547 U.S. 715 (U.S. 2006).
[939] *Id*.
[940] *Id*.
[941] *Id*.

"significant nexus" standard used in the proposed rule clearly over-steps the constraints placed on the EPA's jurisdiction by the Supreme Court. (p. 3)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Airlines for America (Doc. #15439)

10.505 The significant nexus test is not sufficient to determine Clean Water Act jurisdiction. The opinions in *SWANCC* or Rapanos cannot be read to hold that the extent of jurisdiction Congress granted the Agencies under the Act through the phrase "waters of the US" is conclusively resolved through a purely scientific inquiry into whether a "significant nexus" to navigable waters exists. Even Justice Kennedy, who adopted that jurisdictional test in *Rapanos*, was careful to explain that the test could be applied in the specific case presented precisely because it would "raise no serious constitutional or federalism difficulty." 547 US at 782. Similarly, *SWANCC* and *Rapanos* clearly establish that supervening legal principles, be they constitutional or statutory, continue to operate and must be considered even where the significant nexus test is employed. Stated differently, neither the Court nor Justice Kennedy intended the "significant nexus" test to supplant other supervening constitutional and statutory legal principles relevant to determining the extent of the Agencies' jurisdiction under the Act. Any attempt to define the extent of their jurisdiction through regulatory action must acknowledge the limits such principles impose on the Agencies' statutory authority.

This principle is important here because the Federal Aviation Act establishes certain national policies with respect to aviation – including an absolute priority on aviation safety – that have the potential to conflict with the objectives of the Clean Water Act in some circumstances. Courts have clearly established that where Congress has granted potentially overlapping authority to two or more agencies, the jurisdiction of one agency will be circumscribed where there is a "plain" or "clear repugnancy" between the competing authorizing statutory schemes, or where two federal provisions are "clearly incompatible."[943] Our concern is not that the objectives of the Clean Water Act cannot be reconciled to and achieved consistent with the objectives of federal aviation statutes. Rather, the concern is that, by adopting a purely scientific definition of Clean Water Act jurisdiction in the rule, the Agencies purport to eliminate any opportunity to assess, on a case-specific basis, whether the mandates of the Clean Water Act or the Federal Aviation Act conflict and, if so, which controls.[944] Without a clear procedure by which to determine whether those statutes can be harmonized, the definition of WOTUS proposed by the Agencies would purport to permanently foreclose that important and legally necessary inquiry. (p. 7)

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[942] *Id*.

[943] See *Credit Suisse Securities (US) v. Billing*, 551 U.S. 264 (2007) (finding federal securities law to preclude application of federal antitrust law provisions).

15 A4A notes that a case-specific basis could be categorically determined up front for common situations

[944] See *Credit Suisse Securities (US) v. Billing*, 551 U.S. 264 (2007) (finding federal securities law to preclude application of federal antitrust law provisions).

15 A4A notes that a case-specific basis could be categorically determined up front for common situations

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The scope of the Federal Aviation Act is beyond the scope of this rule.**

10.506 Supreme Court Jurisprudence recognized that the "significant nexus" test is subject to and conditioned by supervening legal principles. The Agencies read *SWANCC* and *Rapanos* as establishing a one-step test for WOTUS that relies exclusively on application of the "significant nexus" standard. That reading is incorrect and does not accurately reflect the opinions of the Court.

Justice Kennedy appears to have intended that the "significant nexus" test provide a generalized rule for determining the extent of the Agencies' jurisdiction under the Act.[945] Still, even he recognizes that the test does not and cannot be said to resolve the jurisdictional issue in any and all cases. Justice Kennedy explicitly acknowledges that "[t]o be sure," the significant-nexus requirement may not align perfectly with the traditional extent of federal authority" and that test does not foreclose "[t]he possibility of legitimate Commerce Clause and federalism concerns in some cases." 547 U.S. at 782-83 . Justice Kennedy even acknowledges that the test cannot be expected to categorically resolve the jurisdictional issue in all cases involving the type of waters specifically at issue in *Rapanos*: "Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty." 547 U.S. at 782. Similarly, he states the *SWANCC* Court "interpret[ted] the Act to require a significant nexus with navigable waters,"[946] because the test "avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns." 547 U.S. at 776. Thus, while Justice Kennedy expects that the "significant-nexus test itself prevents problematic applications of the statute," it is also clear that he understands the test remains circumscribed by other supervening legal

[945] Justice Kennedy did, however, carefully define the question presented in *Rapanos*: "These consolidated cases require the Court to decide whether the term 'navigable waters' in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact." 547 U.S. at 759. Similarly, the Justices have carefully scoped the question presented in all other major opinions addressing the extent of the Agencies' jurisdiction under the Act: Justice Scalia's plurality opinion in *Rapanos*, 547 U.S. at 729 ("In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act"); Chief Justice Rehnquist in *SWANCC*, 531 U.S. 159 ("The [COE] has interpreted §404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of §404(a) may be fairly extended to these waters"); Justice White in *United States v. Riverside Bayview Homes*: 474 U.S. at 123 ("This case presents the question whether the [Act]…authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries"). It is clear that neither Justice Rehnquist nor Justice Scalia endorsed the use of the significant nexus test as a generally applicable test for determining jurisdiction in all cases under the Act. Justice Rehnquist helpfully and succinctly explained in *SWANCC* "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*" (531 U.S. at 167), to explain that whether a "significant nexus" existed was not relevant to the analysis. Justice Scalia's plurality opinion in *Rapanos* also makes this point: "*SWANCC* found such ecological considerations irrelevant to the question" presented there. 547 U.S. at 741-42).

[946] As we made clear above, we do not agree *SWANCC* required finding a "significant nexus"; rather *SWANCC* found this inquiry irrelevant to the issue presented there.

principles. Certainly, his opinion cannot be read as establishing a test that categorically resolves the jurisdictional issue, even in cases where it would require "problematic applications of the statute" or raise "serious" or "legitimate" constitutional issues (e.g., Commerce Clause or federalism concerns). To the contrary, Justice Kennedy's opinion acknowledges that the test will not resolve all legal issues in all situations and conceives the "significant nexus" test as a pragmatic formulation that can avoid "problematic applications of the statute," and will do so in "most" situations involving adjacent wetlands. Stated differently, the "significant nexus" test is not conceived as categorically supplanting legitimate statutory or constitutional limitations in its application, but rather is conditioned upon satisfying those limitations.[947]

Jurisdiction under the Act cannot be resolved – as the Proposed Rule asserts – through a purely scientific inquiry into whether a "significant nexus" with navigable waters exists. It also requires a legal inquiry into whether this scientific inquiry is sufficient to resolve "legitimate" or "serious" statutory or constitutional issues. *United States v. Riverside Bayview Homes*, underscores the Court's conception of the relationship between ecological/scientific judgments and legal judgments. The Court endorsed "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands" as "an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." 474 U.S. 121, at 134. The question is whether the scientific inquiry is sufficient as a legal matter – science does not define the extent of jurisdiction; rather the law defines whether science can be "an adequate basis" for determining jurisdiction. In the context of *Riverside Bayview Homes*, science was an "adequate basis" for determining jurisdiction over adjacent wetlands at issue in that case. As Justice Scalia points out in *Rapanos*, however, "*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*…provided an independent basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'waters of the United States.'" 547 U.S. at 741. Certainly, the Court has never stated, and no opinion – including Justice Kennedy's opinion in *Rapanos* – holds that a scientific inquiry into whether a "significant nexus" exists is an "adequate basis" for determining whether assertion of jurisdiction conflicts or potentially conflicts with imperatives Congress has established in other statutes (e.g., maintenance of aviation safety). Indeed, it is nonsensical to assert that a scientific inquiry could resolve such legal issues. Accordingly, the Court – including Justice Kennedy in *Rapanos* – has always acknowledged that the Agencies' jurisdiction under the Act, and the sufficiency of any test designed to determine jurisdiction, remains subject to and conditioned by

[947] Justice Rehnquist and Scalia would certainly agree that any "test" of jurisdiction under the Act is circumscribed by supervening legal principles. In *SWANCC*, Chief Justice Rehnquist declined to accept the Corps' assertion of jurisdiction that "push[ed] the limit of congressional authority" because Congress had not provided a "clear indication" of its intent to do so in the Act. 531 U.S. at 173. Justice Scalia, in his plurality opinion in *Rapanos* also emphasized the Court could not defer to an agency's interpretation of its jurisdiction as authorizing an "intrusion into traditional state authority" or one that "presses the envelope of constitutional validity" without a "clear and manifest" statement of congressional intent to confer such jurisdiction. 547 U.S. at 738.

supervening legal principles that cannot be displaced or resolved by a purely scientific inquiry.[948]

Thus, while the "significant nexus" test arguably may be applicable (and perhaps dispositive) in many cases, the Court has recognized that there are supervening legal principles not resolved by the "significant nexus" test that must be considered in determining jurisdiction under the Act. (p. 7-9)

Agency Response: The rule is consistent with the statute, the caselaw and the Constitution. Technical Support Document, I.A. and C.

10.507 Like the doctrinal and constitutional factors recognized by the Court, statutory constraints on the interpretation of the Clean Water Act also are beyond the Agencies' power to obviate by rule. It is ensuring the ability to consider and, where necessary, enforce those statutory constraints that is the primary concern of A4A and its members.

Congress has long recognized that commercial aviation safety and the efficiency of the National Airspace System ("NAS") depends on the application of a consistent set of regulatory requirements by a primary federal agency – the FAA – with the necessary expertise and capability to develop and administer those requirements. Congressional policy further recognizes that the successful integration of each airport into the NAS implicates not only aircraft operations, but also infrastructure, facilities, and support operations that most appropriately fall within the primary and exclusive jurisdiction of the FAA.

To that end, the Federal Aviation Act establishes "a uniform and exclusive system of federal regulation" of aircraft operations to be administered by the FAA. Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (emphasis added).[949] Congress has affirmed repeatedly its intent that this system of federal regulation maintain the primacy of safety[950] and accommodate, to the maximum extent possible, demand for air transportation.[951] Congress also has affirmed the need to meet environmental objectives consistent with maintaining safety and ability of the NAS to accommodate the needs of

[948] See also *City of Arlington v. FCC*, 569 U.S. at 16 (slip opinion), holding courts must apply *Chevron* deference to agency determinations of their own jurisdiction, but admonishing that courts must police agency assertions of jurisdiction by "taking seriously, and applying rigorously, in all cases, statutory limits on Agencies' authority."

[949] 20 See also Abdullah v. American Airlines, Inc.,181 F.3d 363, 370 n.10 (3d Cir. 1999)(aviation regulation is an area where "[f]ederal control is intensive and exclusive.")(quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944)).

[950] See e.g. 49 U.S.C. § 40101(a) [emphasis added]: "[T]he Secretary of Transportation shall . . .
(1) assign[] and maintain[] safety as the highest priority in air commerce.
(3) prevent[] deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.
See also § 47101(a) [emphasis added]: "It is the policy of the United States – (1) that the safe operation of the airport and airway system is the highest aviation priority."

[951] See, § 47101(a): "It is the policy of the United States –… (7) that construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease." See also e.g., 49 U.S.C. § 40101(a)(4), (6), (7), (10) and (11).

the nation's economy and culture.[952] It is without question, however, that the FAA wields primary and exclusive jurisdiction over air safety and the operation of the NAS.[953]

This pervasive federal regulatory scheme extends to both aircraft in flight and aircraft-related operations on the ground. See, e.g., 49 U.S.C. § 40103(b)(2)(B)-(C); *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) (Federal Aviation Act preempts any regulatory "interference" with the operations of aircraft on the ground); *City of Houston v. FAA*, 679 F.2d 1184, 1195 (5th Cir. 1982) (FAA has regulatory authority "not only [over] the corridors of air traffic, but the use of airports as well").

The nation's commercial aircraft are part of an intricate, interconnected, time-sensitive network in which the smooth and seamless movement of aircraft is critical to keeping flights running safely and efficiently. Aircraft operate on tightly orchestrated schedules where reliability and performance are critical to the safety and efficiency of the NAS, a realm regulated pursuant to the exclusive jurisdiction and authority of the FAA. This is not to the exclusion of sound environmental management or regulation, as environmental impacts associated with airport deicing can and must be appropriately addressed. Indeed, an array of environmental impacts have been and continue to be successfully addressed consistent with FAA's exclusive authority over aircraft operations and the NAS – this includes water quality impacts, which have been and continue to be appropriately and successfully addressed through the NPDES program.

By its very nature, however, the potential expansion of WOTUS and NPDES permitting to newly-designated waters within and beyond the airfield cannot be implemented without affecting or dictating aircraft operations and affecting management of the NAS. This is not the fault of the program, but rather a consequence of the irreconcilable priorities of the two statutes at issue – the Clean Water Act and the Federal Aviation Act – and the effect the Agencies' expansive WOTUS definition proposal would have.

Establishing newly-jurisdictional water bodies inescapably would require the issuance of NPDES and Section 404 permits to authorize discharges into those waters. These permits, in turn, would impose technology- and water quality-based standards through the mechanism of effluent limitations and other conditions to protect the natural and habitat value of those waters. Indeed, protection of habitat value is such a cornerstone of the Agencies' assessment of a water's "significant nexus" with traditionally jurisdictional waters that the word "habitat" appears over 100 times in the preamble to the Proposed Rule. It is that very focus that lays bare the conflict between what the Agencies propose and the federal aviation mandates.

The mandates to protect the ecological value and services provided by natural waters is inherent in the Clean Water Act, but can, in certain cases, be incompatible with the

[952] See, § 47101(a): "It is the policy of the United States – . . . (6) that airport development projects under this subchapter provide for the protection and enhancement of national resources and the quality of the environment in the United States."

[953] See, 49 U.S.C. §40103(b): "The Administrator of the [FAA] shall develop plans and policy for the use of the navigable airspace and assign by regulation and order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."

imperatives established by the Federal Aviation Act. There, the imperatives include the (a) safety of aircraft and airport operations, (b) efficiency and reliability of aircraft operations, and (c) effect on the NAS. One statute seeks to protect habitat values of waters; the other mandates that the habitat values be suppressed when in proximity to commercial aviation. A simple example will help to illustrate the fundamental impossibility in some cases of fully satisfying these two masters.

Avoidance of wildlife hazards, especially from birds and terrestrial animals that are attracted to the habitat provided by water features, has long been a safety priority of the aviation industry and of the FAA. Recognizing the importance of keeping wildlife hazards away from aircraft, EPA signed a Memorandum of Agreement ("MOA") in which it agreed:

> "that a variety of other land uses (e.g., storm water management facilities, wastewater treatment systems, landfills, golf courses, parks, agricultural or aquacultural facilities, and landscapes) attract hazardous wildlife and are, therefore, normally incompatible with airports. Accordingly, new, federally-funded airport construction or airport expansion projects near habitats or other land uses that may attract hazardous wildlife must conform to the siting criteria established in the FAA Advisory Circular (AC) 150/5200- 33, Section 1-3."[954]

In the referenced section 1-3 of AC 150/5200-33,26 FAA recommends that any wildlife attractant (including, as noted in the above MOA, stormwater management facilities like ponds and stormwater treatment facilities) be placed at least 10,000 feet away from the aircraft operations area ("AOA")[955] for any airport serving jet aircraft and five statute miles away "if the attractant could cause hazardous wildlife movement into or across the approach or departure airspace."[956] The FAA is even more definitive with respect to "new wastewater treatment facilities," in that it "strongly recommends against the construction" of such facilities within 10,000 feet of the AOA and instructs that "airport operators should voice their opposition to such facilities if they are in proximity to the airport."

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[954] Memorandum of Agreement Between the Federal Aviation Administration, the U.S. Air Force, the U.S. Army, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture to Address Aircraft-Wildlife Strikes, Section l.J. (signed by EPA Assistant Administrator for Water on January 17, 2003).

[955] Relevant definitions are provided in AC 150/5200-33B, Appendix 1 as follows:

> Air operations area. Any area of an airport used or intended to be used for landing, takeoff, or surface maneuvering of aircraft. An air operations area includes such paved areas or unpaved areas that are used or intended to be used for the unobstructed movement of aircraft in addition to its associated runway, taxiways, or apron.
>
> …
>
> Wastewater treatment facility. Any devices and/or systems used to store, treat, recycle, or reclaim municipal sewage or liquid industrial wastes, including Publicly Owned Treatment Works (POTW), as defined by Section 212 of the Federal Water Pollution Control Act (P.L. 92-500) as amended by the Clean Water Act of 1977 (P.L. 95-576) and the Water Quality Act of 1987 (P.L. 100-4). This definition includes any pretreatment involving the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW. (See 40 CFR Section 403.3 (q), (r), & (s)).

[956] AC 150/5200-33B at ¶¶ 1-3 and 1-4.

Given that the Proposed Rule may create additional jurisdictional and, thus, protected waters, it by definition runs the risk of establishing or preserving inappropriate habitats near airfields, and of requiring the placement of treatment ponds and other wastewater treatment facilities squarely within those AOAs to meet newly-required permits' terms. Yet, despite EPA's having signed the MOA, EPA's Proposed Rule does not address the potential bird strike hazard issue or even list AC 150/5200-33 as among those it considered in the rulemaking.

In some cases, of course, such concerns arguably could be addressed without violating the safety principles announced in the MOA or in AC 150/5200-33. Nonetheless, the recent "Miracle on the Hudson" incident[957] highlights the fact that it is imperative that safety issues are evaluated and addressed at all airports.

The Proposed Rule nowhere discusses the means by which the inherently inflexible water quality protections demanded by the Clean Water Act could be squared with the avoidance of wildlife hazards, including bird strikes, that the FAA so aggressively guards against.

To be clear, we are not suggesting that any attempt by EPA to regulate environmental impacts from aviation is preempted as being "clearly incompatible." In fact, EPA has long used the NPDES program under the CWA to address runoff from deicing operations. What we are highlighting, however, is that assessments of the potential conflict between the CWA and the Federal Aviation Act and related FAA mandates are inherently site-specific and cannot be prejudged in the absence of specific facts. (p. 10-13)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The scope of the Federal Aviation Act is beyond the scope of this rule.**

10.508 We recognize that integration of a usable rule for easy identification of waters that are jurisdictional under the CWA and site-specific assessment of the compatibility of CWA protections with FAA mandates is not necessarily a simple matter. As written, the Proposed Rule categorically determines that certain waters (tributaries and adjacent waters) are jurisdictional and provides the mechanism to determine when and where jurisdictional "other waters" occur. These characterizations are based solely on the Agencies' determinations of the scientific question whether such waters enjoy a "significant nexus" with traditionally jurisdictional waters.

As the Supreme Court has acknowledged, this purely scientific assessment is a tool but is not the final word in determining the extent of jurisdiction of the Act. Legal considerations, including constitutional and statutory limitations on the reach of the federal CWA, must also be considered. The question here is how to integrate that consideration into the CWA's program, as is required, without throwing every determination of jurisdiction into confusion.

[957] On January 15, 2009, US Airways Flight 1549 struck a flock of Canada geese during its initial climb out, lost engine power, and ditched in the Hudson River off midtown Manhattan, fortunately, with no loss of human life.

While there likely are a number of alternatives, two that recommend themselves to A4A as worthy of consideration are as follows:

- Include in the final WOTUS rule a statement that nothing in the definition of WOTUS is intended to foreclose site-specific consideration of potential conflicts between the CWA and the Federal Aviation Act and FAA mandates; or
- include in the final WOTUS rule an identification of the forum or fora in which review may be had of site-specific conflicts between the CWA and the Federal Aviation Act and FAA mandates. (p. 13)

Agency Response: The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A. and C. The scope of the Federal Aviation Act is beyond the scope of this rule.

Ingram Barge Company (Doc. #14796)

10.509 The meaning and intent of *Rapanos* has been the subject of extensive debate, but one aspect of the case is certain: it limits the agencies' jurisdiction. Although the multiple opinions of this case add some complexity, it is clear that *Rapanos* did not invite an expansion of jurisdiction by the Agencies. The Agencies, however, in an attempt to "implement" the Supreme Court decisions on this topic drafted a guidance, but upon facing criticism in not undertaking a formal rulemaking, the Agencies withdrew the guidance and issued this Proposed Rulemaking instead. This Proposed Rulemaking, however, still misconstrues the "significant nexus" test of *Rapanos*, by- in essence reading the word "significant" out of the test. The Proposed Rule states that the Agencies should consider a water to have significant nexus to jurisdictional waters if it: either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to [traditional navigable waters, interstate waters, or the territorial seas]), significantly affects the chemical, physical, or biological integrity of [traditional navigable waters, interstate waters, or the territorial seas]...[that is] more than speculative or insubstantial. [958] Therefore, the Agencies can assert jurisdiction over waters that are remote, small in volume, and insignificant by amassing them with other waters in a watershed. The Agencies do not offer any examples of hydrologic connection that is insignificant or mention those examples where there would not be any hydrological connection at all. Additionally, the Proposed Rule deprives the term "navigable" in "navigable waters" of any meaning by applying the "significant nexus" test in such an overbroad manner, a result that is specifically forbidden in the Kennedy opinion in *Rapanos*. [959](p.3)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Southern Company (Doc. #14134)

10.510 With this proposal, the agencies appear to be exploiting what they characterize as confusion created by *Rapanos* to seize upon Justice Kennedy's "significant nexus" test

[958] 79 Fed. Reg. at 22,263 (emphases added).
[959] Rapanos, 541 U.S. at 778-79 ("[T]he word 'navigable' in 'navigable waters' [must] be given some importance [and] some effect.").

and construe it in ways that even Justice Kennedy himself would not recognize. We note that in defining significant nexus, the agencies use the disjunctive term "or" instead of the conjunctive term "and" in paraphrasing Justice Kennedy's characterization of the CWA's jurisdictional reach. Justice Kennedy spoke specifically of the "chemical, physical and biological" integrity of other covered waters, not the "chemical, physical or biological" integrity of those same waters. This change fundamentally alters the scope and legal construct of the significant nexus test, expanding it in ways that neither the CWA nor Justice Kennedy's opinion support. (p.22)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.511 The roots of Justice Kennedy's "significant nexus" test can be found in the *Riverside Bayview* decision, and subsequently refined in SWANCC and Rapanos. Notably, in *Riverside Bayview*, the Court affirmed the Corps' jurisdiction over wetlands adjacent to and inseparably bound up with navigable waters. Affording deference to the Corps' interpretation in that case, the Court concluded that the Corps' "ecological judgment about the relationship between waters and their adjacent wetlands" offered "an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Riverside Bayview*, 474 U.S. at 134. Thus, it was both the close spatial proximity and an inseparable physical, chemical, and biological linkage that established the significant nexus. (p. 23)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.512 Notwithstanding the differences between the Scalia and Kennedy tests, and the confusion inherent in the plurality and swing vote opinions, one thing remains clear. The sole legal basis for jurisdiction under the Act is rooted in a physically proximate *and* significant functional relationship between non-navigable waters and TNWs. (p. 24)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.513 The agencies claim that the proposal will resolve the confusion created by the Supreme Court's decision in *Rapanos*. But contrary to this claim, the proposal seems more clearly aimed at recapturing many of the non-navigable isolated and otherwise remote, non-jurisdictional waters that were removed from jurisdiction under the *SWANCC* and *Rapanos* decision. This is not appropriate. Only Congress may effect such a recapturing of jurisdiction lost by Supreme Court interpretation. (p. 25)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule does not recapture jurisdiction over waters based on the Migratory Bird Rule.

Westlands Water District (Doc. #14414)

10.514 Second, although the Proposed Rule purports to apply Justice Kennedy's concurring opinion in *Rapanos*, the Proposed Rule adopts a different definition of the phrase "significant nexus"—which is the predicate for determining whether a water body is "adjacent"—from that adopted in Justice Kennedy's concurring opinion. Justice Kennedy's concurring opinion stated that, based on the Supreme Court's prior decision in

SWANCC, a water will be considered as part of "the waters of the United States" if it has a "significant nexus" to traditional navigable waters. Justice Kennedy defined "significant nexus" as follows:

> "[W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[960]

Justice Kennedy's definition of "significant nexus" follows the Clean Water Act's definition of the Act's goals, which are among others "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a)). On the other hand, the Proposed Rule adopts a different definition of "significant nexus," stating:

> "(7) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ''water of the United States'' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section."[961]

While Justice Kennedy's concurring opinion defines "adjacent" has having a significant nexus to the "chemical, physical, and biological integrity" of water, the Proposed Rule defines "adjacent" as having a significant nexus to the "chemical, physical, or biological integrity" of water.

The preamble of the Proposed Rule makes clear that the divergence from Justice Kennedy's formulation was intentional, even though the Rule purported to be consistent with Justice Kennedy's interpretation. The preamble states:

> The proposed rule includes a definition of significant nexus that is consistent with Justice Kennedy's significant nexus standard. In characterizing the significant nexus standard, Justice Kennedy stated: ''The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'…'' 547 U.S. at 779. It is clear that Congress intended the CWA to

[960] *Rapanos*, 547 U.S. at 780.
[961] 79 Fed. Reg. 22263 (2014).

> ''restore and maintain'' all three forms of ''integrity,'' 33 U.S.C. 1251(a), so if any one form is compromised then that is contrary to the statute's stated objective. It would subvert the intent if the CWA only protected waters upon a showing that they had effects on every attribute of a traditional navigable water, interstate water, or territorial sea. Therefore, a showing of a significant chemical, physical, or biological affect should satisfy the significant nexus standard.[962]

Thus, the Proposed Rule goes beyond Justice Kennedy's concurring opinion by extending federal jurisdiction to waters that have a significant nexus to the chemical, physical, or biological integrity of a traditional navigable water, rather than a combination of all three characteristics. Again, the Proposed Rule has expanded federal jurisdiction under the Clean Water Act beyond the analysis provided in Justice Kennedy's concurring opinion, and indeed beyond the language of the Clean Water Act itself. (p. 27-28)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Crop Life (Doc. #14630.1)

10.515 In the proposed rule the agencies have ignored the plurality opinion and inappropriately selected from Justice Kennedy's opinion and other *Rapanos* opinions to advance a position not unlike that previously rejected by the Supreme Court. Under *Marks v. United States*, when the Supreme Court decides a case and five Justices do not arrive at a majority opinion, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds."[963] In proposing this rule, the agencies have inappropriately relied on Justice Kennedy's "significant nexus" standard in *Rapanos*, which was rejected by the four-Justice plurality, rather than a common framework agreed upon by five Justices. The agencies should have proposed a rule that is consistent with a single holding based on the common elements of the plurality's and Justice Kennedy's opinions. (p. 13)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Arizona's Cooperatives G & T (Doc. #14901)

10.516 Under existing caselaw, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." See, e.g., Marks v. United States, 430 U.S. 188, 193 (1977)). In other words, the *Rapanos* decision should only be read as granting jurisdiction where there is commonality between Justice Kennedy and the Plurality. In this case, the agencies seek to use an either/or test; that is, they will find jurisdiction under either the Plurality test or under Justice Kennedy's test, rather than a single test that meets the framework and limitations common between the Plurality and Justice Kennedy. This is in contravention of the holding in *Marks*.

In addition, the aggregation approach stretches the extent of Justice Kennedy's "significant nexus" concept beyond what Justice Kennedy was willing to consider as

[962] 79 Fed. Reg. 22261 (2014).
[963] 430 U.S. 188, 193 (1977) (internal quotations omitted).

establishing such a nexus. Nowhere in Justice Kennedy's opinion does such an approach appear as establishing a "significant nexus" and, as stated above, actually flies in the face of the limiting factors (i.e., that remote, insubstantial, speculative or minor flows do not establish the requisite nexus) set forth in the opinion. Simply, the agencies have cherry-picked language they like best from the opinion in an effort to extend jurisdiction beyond what is clearly allowed under the *Rapanos* decision.

Both opinions would allow jurisdiction over certain non-navigable tributaries, however both the Plurality and Justice Kennedy were concerned about the agencies overreaching and extending jurisdiction over features remote from TNWs and carrying only minor and/or intermittent flows. Justice Kennedy criticized the agencies' "existing standard" which "deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark" because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it." *Rapanos*, at 781 (Kennedy, J., concurring). Similarly, the Plurality chastised the agencies for finding jurisdiction in "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert." *Id*. at 734 (Plurality). While Justice Kennedy took issue with the Plurality's "relatively permanent waters" test for tributaries, both opinions agreed that the Corps had gone too far in its assertion of jurisdiction over tributaries and that "mere adjacency to a tributary" is insufficient. *Id*. at 786 (Kennedy, J., concurring). Yet, that is exactly what the agencies are proposing to do here; extend jurisdiction, not only to merely adjacent tributaries, but also to any tributaries within the same watershed, regardless of the standard set forth in the *Rapanos* decision. The Proposed Rule does not in fact provide clarity on the extent of waters of the U.S.

The Agencies assert that one of the primary purposes of the Proposed Rule is to provide a level of clarity regarding the extent of waters of the U.S. that both the regulated public and the Supreme Court have demanded. However, despite the broad conclusion in the Proposed Rule that "[m]ost prairie streams and southwest intermittent and ephemeral streams are likely to be considered tributaries to (a)(1) through (a)(3) waters….", and that tributaries are, by definition, jurisdictional under the Proposed Rule, the extent o of federal jurisdiction over non-navigable tributaries is still very much in question. (p. 3-4)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The agencies have provided additional clarity.**

West Bay Sanitary District, et. al (Doc. #16610)

10.517 Pursuant to the CWA, the term "Waters of the United States" is not used or defined. Instead, the CWA refers to "navigable waters" which is defined to mean "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Although the regulatory definitions vary across CWA sections, EPA's current NPDES regulations define "waters of the United States" as "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 40 C.F.R. § 122.2 ("Definitions") (defining "Waters of the United States"). The Supreme Court has twice stated that the meaning of

"navigable waters" in the Act is broader than the traditional understanding of that term, but has also emphasized, however, that the qualifier "navigable" is "not devoid of significance." *Rapanos* at 731 citing *SWANCC,* 531 U.S. at 167 and 172; and *Riverside Bayview*, 474 U. S. at 133.

Previously, in 1979, the U.S. Supreme Court created four tests for determining what constitutes a "navigable water." In *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383 (1979), the tests ask whether the body of water (1) is subject to the ebb and flow of the tide, (2) connects with a continuous interstate waterway, (3) has navigable capacity, and (4) is actually navigable. Even earlier, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,6 L. Ed. 23 (1824), the Court, when faced with deciding whether to give precedence to a state or federal law for the licensing of waterborne vessels, ruled that navigation of vessels in and out of the ports of the nation is a form of interstate commerce. This decision was the initial impetus for the contemporary exercise of broad federal power over navigable waters used to transport items sold in the stream of commerce.

Notwithstanding these Supreme Court decisions, case law, particularly in the Ninth Circuit, has continued to exponentially expand the WOTUS definition to hold that "a body of water need not, itself, be navigable in order to be one of the waters of the United States." *United States v. Moses*, 496 F.3d 984,988 (9th Cir.2007). And, a tributary of waters of the United States or a seasonally intermittent stream which ultimately empties into a water of the United States, can, itself, be a water of the United States. *Moses*, 496 F.3d at 989 n. 8.

This expansion was presumably reined in by the decision in *Rapanos*, where the Court defined WOTUS as follows: " '[T]he waters of the United States' includes only those relatively permanent, standing or flowing bodies of water" as found in forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. "All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 547 U.S. at 739, 126 S.Ct. 2208 (citation, internal quotations, ellipses, and brackets omitted); see also *Rapanos*, 547 U.S. 715, 732-33 n. 5,126 S.Ct. 2208 (U.S.S.C. 2006)(Scalia, J.) ("We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months…It suffices for present purposes that channels containing permanent flow are plainly within the definition and that the dissent's 'intermittent' and 'ephemeral' streams…-that is, streams whose flow is '[c]oming and going at intervals…[b]roken, fitful'…are not. ").

Although the Court held that the term "relatively permanent" does not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as a drought, nor does it automatically exclude seasonal rivers that contain continuous flow during some months of the year but no flow during dry months, there was no ruling that these dry washes must fit within the definition of WOTUS. Id. at 733 n. 5, 126 S.Ct. 2208 (emphasis added). Accordingly, just because *Rapanos* did not exclude waters that sometimes run dry, these waters also need not necessarily or automatically be included. For this reason, the proposed rule could just as easily, and should, exclude intrastate waterbodies that seasonally or intermittently have no water in them. See accord *Rapanos* at 733-34 ("The restriction of 'the waters of the United States' to exclude channels

containing merely intermittent or ephemeral flow also accords with the commonsense under-standing of the term. In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."). (p. 3-4)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

10.518 While the rule discusses the scientific connectivity between waters, the real question rests on the scope of the federal government's regulatory powers under the U.S. Constitution, including the reach of the Commerce Clause.[964] Just because waters may be connected in some way does not mean that the federal government should or does have control over all of those waters, particularly those residing solely within a single state.

A good analogy would be to compare the federal highway system. Particular interstate highways are designated as federal highways, which are controlled and maintained by the federal government (e.g., Interstate 5). Each of those federal highways connects to state controlled highways that are "tributary" to the federal highways. Just because the state roads feed traffic to the federal highways does not transform them into federally controlled and maintained highways. Similarly, county and city roads connect to federal highways, but remain locally controlled and maintained. This is true even though these local and state roadways have a direct interstate commerce link with trucks and cars that can travel carrying goods from state to state or to other countries, or that can contribute pollution across state lines. A similar view should be taken of waterways. Just like highways, only the interstate waters, traditional navigable waterways, and territorial seas should be considered to be federal. Local and state officials retain the ability and capability to regulate the quality of local waters and activities within local watersheds and it is in their best interest to do so to stimulate tourism and to provide a healthy environment to its citizens.

Clearly, the scope of the federal government's ability to control is limited by the U.S. Constitution.[965] "The proposed rule would replace the requirement that a waterway substantially "affect interstate or foreign commerce"[966] with the requirement that the

[964] See accord SAB Report (Executive Summary) (Oct. 17,2014) at pg. 1 ("The Report is a scientific review and, as such, it does not set forth legal standards for Clean Water Act jurisdiction."); pg. 2 ("The Report is a science, not policy, document..."); pg. 9 ("The SAB also finds that the Report would be strengthened if it contained: ... (3) an explanation that the definitions used for rivers, streams, and wetlands are scientific, rather than legal or regulatory definitions, and may differ from those used in the Clean Water Act and associated regulations.").

[965] See *National Federation of Independent Business, et al v. Sebelius*, 132 S.Ct. 2566,2579 (2012)("Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.")

[966] In the case of *United States v. DeWitt*, 76 U.S. (9 Wall.) 41, 43-44 (1869), the Supreme Court stated that the Commerce Clause, while authorizing Congress to regulate commerce between States, operated "as a virtual denial of any power to interfere with the internal trade and business of the separate States...." Thus, regulation was only allowed when there was a direct interstate connection. See accord *The Daniel Ball*, 77 U.S. (10 Wall.) 557,565 (1870)(the Court allowed federal licensing of ships operating exclusively intrastate was only permissible if the ships

water must meet Justice Kennedy's "significant nexus" standard as discussed in the *Rapanos* case. 79 Fed. Reg. 22212. This replacement would unlawfully substitute the precedential constitutionally-defined standard upheld over time in Supreme Court jurisprudence with a "standard" pronounced by a single Supreme Court justice without equivalent constitutional backing. The undefined "significant nexus" concept must still operate within the bounds of constitutional jurisprudence or be subject to further challenge and invalidation. Even if couched under the authority of the "Necessary and Proper Clause" of the Constitution, this must still fall within constitutional boundaries by its very terms. The Necessary and Proper Clause reads: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." See U.S. CONST. art. I, § 8, cl. 18. Thus, no rule can transcend the "Powers vested by the Constitution."

Other Supreme Court cases should have been used to provide context to the constitutional extent of "significant nexus" as applied to the CWA. Under CWA jurisprudence, in *Riverside Bayview,* the Supreme Court upheld jurisdiction over adjacent wetlands because the interpretation to include waters that were inseparably bound up with jurisdictional waters was not unreasonable where the wetlands actually abutted the waterways. 474 U.S. at 133. In *Solid Waste Agency of Northern Cook County (SWANCC) v. US. Army Corps of Engineers,* 531 U.S. 159, 167 (U.S.S.C. 2001), the Court held there was no reasonable nexus where isolated, non-navigable, intrastate ponds were used by migratory birds to confer federal regulatory authority under the CWA. See also *Cargill v. United States*, 116 S. Ct. 407,409 (1995) (Thomas, J., dissenting) (presciently rejecting the finding that the presence of migratory birds on wetlands could have been rationally related to interstate commerce).

Perhaps review of non-CWA cases would also provide a clearer point of view. In *United States v. Lopez,* 2 F.3d 1342,1362 (5th Cir. 1993) affd. 115 S. Ct. 1624 (1995),[967] the court noted:

> "If the reach of the commerce power to local activity that merely affects interstate commerce or its regulation is not understood as being limited by some concept such as "substantially" affects, then, contrary to *Gibbons v. Ogden*, the scope of

held cargo destined for other states.) Regulation of intrastate manufacturing was not "commerce" and was reserved to the States. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (Justice Fuller reasoned, "[t]hat which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State." Even in New Deal jurisprudence, intrastate activities were required to possess "a close and substantial relation to interstate commerce [such] that their control is essential or appropriate to protect that commerce from burdens and obstructions" in order to fall within Congress' commerce power. *NLRB v. Jones & Laughlin Steel*. 301 U.S. 1,37 (1937). Thus, the real inquiry should be whether the "substantial nexus" equates to a "close and substantial relation to interstate commerce." See accord *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995) (federal statute exceeded Congress' power to legislate under the Commerce Clause because the prohibited activity had no connection to interstate commerce.)

[967] Lopez represents first time in decades that the Supreme Court has invalidated a federal statute enacted under the claimed authority of the Commerce Clause. Going further, the Lopez case eliminated the rational basis test previously utilized by courts to justify the legality of statutes under the Commerce Clause, and resurrected the "substantially affects" test, whereby courts must now examine the actual effect of a particular statute or law on interstate commerce.

> the Commerce Clause would be unlimited, it would extend "to every description" of commerce and there would be no "exclusively internal commerce of a state" the existence of which the Commerce Clause itself "presupposes" and the regulation of which it "reserved for the state itself." *Id*.: see U.S. CONST. art. I. § 8, c1.3 (granting to Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes")(emphasis added): U.S. CONST. amend. X (reserving to States all powers not delegated to Congress by Constitution).

This decision was affirmed by the Supreme Court. *Lopez*, 115 S. Ct. at 1634. Therefore, the "substantial nexus" must mirror the requirement to have more than a tenuous connection to interstate commerce in order to meet the "substantial connection" test required of legislation authorized pursuant to the Commerce Clause. This does not reflect a scientific or policy decision as EPA has couched it in the proposed rule, but instead requires a legal determination on where the line is drawn to ensure that the connection to actual commerce is not too tenuous. Maintaining the line at traditional navigable waters, those waterways actually abutting those navigable waters, including wetlands and first branch tributaries, would meet this test. Distant, non-navigable intrastate tributaries and isolated waters not connected directly to navigable waterways that are or could reasonably be used for interstate commerce do not. See *Riverside Bayview*, 531 U.S. at 167, 171; *Rapanos* at 726 and at 754, 767 ("nonnavigable, isolated, intrastate waters," which, unlike the wetlands at issue in *Riverside Bayview*, did not "actually abu[t] on a navigable waterway," were not included as "waters of the United States." (citations omitted); see also *id*. at 754, 767. (p. 4-6)

The Supreme Court's most recent decision in *Rapanos* characterized the enforcement proceedings against Mr. Rapanos as being "a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act- without any change in the governing statute-during the past Presidential administrations." *Rapanos v. US*., 547 U. S. 715,722 (2006). Justice Scalia, authoring the four justice plurality decision, held:

> In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States-including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit-whether man-made or natural, broad or narrow, permanent or ephemeral-through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by flood waters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the

> rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

The Scalia decision described the case law that, like the Corps of Engineers' rules and jurisdictional determinations, has drastically expanded the scope of the CWA jurisdiction and declared them implausible. *Id*. at 727 citing *Save Our Sonoran, Inc. v. Flowers*, 408 F. 3d 1113, 1118 (CA9 2005)[968] ("…and (most implausibly of all) the 'washes and arroyos' of an 'arid development site,' located in the middle of the desert, through which 'water courses…during periods of heavy rain.'") The proposed rule continues to impermissibly expand the jurisdictional boundaries instead of staying within the constitutional legal bounds.

Waters themselves are not subject to commerce except when interstate in nature. In *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), the Ninth Circuit found an insufficient connection to commerce on basis of gas supplied to residence by out-of-state company. The court held that "[u]nlike a firearm or a car, both of which can readily move in interstate commerce, a house has a particularly local rather than interstate character." *Id*. at 527-28. Similarly, a wholly intrastate waterbody is local and has no direct connection to interstate commerce. Without such a connection, interstate waters do not meet the "substantially affects" test under the Commerce Clause. Justice Kennedy's decision in *Rapanos* must be construed to read the "significant nexus" to equate to the same inquiry required under the Lopez "substantial affects" test. Without meeting the definition of navigability,[969] it is unclear that this inquiry will produce waters meeting the federal jurisdictional test. (p. 6-7)

<u>Agency Response:</u> The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A. and C.

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[968] The Court cited this case, stating it was "indebted to the Sonoran court for a famous exchange, from the movie Casablanca (Warner Bros. 1942), which portrays most vividly the absurdity of finding the desert filled with waters:
" 'Captain Renault [Claude Rains]: "What in heaven's name brought you to Casablanca?"
" 'Rick [Humphrey Bogart]: "My health. I came to Casablanca for the waters."
" 'Captain Renault: "The waters? What waters? We're in the desert."
" 'Rick: "I was misinformed.' " 408 F. Jd, at 1117.

[969] The Clean Water Act's tie to commerce is through the notion of "navigability" whereby substantial goods can be transported in interstate or foreign commerce. Navigability does not mean that a small boat or kayak can travel down an intrastate waterway as this movement does not implicate interstate commerce any more than driving a car down a city street or county road that may at some point intersect with a federal highway. Courts have recognized that jurisdictional lines must be drawn for statutes, and more so for interpretive regulations, as was indicated in *United States v. Morrow*, 834 F. Supp. 364,365 (N.D. Ala. 1993):

> [N]ot everyone [has] been conditioned to believe that there is nothing which moves or has ever moved which does not support an invocation of the Commerce Clause as the means for conferring federal jurisdiction and control over the activity and/or problem that Congress wishes to govern and/or solve. The air in the soccer ball used on the school playground, or a molecule or two of the milk dispensed in the school cafeteria (especially if the milk is homogenized) undoubtedly crossed some state line before arriving at the school. But this court joins the Fifth Circuit in expecting Congress at least to share with the public, and with the overworked federal courts upon which Congress thrusts the enforcement of an accelerating volume of [...] statutes, some articulated, rational, constitutional basis for the federal government's assumption of jurisdiction over the perceived problem, particularly over an area historically governed by states or municipalities under local laws.

10.519 The CWA contains a clear stated Congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ...." 33 U.S.C. §1251(b). In addition, the CWA preserves to States the rights to protect its own waters by allowing more stringent regulation and excludes any statutory construction that would "impair or in any manner affect any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. §1370. Thus, States were intended under the CWA to be the primary regulatory authorities of both water rights and water pollution.

Expanding federal regulation over legal issues traditionally reserved to the States under the Tenth Amendment (e.g., issues related to regulation of crime, education, manufacturing, agriculture, or water quality) may act to place the Constitutional system of federalism upon which the United States was founded in severe jeopardy of being destroyed. Such federal regulatory expansion also creates a duplicative federal layer of bureaucracy over these traditionally established State functions, thereby wasting tax dollars unnecessarily. Such expansion also upsets the "healthy balance of power between the States and the Federal Government" necessary to "reduce the risk of tyranny and abuse from either front." See *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring), citing *Gregory v. Ashcroft*, 501 U.S.452, 458-59 (1991).

As an example, application of the proposed rule's WOTUS definition to include floodplains where the height of flood waters may only reach every year to everyone thousand years.[970] This definition will potentially pull in most all land in the United States since virtually no locales are wholly immune to flooding. Such a definition would "result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U. S., at 174; *Rapanos* at 738. The extensive federal jurisdiction proposed in the draft rule "would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land." Id. Again, the phrase "the waters of the United States" should be confined to relatively permanent bodies of water, not waters that flow over land occasionally, or just every millennium. *Id*. Permitting "federal jurisdiction over ponds and mudflats [and other occasionally wetted surfaces] ... would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. (p. 8)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The agencies have defined neighboring based in part on the 100 year flood interval, not the 1000 year flood interval.**

San Juan Water Commission (Doc. #16931)

10.520 With respect to federal incursion into state jurisdiction, Congress expressly recognized the importance of state control over intrastate waters, including pollution control, in the

[970] See accord EPA SAB Report (Oct. 17,2014) at pg. 42 ("Flood forecasting analyses require that recurrence intervals be explicitly defined, for example making estimates over a reasonable range of overbank flows (2 years out of 3, to 10-yr and 100-yr events) ..."), and pg. 13 ("all elements of the landscape are connected when considered at sufficiently long temporal scales.").

1972 Clean Water Act: it is "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…" 33 U.S.C. section 1251(b). Such authority traditionally is reserved to the states under the Tenth Amendment, and the federal government should not abrogate such authority. The states can—and have— exercised their authority to clean up polluted intrastate waters. For example, the New Mexico Water Quality Control Commission has adopted an expansive definition of "surface waters of the state." 20.6.4.7(S)(5) NMAC.

EPA and Corps jurisdiction has expanded significantly in the years since the passage of the Clean Water Act, and there is no legal basis for further expansion. Proof of Congressional intent opposite that urged by the Agencies is found in the legislative history of the Clean Water Act. For example, Senator Edmund Muskie, when debating the conference bill said:

> "It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuous highway over which commerce is or may be carried on with other States…" 118 Cong. Rec. 33699 (1972).

By using the term "navigable waters" in the Clean Water Act, Congress clearly intended to limit federal authority to its traditional Commerce Clause jurisdiction, which, although broad, is not limitless. Initially, the Corps regulated only traditional navigable waters. Later, the Corps adopted regulations expanding its jurisdiction over navigable waters to cover wetlands adjacent to navigable waters. Not until the Corps' adoption of the "Migratory Bird Rule" in 1986 did the federal government assert jurisdiction over isolated, private waters such as waters that collect in abandoned gravel pits that are not located near streams or rivers. The Supreme Court correctly struck down the Migratory Bird Rule in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), and the Agencies are bound by this and other Supreme Court decisions limiting federal Clean Water Act jurisdiction to navigable waters, their tributaries and wetlands with a significant nexus to such waters. For example, in *Rapanos v. United States*, the Supreme Court held there is no Clean Water Act jurisdiction over wetlands with no adjacency or "significant nexus" to a traditional navigable waterway. 547 U.S. 715 (2006).

The Agencies' expansive interpretation of "significant nexus" to establish federal jurisdiction based on simple movement of animals or insects between waterbodies rather than the actual movement of pollutants, as proposed in the WOTUS Rule, is without either legal or scientific support. The extensive comments submitted by the Federal Water Quality Coalition ("FWQC") explain in great detail the legal and scientific flaws in the WOTUS Rule. The FWQC comments are so comprehensive there is little SJWC can add to them. Thus, rather than simply repeat the arguments presented by the FWQC, SJWC approves and adopts the FWQC comments as its own.

It is important to remember that Congress passed the Clean Water Act in order to stop industrial pollution, as evidenced by the criminal penalties set out in the Clean Water Act. However, the WOTUS Rule would extend federal jurisdiction to ornamental ponds, flood retention ponds, municipal storm drains, stock watering ponds, irrigation canals and puddles at construction sites. By elevating such waters to federal waters, many land uses will become subject to complex permitting requirements, including potential application of the National Environmental Policy Act and the Endangered Species Act. In fact, SJWC and its member entities are concerned that the WOTUS Rule will put virtually all land under EPA and Corps control and give those agencies veto power over local land use decisions. Many more water and land use activities also will become subject to potential liability from citizen suits.

The harm that will flow from the WOTUS Rule is evidenced by several cases in which the Corps exerted expansive jurisdiction of the type that would be authorized under the proposed Rule, including *Rapanos*. In *Rapanos*, the Corps charged a property owner with destroying wetlands by filling in a very old man-made drainage ditch system on his "sometimes-saturated" fields. The ditches led to a non-navigable creek, which in turn led to a river about 20 miles away. In reversing the Corps' action, the Supreme Court held that the Clean Water Act provides federal jurisdiction only over "relatively permanent, standing or continuously flowing bodies of water' connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. 547 U.S. at 739, 742. As noted by Justice Scalia:

> In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.

SJWC believes that adoption of the WOTUS Rule will result in the "Land Is Waters" federal jurisdiction described by Justice Scalia, and such federal jurisdiction will adversely impact both land and water management activities across the United States that should be left to the purview of the states. Adoption of the WOTUS Rule will dramatically limit the ability of SJWC's member entities to continue necessary maintenance and other activities related to the operation of water diversion and distribution facilities. Under the proposed legislation, such activities will arguably require National Pollutant Discharge Elimination System ("NPDES") and/or Section 404 Wetlands permits, which may or may not be obtainable in a timely manner, if at all. The economic and time costs of compliance, and resulting service disruptions, will be unprecedented and, in many instances, may make it impossible for SJWC's member entities to perform their essential functions. Population growth in New Mexico is straining existing water supplies and infrastructure, and the additional restrictions, prohibitions and limitations that will result from adoption of the WOTUS Rule will do much more harm than good. Many examples of the unwarranted adverse impacts on water, wastewater, stormwater and irrigation activities in arid West states like New Mexico are addressed in the comments submitted by the Western Coalition of Arid States ("WESTCAS"). Again, rather than simply reiterate the information and arguments

presented by others, SJWC hereby approves and adopts the WESTCAS comments as its own.

The expansion of federal jurisdiction over intrastate waters that would result from adoption of the WOTUS Rule will intrude on the rights of states to regulate water and land use activities—a duty the states are not shirking. The New Mexico Water Quality Control Commission and the New Mexico Environment Department regulate all state waters, and thus there is no need to overlay federal Clean Water Act jurisdiction to regulate dry arroyos, isolated private ponds, stormwater drains, irrigation ditches or other non-navigable intrastate waters. For the reasons stated herein, and more particularly for the reasons set forth in the comments submitted by the FWQC and WESTCAS, the WOTUS Rule should be rejected as an unlawful and scientifically unwarranted expansion of federal jurisdiction under the Clean Water Act. (p. 1-4)

Agency Response: The rule is consistent with the statute, the caselaw and the Constitution. Technical Support Document, I.A. and C. Puddles and ornamental pools, for example, are not jurisdictional under the rule.

Edison Electric Institute (Doc. #15032)

10.521 In describing the legal basis for the proposed rule, the agencies rely heavily on Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006). In his concurring opinion, Justice Kennedy stated that CW A jurisdiction requires a "significant nexus" such that wetlands "significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. The agencies expand Justice Kennedy's articulation of a "significant nexus" test to encompass all waters, and reinterpret it to mean that a nexus can be found through the movement of animals, birds, and insects, as contrasted to the movement of pollutants.

However, Justice Kennedy's concurring opinion does not support this interpretation. First, he applies the "significant nexus" test only to wetlands that significantly affect a jurisdictional water, not "all waters."[971] Second, Justice Kennedy recognized that the CWA is a water quality statute.[972] Third, while the *Rapanos* dissent suggested that ecological connections alone were sufficient to establish jurisdiction[973], five justices, including Justice Kennedy, rejected that rationale.

Moreover, the agencies' exclusive reliance on Justice Kennedy's opinion fails to give appropriate effect to the plurality opinion authored by Justice Scalia and joined by three other justices in *Rapanos*. As the Supreme Court has stated in Marks v. United States, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). In

[971] 547 U.S. at 780 ("[W]etlands possess the requisite nexus…if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters…") (Justice Kennedy, concurring). See also *San Francisco Baykeeper v. Cargill Salt Division*, 418 F.3d. 700, 707 (9th Cir. 2007) (jurisdiction based on a "significant nexus" applies to wetlands only).
[972] 547 U.S. at 769 (describing the CWA as "a statute concerned with downstream water quality") (Justice Kennedy, concurring).
[973] 547 U.S. at 797 (arguing the CWA jurisdiction applies based on entwined ecosystems) (Justice Stevens, dissenting).

Rapanos, the five justice majority that remanded the Corps' jurisdictional determination posited a number of factors relevant to jurisdiction under the CWA, including relative permanence, substantial flow, continuous surface connection, and significant nexus. These factors must be considered together to reflect the views of the majority of the Court.

Despite these facts, the proposed rule embraces the approach endorsed by the *Rapanos* dissent, without properly applying the plurality and Justice Kennedy opinions. The proposed rule would thus effectively broaden the CW A from a water quality protection statute to a species and habitat protection statute, when species and habitat protection are more properly left to federal and state fish and wildlife laws such as the Endangered Species Act (ESA).

Thus, the proposed rule also would ignore constraints imposed by the Supreme Court in its decision in *Solid Waste Agency of Northern Cook County v. US. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (SWANCC). In that decision, the Court overturned the agencies' "migratory bird" rule, disallowing isolated waters to be viewed jurisdictional based on movement of biota. (p. 12-14)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

Nucor Corp. (Doc. #14963)

10.522 The Agencies misguidedly rely on Justice Kennedy's vague "significant nexus" standard in the proposed rule. They disregard limitations on jurisdiction that both Justice Kennedy and the Plurality agreed upon. The Agencies cannot cherry pick elements from Rapanos that serves only their interests in an attempt to expand the regulatory landscape. Under *Marks*, *Rapanos* cannot be read in such a manner. Despite the Plurality's rejection of the "significant nexus" test (*Rapanos*, at 755), the Agencies focus almost exclusively on that test. The Agencies simply cannot ignore the Plurality's rejection of the "significant nexus" test and treat Justice Kennedy's opinion as the holding of *Rapanos*. (p. 3-4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

Ducks Unlimited (Doc. #11014)

10.523 The touchstone for the final "Waters of the U.S." rule and future administration of jurisdiction must be the primary purpose of the Clean Water Act – "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Justice Kennedy's language in creating the "significant nexus test" in his pivotal opinion in the *Rapanos* case, his description of its key elements, and the state of the existing and emerging science, provides a firm foundation for moving toward that goal. (p. 73-74)

Agency Response: The agencies agree and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

Natural Resources Defense Council (Doc. #15437)

10.524 The rule must at least afford the protections of the law to the waters that pass Justice Kennedy's "significant nexus" test. Under this test, a water is jurisdictional under the Clean Water Act if there exists "a significant nexus between the [water] in question and

navigable waters in the traditional sense."[974] Jurisdiction can be established based on an analysis of a water's "ecological functions vis-à-vis other covered waters."[975] This test allows for waters to be protected not just singly, but also categorically. Justice Kennedy specifically mentioned in his opinion that, "[t]hrough regulations or adjudication, the Corps [or EPA] may choose to identify categories" of waters that pass the test, based on scientific considerations.[976] The agencies must "establish a scientific nexus on a case-by-case basis" only in the absence of "more specific regulations" that provide appropriate justification for categorical protections.[977] The proposed categorical protections for tributaries and adjacent waters are a commonsense approach on firm scientific and legal ground.[978] EPA's "Connectivity Report" establishes definitively that tributaries and adjacent waters categorically pass the "significant nexus" test with ease. These findings were confirmed by the independent Science Advisory Board. Therefore, these categorical protections must be included in the final rule. (p. 31-32)

Agency Response: **The agencies agree.**

Chesapeake Bay Foundation (Doc. #14620)

10.525 In 2010, in a case before the Fourth Circuit Court of Appeals, CBF and others submitted an amicus curiae brief in support of the Army Corps' denial of a CWA permit for Precon Development to develop 443 acres of wetlands for residential units.[979] The wetlands at issue were not directly adjacent to a navigable water and thus allowed Precon to argue that they did not have a "significant nexus" to the downstream Northwest River and were thus not protected as "waters of the United States." In fact, like the wetlands in Tri-City, the wetlands improved water quality, filtered pollutants in runoff, and protected the integrity of downstream waters and the Bay. In January 2011 the Fourth Circuit vacated the district court's decision to uphold the permit denial and remanded the case back to the district court for reconsideration.[980] On remand, the magistrate found sufficient information in the record to support the Army Corps' "significant nexus" analysis that found a hydrologic connection between the 443 acres and the Northwest River.[981] Despite the magistrate's review of the substantial scientific evidence supporting the Corps' analysis, the decision has again been appealed to the Fourth Circuit.[982]

[974] *Rapanos*, 547 U.S. at 779.
[975] *Id*. at 780.
[976] *Id*. at 780-81.
[977] *Id*. at 782.
[978] These comments focus on the categories of water bodies that have most been in dispute under the current legal regime. We of course support the continued categorical protection of traditionally navigable waters, interstate waters, the territorial seas, and impoundments of specified waters, and the agencies' proposal amply supports maintaining longstanding safeguards for these as well.
[979] Proposed Brief *Amici Curiae* ofNat'l Wildlife Fed'n, Chesapeake Bay Found. and Natural Res. Def. Council in Support of Defendant-Appellee U.S. Army Corps of Eng'rs and Affirmance of District Court Decision, filed in the case of *Precon Dev. Corp., Inc. v. U.S. Army Corps ofEng'rs* (4th Cir. 2010).
[980] *Precon Dev. Corp., Inc. v. U.S. Army Corps ofEng'rs*, No. 09-2239, 2:08-cv-00447-RBS-TEM (4th Cir. 2011).
[981] See *Precon Dev. Corp., Inc. v. U.S. Army Corps ofEng'rs*, Civil No. 2:08-cv-00447-RBS-TEM, at 13 (E.D. Va. 2013) (finding that the "Corps' extensive factual findings supporting its significant nexus determination were not arbitrary and capricious, and that the Corps' ultimate determination that the relevant wetlands have a significant nexus to the Northwest River is highly persuasive.").
[982] *Precon Dev. Corp., Inc. v. U.S. Army Corps ofEng'rs*, Case No. 13-2499 (4th Cir. 2013).

The wetlands in these cases were connected to the Chesapeake Bay tributaries and the Bay itself through a complex network of underground and surface water flows. The proposed definition includes wetlands like these and provides clarity to developers and regulators. It also explicitly acknowledges the hydro logic connection and importance of these waters and does not require protracted litigation to dispute already-settled scientific determinations regarding their connectivity to navigable waters. (p. 10)

Agency Response: The agencies agree.

Washington Legal Foundation (Doc. #5503)

10.526 WLF is concerned that the proposed Rule's reliance on Justice Kennedy's "significant nexus test" to promulgate new definitions for "tributary," "adjacent "and" other waters" will undoubtedly lead to the sort of resource-intensive and inconsistent case-by-case analysis explicitly rejected by a strong majority of the Supreme Court in *Rapanos.* In all events, such a rule exceeds the powers granted to the agencies under the CWA. (p. 2)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

10.527 EPA and the Corps are wrong to read the robust holding in SWANCC as being limited solely to the Migratory Bird Rule. Equally mistaken is their apparent take-away that the case somehow created a "significant nexus" test.' *SWANCC* clearly established a firm check on the agencies' view of federal jurisdiction, which the Court found was "a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. There, as here, EPA "attempt[ed] to 'clarify' the reach of its jurisdiction" through a new definition of "waters of the United States." *Id*. at 164. The Court struck down that "clarification," noting that EPA "fac]ed] a difficult task in overcoming the plain text and import of § 404(a)" because "[a]bsent overwhelming evidence of [congressional] acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id*. at 682, n.5. Rather, the Court "expect]s] a clear indication that Congress intended" for the "administrative interpretation [to] invoke[J the outer limit of Congress' power." *Id*. at 683. Such a "concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* (p. 8)

Agency Response: The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A and C.

10.528 As for the powers granted to regulatory agencies by the CWA, the SWANCC Court noted that "[rather than expressing a desire to readjust the federal-state balance [by reading out the term 'navigable'], Congress chose to 'recognize, preserve and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources.... '" *Id*. at 684 (quoting 33 U.S.C. § l251(b). Searching the legislative history, the Court found nothing that "signifie[d] that Congress intended to exert anything more than its commerce power of navigation" and "'[t]he committee ... d[id] not redefine navigable waters.'" *Id*. at 683 n.3, n.6. By using the "term 'navigable' . . . Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id*.

Without explanation, the agencies' proposed Rule seeks to adopt Justice Kennedy's "significant nexus" test from *Rapanos*. But that approach to interpreting a Supreme Court plurality decision is plainly mistaken. In *Marks v. United States*, the Court announced a rule for interpreting its split decisions, stating that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. 188, 193 (1976) (emphasis added). "Narrowest grounds" has been interpreted by the D.C. Circuit to mean that opinion which is a "logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). The ultimate goal is to find "a single legal standard ... [that] when properly applied, producers] results with which a majority of the Justices in the case articulating the standard would agree." *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir.1991), modified on other grounds, 505 U.S. 833 (1992).

Applying the *Marks* rule to *Rapanos*, the Scalia plurality concurred with the judgment on the narrowest grounds. As a logical subset of the much broader Kennedy test, the Scalia plurality is the controlling position under *Marks*. Any body of water that satisfies the Scalia plurality's test would also satisfy Justice Kennedy's "significant nexus" test. At least eight of the nine Justices would agree that any waters that satisfy Justice Scalia's test are jurisdictional. Conversely, eight of the nine Justices *expressly rejected* Justice Kennedy's significant nexus test. Scalia's four-member plurality made it clear that "Justice Kennedy [simply] devised his new statute all on his own," *Rapanos* 547 U.S. at 756, and that the Court's previous rulings had "explicitly rejected such caseby- case determinations." *Id*. at 753. Likewise, SWANCC "specifically rejected the argument that physically unconnected ponds could be included based on the ecological connection to covered waters." *Id*. at 754 (emphasis in orginal). Further, the "phrase appears nowhere in the Act" and can only be inserted "by ignoring the text of the statute." *Id*. at 755. The plurality concluded "[i]t would have been an easy matter for Congress to give the Corps jurisdiction over all [waters] that 'significantly affect the chemical, physical, and biological integrity of' waters of the United States. It did not do that, but instead explicitly limited jurisdiction to 'waters of the United States.'" *Id*. at 756.

Even the *Rapanos* dissenters agreed on this point. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, did "not share [Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*." *Id*. at 808 (Stevens, J., dissenting). Indeed, Stevens noted that "*SWANCC*'s only use of the term comes in [one] sentence." *Id*. "Justice Kennedy's approach will have the effect of creating additional work for all concerned" with "no certain way of knowing whether they need" permits and the "Corps will have to make case-by-case" determinations. *Id*. at 809. "These problems are precisely the ones that *Riverside Bayview* . . . avoided." *Id*. Justice Stevens concluded that he "see[s] no reason to" adopt the significant nexus test. *Id*.

Nevertheless, the Rule proposed by the agencies inexplicably relies on Justice Kennedy's "significant nexus" test to justify their new definitions:

> Because Justice Kennedy identified "significant nexus" as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to

> apply the ‘‘significant nexus’’ standard for CWA jurisdiction that Justice Kennedy’s opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to ‘‘other waters’’) to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.[983]

Not only does this approach rely on the broadest concurring opinion in *Rapanos*, which the *Marks* rule dictates is *not* the Court’s holding, but it also would impose a rule that eight of the nine *Rapanos* Justices *expressly rejected*. Notably, the agencies never explain *why* they chose to single out Kennedy’s “significant nexus” test as the basis for their new definitions. Regardless, the significant nexus test has no proper place in the Agencies’ interpretation of “waters of the United States” under the CWA. It can find no support in either the statute or Supreme Court precedent. The Agencies’ reliance on Kennedy’s idiosyncratic interpretation to completely rewrite the jurisdictional reach of the CWA will not withstand judicial scrutiny. (p. 9-10)

Agency Response: No Circuit Court has taken the position suggested by the commenter. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

National Federation of Independent Business (Doc. #8319)

10.529 The CWA prohibits the discharge of pollutants into “navigable waters” and defines those waters as the “waters of the United States.” But, the Supreme Court has repeatedly rebuffed overly expansive interpretations of “waters of the United States.” Most recently in *Rapanos*, the Supreme Court made clear that jurisdictional wetlands must have some connection or nexus to “traditional navigable waters.” (p. 3)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

10.530 Unfortunately, the Court offered two distinct tests for determining whether there is a sufficient connection or nexus to satisfy the constitutional requirement that CWA regulation bear some connection to interstate commerce. Under the plurality’s test, CWA jurisdiction may only be established where there is a continuous surface connection from traditional navigable waters, such that it is difficult to determine where the water body ends and the wetland begins. *Rapanos*, 547 U.S. at 742. By contrast, Justice Kennedy’s test would instead extend CWA jurisdiction to any wetland with a significant nexus to navigable waters. According to Justice Kennedy:

‘[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable”’ *Id*. at 780.

To date the federal appellate courts are split as to which test is controlling. The Seventh, Ninth and Eleventh Circuits hold that Justice Kennedy’s “significant nexus” test controls. *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robinson*, 521 F.3d 1319

[983] 79 Fed Reg. 22192.

(11th Cir. 2008). Whereas the First and Eighth Circuits hold that jurisdiction may be established under either test. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Baily*, 571 F.3d 791 (8th Cir. 2009). And at least one district court has held that the plurality's "continuous surface connection" test is controlling. *United States v. Chevron Pipe Line Co*., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). (p. 3)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

10.531 In the wake of *Rapanos* the regulated community, and regulators alike, struggled to make sense of the fact intensive "essential nexus" and "continuous surface connection" tests. To assist regulators in making jurisdictional assessments, the Agencies released a guidance document in December, 2008. Thereafter, the Agencies proposed a new guidance document in 2012.

As we noted in a November 16, 2012 letter to the Office of Information and Regulatory Affairs, "the 2008 guidance was much more conservative than the newly proposed 2012 guidance." We explained that the 2008 guidance was mostly faithful in defining the contours of CWA jurisdiction in accordance with the *Rapanos* tests, whereas the 2012 guidance liberally mischaracterized the *Rapanos* tests in order to justify more expansive jurisdictional assertions. Ultimately the Agencies abandoned the proposed 2012 guidance, choosing instead to pursue this rulemaking; however, the Proposed Regulation defines CWA jurisdiction consistent with the expansive 2012 guidance. Accordingly, NFIB opposes the Proposed Regulation for the same reasons it opposed the 2012 guidance. (p. 3-4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

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

10.532 The agencies' proposal misconstrues the "significant nexus" test articulated in Justice Kennedy's concurring opinion in *Rapanos* in a manner that impermissibly expands CWA jurisdiction. The Proposed Rule contains sweeping and vague definitions of "adjacent," "tributary," and other terms. In these and other ways, the proposal creates new, overbroad categories of jurisdictional areas that lack a significant nexus to traditionally navigable waters. In so doing, the proposal violates the law as established by *Rapanos*. The agencies also have greatly underestimated the costs that will be associated with their Proposed Rule. Finally, the process by which EPA proposed the rule has denied a reasonable opportunity for the public to review and comment on important scientific information. (p. 1)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The rule provides additional clarity and limitations. Preamble.

10.533 The meaning and intent of *Rapanos* have been the subject of extensive debate, but one aspect of the case is certain: it limits the agencies' jurisdiction. The case vacated Sixth Circuit opinions that had upheld CWA jurisdiction in specific cases. The multiple opinions in the case lead to some complexity, but one aspect of the outcome is clear:

Rapanos did not invite the agencies to expand jurisdiction compared to the law prior to that case. (p. 3-4)

Agency Response: The rule is narrower than the existing regulation and is consistent with the statute and the caselaw. Technical Support Document, I.A and C.

10.534 Justice Kennedy's concurring opinion in *Rapanos* establishes a "significant nexus" test for jurisdiction. However, the agencies' interpretation of the Kennedy test in the Proposed Rule, like in the Draft Guidance, effectively reads the word "significant" out of the text. The adjective "significant" is essentially comparative in nature. For any one thing to be significant, there must be other things that are insignificant by comparison. However, the agencies have offered no example of a hydrologic connection that is insignificant. As explained below, the agencies would find jurisdiction even in some instances where there is no hydrologic connection at all. In other words, any connection is sufficient to establish jurisdiction. That result violates the "significant nexus" test. If the agencies deem all connections to be significant, none truly is.

No fair reading of the Kennedy opinion leads to the result reached by the agencies. Justice Kennedy clearly stated that a "mere hydrological connection should not suffice in all cases," because "the connection may be too insubstantial for the hydrologic linkage to establish the required nexus." He also stated that mere adjacency to a ditch described in the case was not sufficient to establish jurisdiction, because "a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flows towards it."

The Proposed Rule states that agencies should consider a water to have a significant nexus to jurisdictional waters if it—

> "either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to [traditional navigable waters, interstate waters, or the territorial seas]), significantly affects the chemical, physical, or biological integrity of [traditional navigable waters, interstate waters, or the territorial seas] . . . [that is] more than speculative or insubstantial.[984]

So the agencies will assert jurisdiction over waters that are remote, small in volume, and individually insignificant by amassing them with other waters the agencies may deem to be "similarly situated" in a watershed.

The Kennedy opinion refers to "similarly situated" wetlands in the context of discussing one possible component of the process of determining jurisdiction in some instances. However, that is different than applying jurisdiction over a water that has only an insignificant nexus on the grounds that it is similar to one or more other waters in the watershed which, collectively, have a more substantial connection to downstream waters. To the contrary, according to Justice Kennedy, "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency."[985] Justice Kennedy emphasized that individualized analysis because of, in his words, "the

[984] 79 Fed. Reg. at 22,263.
[985] *Rapanos*, 547 U.S. at 782.

potential overbreadth of the Corps' regulations" and a need "to avoid unreasonable interpretations of the statute."[986]

The Kennedy concurrence clearly envisions that there are some waters with a hydrologic connection that nevertheless are not jurisdictional.[987] By contrast, virtually any nexus beyond "speculative" or "insubstantial" would result in a finding of jurisdiction under the agencies' interpretation in the Proposed Rule. Even areas that lack a hydrologic connection to a traditional navigable water can be deemed jurisdictional under the Proposed Rule's expansive test.[988] Virtually any discernible downstream effect—such as the retention of any amount of upstream drainage, or a function resulting in the addition of any substance that the agencies may deem to be a nutrient, sediment, or pollutant—is sufficient to confer jurisdictional status.[989] That is not a plausible interpretation of Justice Kennedy's opinion.

Furthermore, the Proposed Rule robs the term "navigable" in "navigable waters" of any meaning, an outcome the Kennedy opinion explicitly forbids.[990] The proposed language for concepts including "adjacent," "neighboring," and "tributary" expand the CWA's reach to ditches, ephemeral drainages, ponds, and other waters that are too small, too far removed, with too speculative and insubstantial an effect on traditionally navigable waters, to allow any meaningful connection to navigability.

The agencies' departure from the Kennedy concurrence is most clearly apparent when comparing the Proposed Rule to Justice Kennedy's instructions to identify impacts to the "chemical, physical, and biological integrity" of traditional navigable waters. Where Justice Kennedy uses the conjunction "and" to refer to all kinds of impacts collectively, the agencies substitute "or," allowing the identification of any one. The result of the agencies' wordplay is an undeniably and unequivocally broader test than that articulated by Justice Kennedy. (p. 5-7)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.

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

10.535 The establishment of "automatic jurisdiction" or "jurisdiction by rule" despite any water specific substantiation runs counter to logic, law and Justice Kennedy's own requirements—whose opinion serves as almost the entire basis of support.

See *Rapanos*, 547 U.S. at 781 (repudiating the ordinary high water mark standard as an appropriate factor for determining that tributaries are "waters of the United States" because "the breadth of th[e] standard…leave[s] room for regulation of drains, ditches, and streams remote from any navigable-in-fact water anad carrying only minor water

[986] *Id*.
[987] *Id*. at 784–85 ("Mere hydrologic connection should not suffice in all cases . . . .").
[988] 79 Fed. Reg. at 22,213 ("A hydrologic connection is not necessary to establish a significant nexus . . . .").
[989] *Id*.
[990] *Rapanos*, 547 U.S. at 778–79 ("[T]he word 'navigable' in 'navigable waters' [must] be given some importance [and] some effect.").

volumes toward it."); id. at 781-82 (noting that "wetlands adjacent to" a tributary—as defined by the Corps—might appear "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*"); id. at 784–85 (noting that even a direct hydrologic connection may not prove sufficient to establish the required nexus); *id*. at 786 (explaining that court's reviewing significant nexus determinations "must identify substantial evidence supporting the Corps' claims.").

Here, the agencies' Proposed Rule runs counter to fact specific investigations and determinations of significant nexus, or even *actual* connection, and applies jurisdiction by rule to broad categories of waters. "Similar to the 'piling of inferences' necessary to connect the regulated activity in *Lopez* and *Morrison*," the nexus between navigable-in-fact or interstate waters and everything automatically included in the newly proposed definition of "tributary" and "adjacent waters" is clearly wanting. *See Goudy-Bachman*, 811 F.Supp.2d at 1105. Furthermore, this is not the case where a "regulation ensnar[ing] some purely intrastate activity is of no moment" or "the *de minimis* character of individual instances arising under the statute is of no consequence." *Gonzalez v. Raich*, 545 U.S. 1,17 and 22. Rather, this is the case where the agencies are attempting to codify a regulation that specifically targets "purely intrastate activity" and "individual instances." Such efforts are beyond the limits envisioned by the Commerce Clause and cannot stand under the weight of even the most minimal of scrutiny. As such, the agencies Proposed Rule should be withdrawn in favor of more circumscribed ambition. (p. 10)

Agency Response: The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.

10.536 The rule relies almost entirely on Justice Kennedy's formulation of the "significant nexus" test as the basis of its scientific and legal authority. See 79 Fed. Reg. 22,259, app. B (relying on Justice Kennedy at least 12 separate times to support the proposed definition of "tributary"). As a matter of public policy, reliance on a standard developed and articulated by a single justice in a concurring opinion seems altogether unreliable for such a sweeping expansion of federal authority into the lives (and property) of so many Americans. Legally, the utilization of the "significant nexus" test is also inappropriate and should at least be replaced with the narrowest of potential interpretations from Court. See Marks v. United States, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) ("the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest of grounds …").

"Significant nexus" has no basis in statutory text, no previous explanation in regulatory use, and has no observable qualities. That the phrase—now serving as the basis for all jurisdiction over "the waters of the United States"—appears nowhere in the text of the CWA should give pause and be reviewed with hesitation. See *Utility Air Reg. Group v. EPA*, No. 12-1146, slip op. (U.S. Jun. 23, 2014) (cautioning that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") The now common phrase is actually derived from the misplaced language in a Supreme Court opinion. See *Rapanos*, 547 U.S. at 754–55 (it "is taken from

SWANCC's cryptic characterization of the holding of *Riverside Bayview*"); *id*. at 754 ("Justice KENNEDY misreads SWANCC's 'significant nexus' statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance.").

The use of "significant nexus" is also dubious from a practical standpoint, as it has no observable qualities and cannot be easily established. To use such a standard for the basis of jurisdiction does little to ease the work of landowners or bureaucrats. For example, under the now proposed definition of "the waters of the United States," a water adjacent to an intermittent ditch that flows into another ditch before finally emptying into the larger tributary of a navigable-in-fact water is itself a "tributary" and, therefore, "jurisdictional by rule." However, the typical farmer or rancher is not going to know of these connections and will find it necessary to work with the bureaucrat. The bureaucrat will also not know the connections and will need to conduct the appropriate on-the-ground investigation, analysis and determination of all connections; unless, the agencies intend to utilize a pre-determined map of all jurisdictional waters. See United States House or Representatives Committee on Science, Space and Technology, EPA State and National Maps of Waters and Wetlands, http://science.house.gov/epa-maps-state-2013; see also Letter from Lamar Smith, Chairman of House Committee on Science, Space and Technology, to the Honorable Gina McCarthy, Administrator of the EPA (Aug. 27, 2014) available at http://science.house.gov/epa-maps-state-2013. (p. 11-12)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.

Environmental Law Institute (Doc. #16406)

10.537 The Supreme Court's 2006 ruling in *Rapanos v. United States* marked the rise of the legal term "significant nexus" as a jurisdictional test under the Clean Water Act. The question in *Rapanos* was whether the CWA covers wetlands that do not contain, and are not adjacent to, waters that are navigable in fact.[991] *Rapanos* yielded two tests for CWA jurisdiction. Justice Antonin Scalia, writing for a plurality of four justices, concluded that jurisdiction is limited to circumstances where a wetland is both adjacent to, and has a continuous surface connection with, a "relatively permanent" body of water that is "connected to traditional interstate navigable waters."[992] Justice Kennedy's concurring opinion articulates the contours of a "significant nexus" test in the CWA context.[993] As authority for this test, Justice Kennedy relied on the Supreme Court's use of the words

[991] Specifically, the Court faced two different factual scenarios arising out of two lower-court cases that had been consolidated for review. In the first (*Rapanos*), the wetlands in question shared a surface-water connection with non-navigable tributaries of traditional navigable waters; and, in the second (*Carabell*), the wetlands at issue were separated by a berm from non-navigable tributaries of traditional navigable waters. In a 4-1-4 ruling, a total of five justices agreed to overturn the lower court decisions, which had found jurisdiction over the wetlands in question, and to send the cases back for further consideration. *Rapanos*, 547 U.S. at 729-30, 758-59

[992] *Id*. At 742(Scalia, J. plurality)

[993] *Id*. at 767 (Kennedy, J., concurring in the judgment).

"significant nexus" in the 2001 ruling *Solid Waste Agency of Northern Cook County* (*SWANCC*) *v. U.S. Army Corps of Engineers*.[994]

For Justice Kennedy in *Rapanos*, significant nexus is to be assessed in terms of the goals and purposes of the Act—namely, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[995] Justice Kennedy recognized that a significant nexus might be assessed not only on a case-by-case basis, but also on a categorical basis, pursuant to agency regulation or adjudication.[996] There must be "some measure of the significance of the connection for downstream water quality,"[997] in the sense that when "wetlands' effects on water quality are speculative or insubstantial," there is no significant nexus.[998] Justice Kennedy made clear that he was articulating a "legal standard."[999]

As of April 2012, the *Rapanos* decision had been interpreted, applied, discussed, or cited in over ninety different cases, arising out of 35 states and Puerto Rico.[1000] The U.S. Courts of Appeal that have addressed the issue have agreed that if a water satisfies Justice Kennedy's significant nexus legal test, that water is jurisdictional.[1001] And many courts have found CWA jurisdiction when either the *Rapanos* plurality test or the Kennedy significant nexus test has been satisfied.[1002] The post-*Rapanos* case law tends to take a holistic, all facts and circumstances approach to the application of the significamt nexus test. [1003] This body of post-*Rapanos* precedent in the federal courts suggests that the

[994] *Id*. at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC. v. Army Corps of Eng'rs*, 531 U.S. 159, 167, 172 (2001)). In *SWANCC*, the Court determined that an abandoned sand and gravel pit was not covered by the CWA. In so doing, the Court distinguished its unanimous 1985 decision in *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), which held that the Corps had jurisdiction over wetlands that abutted a navigable waterway. The *SWANCC* majority explained that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167. This reference to "significant nexus" was the *SWANCC* Court's sole usage of that term, and the term does not appear in the *Riverside Bayview Homes* opinion. To date, the Supreme Court has used the exact words "significant nexus" only in the SWANCC and *Rapanos* decisions.

[995] 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (CWA citation omitted).

[996] E.g., id. at 780-82 (Kennedy, J., concurring in the judgment).

[997] *Id*. at 784-85 (Kennedy, J., concurring in the judgment).

[998] *Id*. at 780 (Kennedy, J., concurring in the judgment).

[999] *Id*. at 783 (Kennedy, J., concurring in the judgment).

[1000] Environmental Law Institute, The Clean Water Act Jurisdictional Handbook, 46 (2d ed. May 2012) (Case Appendix containing a compendium of post-*Rapanos* federal court decisions and EPA administrative rulings). Since the Handbook was published, more than 40 additional federal court opinions have discussed or cited to *Rapanos*.

[1001] *Id*.

[1002] *Id*.

[1003] The word "holistic" here is intended to be in contrast with an approach that separately examines the "nexus" and "significance" components of "significant nexus," which would essentially establish a two-part test.

significant nexus legal test is susceptible to being satisfied by a wide range of scientific data and other kinds of information.[1004]

As the Fourth Circuit explained in *Precon Development Corp. v. U.S. Army Corps of Engineers*, the significant nexus test "does not require laboratory tests or any particular quantitative measurements in order to establish significance."[1005] The court did, however, recognize that Justice Kennedy in *Rapanos* "clearly intended for some evidence of both a nexus and its significance to be presented."[1006] Similarly, in *United States v. Cundiff*, the Sixth Circuit stated that although laboratory analysis of soil samples or water samples, or other tests, could be persuasive evidence, there is nothing to indicate that this is the sole method by which significant nexus can be proved.[1007]

The words "significant nexus" have been used as a legal term of art for many years prior to the *Rapanos* decision, in many different legal and factual settings by federal and state courts around the country.[1008] Before Justice Kennedy articulated a significant nexus test in *Rapanos* in 2006, this phrase had appeared in over 250 published and unpublished opinions issued by federal and state courts in contexts other than the Clean Water Act. Full citations to the complete list of opinions using the words "significant nexus," prior to Rapanos and outside of the CWA context, are included in the annex to this comment.

This diverse case law using "significant nexus" dictates no particular approach for the agencies in applying the term post-*Rapanos* in the context of the CWA. Nonetheless, a survey of these cases is instructive. In short, none of these judicial opinions stands for the proposition that a "significant nexus" determination must be a technical, highly detailed, or otherwise formalistic inquiry. To the contrary, courts have often reviewed the various kinds of connections at issue (subject to the area of law and type of case) and reached

[1004] See *id*. at 47-104 (discussing, case by case, courts' use of scientific data and other information to make significant nexus determination); see also id. at 21-22 (surveying the wide array of scientific and other technical resources and tools that might be used to inform a jurisdictional determination for a body of water: textbooks and treatises; delineation manuals for wetlands and streams; scientific journals; assessment methodologies for wetlands and streams; technical reports issued by federal and state agencies; watershed plans and assessments; wetland and stream databases; total maximum daily load (TMDL) and water quality management documents; publications, online resources, and research reports produced by state and local agencies and other entities, such as information from natural heritage programs and state wildlife action plans, and by organizations such as The Nature Conservancy, the Association of State Wetland Managers, and the National Academy of Sciences; local and regional aerial photographs or satellite images, historical and current; maps, historical and current (e.g., U.S. Geological Survey maps); land records, historical and current; historical evidence (e.g., from books, newspapers, local histories, or testimony of residents) of how waters were used in the past; regional flood analyses; results of water tests that demonstrate downstream flow of pollutants; and results of flow measurements.

[1005] 633 F.3d 278, 294 (4th Cir. 2011).

[1006] *Id*. The court further explained that while there must be evidence of both a nexus and wetlands' significance to downstream waters, documentation "need not take the form of any particular measurements" and can be either qualitative or quantitative. *Id*. at 293-94, 297.. The Fourth Circuit in *Precon* determined that the administrative record in that case contained insufficient information to assess the Corps' conclusion that a significant nexus was present. *Id*. at 297. On remand in *Precon*, the district court determined that the Corps has supported its determination of significant nexus. *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 984 F. Supp. 2d 538, 544 (E.D. Va. 2013).

[1007] 555 F.3d 200, 211 (6th Cir. 2009).

[1008] See Environmental Law Institute, The Clean Water Act Jurisdictional Handbook 18, n.72 (2007). Based on a sampling of these cases, ELI concluded that the case law did not support a reading of "significant nexus" that would have the effect of reducing it to a discrete, two-part determination of "nexus" and "significance."

their determination on the presence or absence of a significant nexus with little analysis.[1009] The cases do not suggest that any particular type of evidence, quantitative or otherwise, is required for determining a nexus' significance.

The legal and factual contexts in which the words "significant nexus" are used vary widely. Pursuant to the Foreign Sovereign Immunities Act (FSIA),[1010] a foreign state is not immune from U.S. court jurisdiction for its commercial activities that have a direct effect in the United States. This exception to immunity applies where there is a significant nexus between a particular cause of action in a lawsuit and the commercial activity carried on in the United States.[1011] For example, in a tort action brought in a U.S. court on behalf of Mexican decedents killed on a crashed flight operated by the Mexican national airline, with tickets purchased in Mexico and points of departure and arrival in Mexico, no significant nexus existed. This was despite the fact that the airplane had been recently serviced in Chicago, and the particular flight was due to land eventually in Los Angeles.[1012]

Pursuant to suits brought under 42 U.S.C. § 1983, a court may be asked to determine whether a private individual who actively conspires with an absolutely immune state official, with the intent to deprive another of Constitutional rights, is acting under "color of state law."[1013] The question becomes whether there is a significant nexus or entanglement between the absolutely immune state official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy. The Tenth Circuit has said that "the resolution of such issues must, of necessity, be made on a case-to-case basis."[1014]

In yet another context, a federal district court considering the transfer and centralization of various cases to a new Multi-District Litigation (MDL) docket noted that the Eastern District of Michigan had a significant nexus to the litigation, and was thus an appropriate forum.[1015] This district was where many relevant documents and witnesses were likely to be found, as the defendant's principal place of business was located there. Also, the state was the situs of related state court actions, allowing for easy coordination of discovery between state and federal proceedings.[1016]

Many more examples of how courts have made determinations of significant nexus outside of the CWA context can be found in the case citations contained in the annex to this comment. (p. 2-5)

[1009] In fact, in many of the cases "significant" is appended to "nexus" as a modifying adjective in a manner that could not be considered to have legal significance. See, e.g., *State v. Schnoering*, No. 95CA006044, 1995 WL 678522, at *1 (Ohio Ct. App. Nov. 15, 1995) (in venue context, using "significant nexus" interchangeably with "sufficient nexus" in finding venue in any county where "the offense or any element of the offense was committed.").
[1010] 28 U.S.C. §§ 1602-11
[1011] See, e.g., *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Ct. for the Cent. Dist. of Cal*., 859 F.2d 1354, 1359-60(9th Cir. 1988)
[1012] Id. at 1360.
[1013] See, e.g., *Norton v. Liddel*, 620 F.2d 1375, 1380 (10th Cir. 1980).
[1014] *Id*.
[1015] In re Delphi Corp. Secs., Derivative & "ERISA" Litig., 403 F. Supp. 2d 1358, 1360 (J. P. M. L. 2005).
[1016] *Id*.

Agency Response: **This is a description of cases; to the extent this is a comment that requires a response the agencies agree that the rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.**

Coalition of Alabama Waterways (Doc. #15101)

10.538 The agencies claim that "the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations."[1017] We agree that *Rapanos* requires that to be so, but the statement is not accurate.

The agencies misconstrue the "significant nexus" test.

Justice Kennedy's concurring opinion in *Rapanos* establishes a "significant nexus" test for jurisdiction. However, the agencies' interpretation of the Kennedy test in the Proposed Rule, like in the Draft Guidance, effectively reads the word "significant" out of the text. The adjective "significant" is essentially comparative in nature. For any one thing to be significant, there must be other things that are insignificant by comparison. However, the agencies have offered no example of a hydrologic connection that is insignificant. As explained below, the agencies would find jurisdiction even in some instances where there is no hydrologic connection at all. In other words, any connection is sufficient to establish jurisdiction. That result violates the "significant nexus" test. If the agencies deem all connections to be significant, none truly is.

No fair reading of the Kennedy opinion leads to the result reached by the agencies. Justice Kennedy clearly stated that a "mere hydrological connection should not suffice in all cases," because "the connection may be too insubstantial for the hydrologic linkage to establish the required nexus." He also stated that mere adjacency to a ditch described in the case was not sufficient to establish jurisdiction, because "a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flows towards it."

The Proposed Rule states that agencies should consider a water to have a significant nexus to jurisdictional waters if it—

> "either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to [traditional navigable waters, interstate waters, or the territorial seas]), significantly affects the chemical, physical, or biological integrity of [traditional navigable waters, interstate waters, or the territorial seas]…[that is] more than speculative or insubstantial.[1018] (p. 6)

Agency Response: **The rule is narrower in scope than the existing regulation and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A, B. and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.**

[1017] 79 Fed. Reg. at 22,189
[1018] 79 Fed. Reg. at 22,263 (emphasis added)

10.539 So the agencies will assert jurisdiction over waters that are remote, small in volume, and individually insignificant by amassing them with other waters the agencies may deem to be "similarly situated" in a watershed.

> The Kennedy opinion refers to "similarly situated" wetlands in the context of discussing one possible component of the process of determining jurisdiction in some instances. However, that is different than applying jurisdiction over a water that has only an insignificant nexus on the grounds that it is similar to one or more other waters in the watershed which, collectively, have a more substantial connection to downstream waters. To the contrary, according to Justice Kennedy, "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency."[1019] Justice Kennedy emphasized that individualized analysis because of, in his words, "the potential overbreadth of the Corps' regulations" and a need "to avoid unreasonable interpretations of the statute."[1020]
>
> The Kennedy concurrence clearly envisions that there are some waters with a hydrologic connection that nevertheless are not jurisdictional.[1021] By contrast, virtually any nexus beyond "speculative" or "insubstantial" would result in a finding of jurisdiction under the agencies' interpretation in the Proposed Rule. Even areas that lack a hydrologic connection to a traditional navigable water can be deemed jurisdictional under the Proposed Rule's expansive test.[1022]Virtually any discernible downstream effect—such as the retention of any amount of upstream drainage, or a function resulting in the addition of any substance that the agencies may deem to be a nutrient, sediment, or pollutant—is sufficient to confer jurisdictional status.[1023] That is not a plausible interpretation of Justice Kennedy's opinion.
>
> Furthermore, the Proposed Rule robs the term "navigable" in "navigable waters" of any meaning, an outcome the Kennedy opinion explicitly forbids.[1024] The proposed language for concepts including "adjacent," "neighboring," and "tributary" expand the CWA's reach to ditches, ephemeral drainages, ponds, and other waters that are too small, too far removed, with too speculative and insubstantial an effect on traditionally navigable waters, to allow any meaningful connection to navigability.
>
> The agencies' departure from the Kennedy concurrence is most clearly apparent when comparing the Proposed Rule to Justice Kennedy's instructions to identify impacts to the "chemical, physical, and biological integrity" of traditional navigable waters. Where Justice Kennedy uses the conjunction "and" to refer to all kinds of impacts collectively, the agencies substitute "or," allowing the identification of any one. The result of the agencies' wordplay is an undeniably and unequivocally broader test than that articulated by Justice Kennedy. (p. 7-8)

[1019] *Rapanos*, 547 U.S. at 782.
[1020] *Id*.
[1021] *Id*. at 784–85 ("Mere hydrologic connection should not suffice in all cases . . . .").
[1022] 79 Fed. Reg. at 22,213 ("A hydrologic connection is not necessary to establish a significant nexus . . . .").
[1023] *Id*.
[1024] *Rapanos*, 547 U.S. at 778–79 ("[T]he word 'navigable' in 'navigable waters' [must] be given some importance [and] some effect.").

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.**

Hackensack Riverkeeper et al. (Doc. #15360)

10.540 Impacts on navigable waters are among the reasons that our organizations prioritize the protection of wetlands. We all work in watersheds where many of the native wetlands have been destroyed or altered by development. We find that losing wetlands causes additional flooding and lower water quality that we can see in our every day work. It is vital that the definition of Waters of the United States include as many wetlands as are scientifically justified and permissible under Supreme Court case law. Thus, if the definition of Waters of the United States is to include

> those waters found jurisdictional under Justice Kennedy's test, it must include Waters and wetlands possessing a significant nexus to navigable waters, meaning that the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters. (p. 9-10)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.**

Everglades Law Center and Center for Biological Diversity (Doc. #15545)

10.541 Connectivity to more traditionally navigable waters, however, is not limited to physical connections nor should jurisdiction under the "significant nexus" test depend on a finding of all three forms of connectivity (physical, chemical, and biological). Justice Kennedy stated in his concurring opinion in *Rapanos* that "the required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[1025] Therefore, a showing of any one of these connections should satisfy the significant nexus standard set forth in Justice Kennedy's concurrence in Rapanos and we agree with the Corps and EPA that "it would subvert the intent if the CWA only protected waters upon a showing that they had effects on every attribute of a traditional navigable water, interstate water, or territorial sea."[1026] Further, as Justice Kennedy recognized, a hydrologic connection is not necessary to establish a significant nexus because in some instances the lack of a connection shows the water's significance to the aquatic system. This is particularly true for those small, isolated wetlands that otherwise have a biological or chemical connection and serve as breeding sites for amphibians and are free of fish and other predators. (p.7)

Agency Response: **The agencies agree.**

[1025] *Rapanos*, 547 U.S. at 779.
[1026] 79 Fed. Reg. 22261.

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

10.542 The center of gravity of the Agencies' proposed rule is its reliance on the concept of "significant nexus" which is defined only in negative terms and is the crux of the 4-1-4 *Rapanos* decision, most notably Justice Kennedy's controlling opinion. However, the Agencies, in both their proposed rule as well as their legal analysis (Appendix B)[1027], minimize or ignore the central holding of *SWANCC* as to the resilience of navigability as the true touchstone of CWA jurisdiction and the exclusion from jurisdiction of waters or wetlands that are non-navigable, isolated and intrastate. (p. 6)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.543 Justice Kennedy's discussion of the role of "significant nexus" must be read in the context of this decision. To read *Rapanos* in isolation of *SWANCC* removes necessary context from interpretation of what constitutes a significant nexus. The Agencies have decontextualized Justice Kennedy's opinion and the holding of *Rapanos* resulting in an over-broad application of significant nexus, say, to all tributaries or, prospectively, to prairie potholes. These resources are worthy of protection, but the question is to what extent the CWA allocates that responsibility to the federal government or the states' traditional authority over land use.

A careful reading[1028] of Justice Kennedy's opinion in *Rapanos* indicates that he was not offering his version of the "significant test" as a vehicle to expand federal CWA jurisdiction up the Continental Divide or anywhere close. Although the Court has held that the statute's language invokes:

> Congress's traditional authority over waters navigable in fact or susceptible of being made so…the dissent would permit federal regulation whenever wetlands alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.[1029]

Justice Kennedy clearly sees limits to adjacency to navigable waters, "however remote and insubstantial," which strain the rule in *Riverside Bayview Homes*. And so "the Corps' assertion of jurisdiction cannot rest on that case."[1030]

While Justice Kennedy certainly does rely on "significant nexus" in his opinion, that concept must be understood in the context of *SWANCC*. In other words, it must be cabined off by the limits on jurisdictionality of waters and wetlands which are non-navigable, isolated and interstate.

In sum, *Rapanos* did not overrule *SWANCC*. As noted above, "significant nexus" is not a scientific term. Nor is the fundamental question of jurisdiction purely a matter of ecology. As such, jurisdiction pertains to federalism and the allocation of power between

[1027] 79 FR 22252 et seq.
[1028] My thanks to Virginia Albrecht of Hunton & Williams for her insights here.
[1029] *Rapanos v. United States*, 547 U.S. 715, 778-779.
[1030] *Id* at 780.

federal and state governments. Connectivity does not trump navigability for purposes of determining CWA jurisdiction.

The Agencies should defer promulgation of the rule and seek public comment on the relationship of *SWANCC* to *Rapanos* and revise both the rule and Appendix B accordingly. (p. 6-7)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.

10.544 Finally, the proposed rule does not address the question of its application to waters "that were previously found to be non-jurisdictional, but that are re-evaluated and found to be jurisdictional," raising the issues of retroactivity and grandfathering.[1031] Even taking the Agencies conservative assessment in their Economic Analysis accompanying the proposed rule that roughly an additional 3 percent of waters would be subject to jurisdiction, including 17 percent of "other waters" due to all tributaries and adjacent wetlands being deemed jurisdictional,[1032] it is a matter which needs further comment.

The Agencies do not address the issues of retroactivity or "grandfathering," relative to waters previously non-jurisdictional but are reevaluated and found to be jurisdictional under the proposed rule. (p. 9-10)

Agency Response: The rule is effective on [60 days after Federal Register publication]. Under existing Corps' regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations made on or after the effective date of this rule will be made consistent with this rule. Similarly, consistent with existing regulations and guidance, jurisdictional delineations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization. Preamble. See the Economic Analysis for an explanation of methodology.

Michael Bamford, Director, The Property Which Water Occupies (Doc. #8610)

10.545 Because deference to interpreting *significant* is awarded to agency, the failure of the Rules to identify the limits to what are, or may be, significant impacts to navigable waters, the scope of CWA jurisdictional authority leaves open-ended the extent to which the CWA could be evoked over private property. Making the Rules themselves a continuation of the arbitrary and capricious standard for invoking the CWA jurisdiction deemed an overreach by the US Supreme Court. By failing to first establish what may be a threat to public/navigable waters, the Rules cloud the boundary between states rights, private property rights, and federal authority under the auspice of protecting water

[1031] ACOEL at p. 46

[1032] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Economic Analysis of Proposed Revised Definitions of the Waters of the United States, March 2014, p. 12. For a critique of this analysis, see David Sundig, Ph.D., Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States (The Brattle Group), May 15, 2014, prepared for The Waters Advocacy Coalition.

quality; the Rules clarify jurisdiction by unlawfully failing to avoid interference with property rights.

Clarification as to where there is water which may be hydrologically connected is insufficient to invoke CWA jurisdiction over private lands. By failing to define the limits of CWA jurisdiction beyond navigable waters, the Rules exceeds the stated purpose of the CWA and the will of Congress. Such broad self-claimed authority by a federal agency over private property is far in excess of any delegated authority and illegal without providing for just compensation for taking control of private property for the public purpose. The Rules should not claim such broad discretion leaving constitutional questions of taking up to the judiciary to resolve whenever CWA jurisdiction is invoked. (p. 12-13)

Agency Response: The rule is consistent with the statute and the caselaw and the Constitution. Technical Support Document, I.A and C. The agencies significant nexus determinations are reasonable. Preamble, III; Technical Support Document, II.

10.5. DITCHES

Agency Summary Response:

As explained in the preamble to the rule and the TSD Section I, ditches are regulated under the rule as "waters of the United States" only if they both meet the definition of tributary and are not excluded under paragraph (b) of the rule. As a result, to be a regulated water, a ditch must contribute flow to a traditional navigable water, interstate water or territorial sea and have indicators of bed and banks and an ordinary high water mark. A ditch that is thus a "tributary" may nonetheless be excluded. The exclusions under paragraph (b) have been clarified in the final rule and address three categories of ditches, as well as several related features, such as conveyances for stormwater control created in dry land. The regulation of the remaining ditches is consistent with the statute and case law. As explained in the preamble to the final rule and the TSD, the science shows that tributary ditches function in the same manner as other tributaries and thus have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas.

Specific Comments

Waterlaw (Doc. #13053)

10.546 *Rapanos* does not authorize including ditches as tributaries. J. Kennedy's concurring opinion in *Rapanos*, together with the plurality opinion, instructs the Corps that its position that "all ditches with any connection to streams that themselves may have some connection to navigable in-fact waters constitute tributaries to the waters of the United States" is not supported by the CWA's language. *Rapanos* at 734, 778-9. Yet the Rule continues to apply nearly the same expansive interpretation as if *Rapanos* had never been decided and a majority of the Justices had not spoken. Including ditches as tributaries is predicated on an approach that all ditches meet the significant nexus test unless they meet the Agencies' limited exemptions. The Rule is the first time the regulatory definition of

waters of the United States includes man-made water supply ditches. However a close reading of *Rapanos* does not support extending jurisdiction to man-made water supply ditches. (p. 2)

Agency Response: While the rule did not previously expressly include ditches, ditches have historically been regulated as tributaries consistent with the case law. See summary response and Technical Support Document, I.A., and C. See also Ditches Compendium for a discussion of water supply ditches.

Waters Advocacy Coalition (Doc. #19721.1)

10.547 Contrary to *Rapanos*, which made clear that CWA jurisdiction does not extend to many ditches, even those ditches that connect to waters of the United States, the proposed rule would extend jurisdiction to a significant number of ditches. For the first time, the proposed rule expressly includes "ditches" in the definition of tributary, meaning that ditches with a bed, bank, and OHWM that contribute flow will categorically be jurisdictional unless they meet one of the narrow ditch exclusions. 79 Fed. Reg. at 22,263. The proposed rule excludes ditches in two very limited circumstances: (1) ditches excavated wholly in uplands for their entire length, draining only uplands, with less than perennial flow, and (2) ditches that do not contribute flow, directly or indirectly, to a traditional navigable water, interstate water, territorial sea, or impoundment. *Id*. at 22,203. As discussed in more detail in section III.C., most ditches will not satisfy the rigorous standards of these narrow exclusions, and therefore, under the proposed rule, many ditches will be regulated as tributaries regardless of their function, contribution to, or distance from traditional navigable waters.

Both the *Rapanos* plurality and Justice Kennedy's concurrence made it clear that many ditches should not be subject to CWA jurisdiction. The plurality emphasized the plain language of the CWA in regulating "navigable" waters and rebuked the agencies for regulating ditches, drains, and desert washes far removed from navigable waters. *Rapanos*, 547 U.S. at 733-34. The plurality interpreted the phrase "waters of the United States" to include only "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] . . . oceans, rivers, [and] lakes," and would exclude "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739. Likewise, Justice Kennedy noted, with disapproval, that the dissent "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters," and concluded that "[t]he deference owed to the Corps' interpretation does not extend so far." *Id*. at 778-79. Justice Kennedy also expressed concern with the agencies' existing tributary standard because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes." *Id*. at 781.

The proposed rule ignores all of this language and sets up a structure where many ditches that are remote from any navigable-in-fact water and that carry only minor water volumes are categorically jurisdictional. Based on the limits acknowledged by the *Rapanos* Court, ditches should be excluded from jurisdiction. (p. 102-103)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A., and C. In the final rule, the agencies made changes to the exclusions provision, including the exclusion for ditches. Preamble, IV and Ditches Compendium. See summary response. The ditches that are regulated must meet the definition of tributary and not be excluded under paragraph (b). These remaining ditches have a significant nexus to traditional navigable waters, interstate waters and the territorial seas. As a result, the rule is consistent with the statute and the caselaw. Technical Support Document, I.A., and C. In the final rule, the agencies clarified the exclusions provision, including the exclusion for ditches. Preamble Section IV and Ditches Compendium.**

Missouri Agribusiness Association (Doc. #13025)

10.548 But if we were just to focus upon the Kennedy opinion, the agencies did not follow the limited scope that even Kennedy envisioned. Kennedy said ditches and streams remote from any navigable -in-fact water and carrying only minor water volumes toward it put common sense and lawful parameters upon the significant nexus concept by recognizing "minor water volumes" do not result in a significant nexus. This, however, is not reflective in the proposed rule with its inclusion of the 'minor water volumes' such as those in ephemeral streams. Kennedy continued this theme with his concern of including adjacent waters regardless how "however remote and insubstantial." (p. 2)

Agency Response: **Ephemeral ditches that do not meet the definition of tributary are not regulated under the final rule; in additional many ephemeral ditches are explicitly excluded. See summary response.**

Multiple Agricultural Agencies (Doc. #16357.1)

10.549 The Agencies mistakenly claim that jurisdiction over ditches in the 2008 post-*Rapanos* guidance was broader than in the current proposal. See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. U.S.* & *Carabell v. U.S.* (U.S. EPA and U.S. Army Corps of Engineers, Dec. 2, 2008). Although the 2008 guidance excluded from regulation ditches that do not carry a "relatively permanent flow" (versus the proposal's less than perennial flow), that exclusion was not part of a broader regulatory expansion that categorically defined both ephemeral drainages and ditches as tributaries. Moreover, the Agencies have asked for comment on whether the appropriate standard should be the "less than intermittent flow" standard. 79 Fed. Reg. at 22,203; 22,219. At the same time the Agencies are trying to convince farmers and ranchers that the proposed rule will not regulate ditches, they are also asking the public for additional comment and considering an even narrower exemption than has been proposed. (p. 10)

Agency Response: **The scope of the rule, as compared to historical jurisdiction, is explained in detail in the TSD at Section I.b.iii.**

Association of American Railroads (Doc. #15018.1)

10.550 The Agencies have proposed a new definition of "tributary" to Waters of the United States that specifically includes ditches. "A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or

(iv)[1033] of this definition." 79 Fed. Reg. at 22,262-22,274 (amending 33 C.F.R. Part 328, 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. However, the CWA statute and regulations already define a ditch as a point source.

Ditches are point sources, not Waters of the United States.

(a) The CWA defines ditches as Point Sources The text of the CWA explicitly states that a ditch is a point source. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). As the Supreme Court and many courts have noted, point source and navigable waters are "two separate and distinct categories."[1034] The proposed rule eliminates any meaningful distinction between point sources and Waters of the U.S. in contravention of these court decisions. (p. 4-5)

Agency Response: A ditch may in some circumstances be both a point source and a "water of the United States." Technical Support Document, I.C.

10.6. FEATURES AND WATERS NOT JURISDICTIONAL

Agency Summary Response

As explained in the TSD, Section I.c., a water may be both a point source and a "water of the United States." However, the final rule excludes from the definition of "water of the United States" any stormwater control feature constructed in dry land to convey, treat or store stormwater. As a result, most municipal stormwater conveyances will be excluded from regulation as a water of the US. See Exclusions Compendium and Preamble Section IV.

Specific Comments

Waters of the United States Coalition (Doc. #14589)

10.551 In adopting Section 402(p), Congress defined the MS4 as a point source, established a specific standard for discharges from the MS4, and exempted MS4s from compliance with the Water Quality Standards and TMDL requirements applicable to Waters of the United States through Clean Water Act section 303. (*Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).) This Congressional determination per se defines MS4s as a point source and not waters of the United States. Any other reading would write the MEP standard out of the Act.

[1033] Identification of the exclusion differs for several Code of Federal Regulation Sections. For example, 33 C.F.R. Part 328 and 40 C.F.R. Part 117 ditch exclusion is located at sections (b)(3) and (4); 40 C.F.R. Parts 110, 112, 116, 232, 300 and 302 ditch exclusion is located at sections (2)(iii) and (iv); 40 C.F.R. Part 230 ditch exclusion is located at sections (t)(3) and (4); 40 C.F.R. Part 401 ditch exclusion is located at sections (l)(2)(iii) and (iv). Aside from the citation, the language for each exclusion is identical.

[1034] *Rapanos v. United States*, 547 U.S. 715, 735-36 (2006). See also 547 U.S. at 759 ("as relevant here, the term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."); Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1137, 1141 (C.A.10 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

As noted in *Los Angeles County Flood Control v. NRDC*, the MS4 is a complex system of open drains, swales and channels that convey floodwaters off of public streets and into the Waters of the United States. These systems are often fenced and not designed to be used for fishable, swimmable purposes. MS4s are a flood control system first and since 1987 have also become a treatment system. Attaining Water Quality Standards within the treatment system is not the purpose of the Clean Water Act and a definition of waters of the United States that requires this outcome violates the plain text of the Act. (p. 30-31)

Agency Response: **See summary response.**

Coalition of Real Estate Associations (Doc. #5058.2)

10.552 The CWA's overriding regulatory objective is to prohibit pollutant discharges without a permit – such as a permit issued under the NPDES program.[1035] Stormwater that conveys pollutants"[1036] from a "point source"[1037] into WOTUS are a type of "discharge"[1038] that triggers NPDES permitting requirements.

[1035] 33 U.S.C. §§ 1311(a), 1342(a); see Envt'l Def. Ctr. v. EPA, 344 F. 3d 832, 841 (9th Cir. 2003) ("EDC") (the CWA "prohibits the discharge of pollutants from a 'point source' into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System ….").

[1036] While Congress exempted most discharges "composed entirely of stormwater" (i.e., not mixed with wastewater or other regulated discharges) (33 U.S.C. § 402(p)(1), it specifically identified certain MS4 and industrial stormwater pollutant sources for permitting to control pollutants discharged in stormwater from those point sources. The CWA defines "pollutants" to mean wastes like "dredged spoil, solid waste, … sewage, garbage sewage sludge, … chemical wastes, biological materials, … heat, … rock, sand, cellar dirt, and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). *See LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 712 (2013) ("Because stormwater is often heavily polluted, … the CWA and its implementing regulations require the operator of an MS4 … to obtain a [NPDES] permit before discharging storm water into navigable waters"); *EDC*, 344 F.3d at 840-841 ("Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorous), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants ….") In *Virginia DOT v. EPA*, 2013 WL 53741 (E.D. Va., Jan. 3, 2013), the court held that EPA did not have the statutory authority to establish a Total Maximum Daily Load (TMDL) based on "stormwater flow rate" as a "surrogate" or "proxy" for sediment. *Id*. at *2, *3. For purposes of the CWA, the court stated "sediment is a pollutant, … but stormwater is not. " *Id.* at *3. In short, stormwater is subject to NPDES permit requirements to the extent such runoff discharges "pollutants" into WOTUS.

[1037] "The term 'point source' means any discernible, defined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well … [or] container … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

[1038] The CWA defines "discharge of a pollutant" as "any addition of any pollutant **to** navigable waters **from** any point source …." 33 U.S.C. § 1362(12) (emphasis supplied). Thus, in the "discharge" definition, Congress distinguished between "navigable waters" (defined to mean WOTUS at 33 U.S.C. § 1362(7)) on the one hand, and "point sources" on the other hand. EPA regulations likewise specify that "discharge of a pollutant" includes "additions of pollutants into [WOTUS] from … discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works …" 40 C.F.R. § 122.2. Thus, "point sources" (like MS4s) serve the function to convey and carry pollutants, and are features from which pollutants are discharged into WOTUS . But "point sources" are not themselves WOTUS. Congress did not give the Agencies broad authority over "point sources" as conveyances per se -- but only conferred limited federal permitting authority over the activity of a "discharge" when a "point source" *adds* a pollutant to WOTUS. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109-110 (2004) (emphasizing that CWA permits are required for "any addition" of pollutants to WOTUS, not the movement of pollutants within the same waterbody).

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted … § 402(p), [entitled] 'Municipal and Industrial Stormwater Discharges.'"[1039] By requiring stormwater discharge permits under CWA section 402, Congress made "the stormwater program … part of the (NPDES) Program…."[1040] Municipal pollutant discharges from MS4s are one of three categories of stormwater permits authorized by section 402(p).[1041] For over 20 years, EPA has implemented Congress's plan for a "phased" approach to regulate municipal runoff based on the size of the population served by an MS4.[1042] NPDES permits must be obtained for all stormwater discharges from "large" and "medium" MS4s under so-called "Phase 1" rules,[1043] and from regulated "small" MS4s under Phase 2 rules.[1044] EPA estimates there are approximately 750 Phase 1 MS4s, and 6,700 Phase 2 MS4s, in the United States.[1045]

Regulations define MS4s as "a conveyance or *system of conveyances* … designed or used for collecting or conveying storm water."[1046] The component "conveyances" within a larger MS4 "system" collect and channel runoff through "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains."[1047] The MS4 definition closely tracks the separate definition of "point source"[1048] – thus confirming that "'[s]torm sewers are established point sources subject to NPDES permitting requirements" within section 402's regime.[1049]

Generally speaking, governmental bodies at the state and local level own or operate MS4 systems.[1050] EPA guidance explains:

> "What constitutes an MS4 is often misinterpreted and misunderstood. An MS4 is not always just a system of underground pipes—it can include roads with drainage systems, gutters, and ditches. Although most entities with MS4s are local municipal governments (*e.g.*, cities and counties), there are other governmental entities that manage storm drains at their facility, including state departments of

[1039] *EDC*, 344 F. 3d at 841.
[1040] 40 C.F.R. § 122.30(b).
[1041] 42 U.S.C. § 1342(p)(2). The other categories are discharges associated with "industrial activity" (such as land development and construction activities), and certain other discharges that, as EPA determines on a case-by-case basis, contribute to a violation of a water quality standard or significantly contribute pollutants to WOTUS. See *EDC*, 344 F.3d at 841-842.
[1042] See 33 U.S.C. § 1342(p)(2)-(4), (6) (two-phase approach for stormwater regulation). MS4s can be "large," "medium," or "small." Large MS4s serve a population of 250,000 or more (40 C.F.R. § 122.26(b)(4)), while medium MS4s serve a population of 100,000 or more but less than 250,000. (Id. § 122.26(b)(7)). Large and medium MS4s have been subject to NPDES regulation since 1990 under the so-called "Phase 1" rules, see 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122-124). Small MS4s (defined id. § 122.26(b)(16) have been regulated since 1999 under the "Phase 2" rules, see 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124). The phased approach for the NPDES stormwater permit program, including MS4 discharge permits, is discussed at *EDC*, 344 F. 3d at 841-842.
[1043] See, *e.g.*, 40 C.F.R. §§ 122.26(a)(3), (4).
[1044] See, *e.g.*, id. § 122.26(a)(5).
[1045] See http://cfpub.epa.gov/npdes/stormwater/munic.cfm.
[1046] 40 C.F.R. § 122.26(b)(8) (emphasis supplied).
[1047] *Id*.
[1048] See *supra* note 15.
[1049] *EDC*, 344 F.3d. at 841 (citing NRDC v. Costle, 568 F.2d 1369, 1379 (D.C. Cir. 1977)).
[1050] 40 C.F.R. § 122.26(b)(8)(i).

> transportation, universities, local sewer districts, hospitals, military installations, and prisons."[1051]

All of the municipally owned or operated pipes, curbs, gutters, ditches, drains and other conveyances that comprise an MS4 system collect and carry stormwater to an "outfall" – specifically designated by EPA's regulations as a "point source" because it is "the point where a municipal separate storm sewer discharges to [WOTUS]."[1052] A key element of MS4 permit applications is the precise mapping and identification of the storm sewer's outfall points[1053] as well as the entire "network" of conveyances that ultimately connect to the outfall:

> Phase I MS4 permittees should have developed a map of known municipal outfalls discharging to waters of the United States as part of their source identification conducted for Part I of their NPDES application. Phase II permittees are required to develop a map of outfalls and the names of locations of all waters of the United States that receive discharges from those outfalls. *To be useful, these maps should also include the storm drain pipe network and catch basin locations,* along with other relevant information such as the location of stormwater treatment facilities, watershed boundaries for each outfall, critical land uses and pollutant sources, and municipal facilities. Outfalls and drainage areas should be prioritized in order of their potential to be a source of illicit discharges. Ideally, this information would be managed in a database linked to a GIS.[1054]

MS4 maintenance likewise calls for "infrastructure mapping" in a geographic information system (GIS) showing all inlets, outfalls, storm drain conduits, and receiving water bodies; EPA further advises that these "infrastructure assets or components" should be "named or numbered" for ease of identification.[1055] (p. 4-8)

Agency Response: **This is descriptive and does not need a response. However, to the extent that the commenter is suggesting that MS4s not be regulated under this rule, see summary response.**

10.553 NPDES regulations require MS4 owners and operators to control pollutant discharges into receiving waters "to the maximum extent practical." While the CWA requires NPDES permits for discharges "from" the MS4 into WOTUS, MS4 owners and operators

[1051] U.S. EPA Office of Wastewater Management, "MS4 Program Evaluation Guidance," EPA-833-R-07-003, at p. 5 (Jan. 2007) (available at: http://www.epa.gov/npdes/pubs/ms4guide_withappendixa.pdf) ("MS4 Guidance").
[1052] 40 C.F.R. § 122.26(b)(9). A "major" MS4 outfall discharges from a single pipe with an inside diameter of 36 inches or more; or an inside diameter of 12 inches in the case where an MS4 receives stormwater from lands zoned for construction and other types of industrial activity. *Id*. § 122.26(b)(7).
[1053] *Id*. §§ 122.26(d)(iii)(B)(1),(5) (Part 1 of the large or medium MS4 NPDES permit application shall include a USGS topographic map that identifies "[t]he location of known [MS4] outfalls discharging to (WOTUS)," and "[t]he location of major structural controls for stormwater discharge (retention basins, detention bsins, major infiltration devices, etc."). After storm events, samples of effluent are taken at MS4 outfall points and, as required, analyzed to detect pollutants. Id. § 122.26 (d)(2)(iii)(A).
[1054] MS4 Guidance, at p. 85 (emphasis supplied).
[1055] *Id*. at p. 47.

also need to control or limit pollutant contributions entering their storm sewer systems from third parties.

First, because "municipal … waste" carried by stormwater is a "pollutant,"[1056] section 402 permits are necessary at the point that an MS4 outfall discharges runoff into WOTUS. Permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design, and engineering methods."[1057] To obtain NPDES permit coverage, the MS4 operator must certify that all outfalls "that should contain stormwater discharges … have been tested or evaluated for the presence of non-stormwater discharges which are not covered by a NPDES permit …."[1058] In describing the system monitoring approach for MS4s, EPA states that "monitoring of outfalls close to the point of discharge to [WOTUS] is generally preferable when attempting to identify priorities for developing pollutant control programs."[1059] NPDES regulations further specify effluent sampling procedures at MS4 outfall points after storm events,[1060] such as the reporting of "quantitative data … for the grab sample … of the discharge of all pollutants" (such as process wastewater, oil, grease, phosphorous, total suspended solids, and nitrogen).[1061]

Second, any industrial operation (like many construction sites)[1062] that discharges stormwater "through" a large or medium MS4 must provide the MS4 operator with key information regarding that penultimate discharge into the municipal system before it may reach receiving waters – such as any existing NPDES permit allowing that "industrial" site to legally discharge pollutants off site in the first place.[1063] Otherwise, any other release of a pollutant into an MS4 that is not itself permitted or otherwise exempt from permitting is "illicit."[1064] The MS4 permit application must set forth "[a]dequate legal authority" for the municipality to prohibit illicit discharges "through ordinance, order, or similar means."[1065] Applicants for MS4 permit coverage must also describe a program "including a schedule, to detect and remove (or require the discharger to the [MS4] to obtain separate NPDES permit coverage for) illicit discharges and improper disposal into the storm sewer."[1066] (p. 8-9)

[1056] 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. See supra note 14.
[1057] 33 U.S.C. § 1342(p)(3)(B)(iii).
[1058] 40 C.F.R. § 122.26(c)(i)(C).
[1059] Phase 1 Rules, 55 Fed. Reg. at 48,057 (Nov. 16, 1990).
[1060] See 40 C.F.R. subpt. B.
[1061] 40 C.F.R. § 122.21 (g)(7)(ii); § 122.26 (c)(1)(i)(E).
[1062] According to EPA's Phase 1 stormwater rules an "industrial activity" includes construction activity (such as land clearing, grading and excavation) on sites larger than five acres, but may also include land clearing activities on smaller lots in a common plan or development (like a subdivision) that is five acres or more. 40 C.F.R. § 122.26(b)(14)(x). Under the Phase 2 rules, "small construction activity" on sites between one and five acres must also obtain NPDES permit coverage for stormwater discharges. *Id*. § 122.26(b)(15).
[1063] *Id*. § 122.26(a)(4).
[1064] *Id*. § 122.26(b)(2).
[1065] *Id*. § 122.26(d)(2)(i)(B).
[1066] *Id*. § 122.26(d)(2)(iv)(B).

Agency Response: **This is descriptive and does not need a response. However, to the extent that the commenter is suggesting that MS4s not be regulated under this rule, see summary response.**

10.554 Just as treatment works are publicly owned and operated systems that store, treat and recycle sanitary and industrial waste (*i.e.*, sewage)[1067] – and are "point sources" subject to NPDES permit requirements[1068] – MS4s are systems that separately treat, store and recycle municipal and industrial pollutants that are present in stormwater flows.

Stormwater discharged from MS4s often carries "pollutants" as the CWA defines that term.[1069] Regulations specify that MS4s are owned or operated by state or local governments (or other bodies) created under State law, that specifically have "jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes …."[1070] Thus, only government entities that have responsibilities for waste management are eligible to obtain MS4 NPDES permits.[1071]

To meet the CWA's directive that municipal stormwater permits must control pollutants "to the maximum extent practicable,"[1072] MS4 operators must include a "proposed management plan" in their NPDES application that, among other things, incorporates "management practices, control techniques, and system design and engineering methods" to reduce pollutant discharges.[1073] MS4s treat wastes in stormwater with such features as settling structures to collect sediment, and racks to capture trash.[1074] EPA's online "National Menu of Stormwater Management Best Practices" sets forth an exhaustive suite of controls[1075] to help prevent and treat municipal waste such as trash, debris, sediment, animal waste, oil and grease, and pesticides before such pollutants are conveyed by stormwater discharges from an MS4 outfall into WOTUS (or at the front end, from third parties releasing pollutants into the MS4).

[1067] 33 U.S.C. § 1292(2)(A).
[1068] See, *e.g.*, http://www.epa.gov/region1/npdes/potw-gp.html.
[1069] 33 U.S.C. § 1362(6). See *supra* note 14.
[1070] 40 C.F.R. § 122.26(b)(8)(i) (emphasis supplied)
[1071] That stormwater conveys "waste" is also made plain by EPA's regulations addressing non-municipal runoff associated with industrial activities. Aside from the general definition of "discharge of a pollutant," EPA has a specific definition for "storm water discharge associated with industrial activity" – that is, the discharge "from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing processing or raw materials storage areas at an industrial plant." *Id.* § 122.26(b)(14). Among the categories of industrial discharges identified in this definition are runoff from roads and rail lines "used or traveled by carriers of … waste materials," "refuse sites," "sites used for the application or disposal of process waste waters," and "material handling activities that include … conveyance of any … by-product or waste product." *Id.*
[1072] 33 U.S.C. § 1342(p)(3)(B)(iii).
[1073] 40 C.F.R. 122.26(d)(2)(iv). For example, "structural controls to reduce pollutants (including floatables) in discharges from [MS4s]" must be included in the plan accompanying the NPDES application. *Id.* § 122.26(d)(2)(iv)(A)(1).
[1074] Ben Urbonas, *et al., Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* 42, 416-433 (1993).
[1075] *E.g.*, infiltration trenches, infiltration basins, drain system cleaning, silt fences, wet and dry detention ponds, geotextiles, polymer treatment of suspended solids, etc. See http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm.

Municipalities around the country typically install stormwater infrastructure for the sole purpose of cleaning runoff and treating the wastes it conveys before entering receiving waters. For example, Madison, Wisconsin has installed numerous treatment structures that remove large particles and trash from the stormwater as it moves through the municipality's storm sewer.[1076] Similarly, the Brookfield Pond Restoration Project in Fairfax, Virginia improves a pond that was not created with modern stormwater management techniques. The project includes infrastructure located where stormwater enters the pond to filter pollutants and sediment, and floating wetlands designed to remove nutrients.[1077] These are just two examples of the thousands of treatment projects nationwide that municipalities operate to manage and control the wastes carried by stormwater that runs through MS4 systems. (p. 9-11)

Agency Response: This is descriptive and does not need a response. However, to the extent that the commenter is suggesting that MS4s not be regulated under this rule, see summary response

10.7. TRIBUTARIES

Agency Summary Response

The agencies determine based on their scientific and technical expertise that waters meeting the definition of "tributary" in a single point of entry watershed are similarly situated and have a significant nexus because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. As such, it is appropriate to conclude covered tributaries as a category are "waters of the United States." *See* Technical Support Document. The agencies limited the tributaries that are "waters of the United States" to those that have both a bed and banks and another indicator of ordinary high water mark. That limitation served as a reasonable basis to consider covered tributaries similarly situated because those physical characteristics indicated sufficient flow that the covered tributaries are performing similar functions and located such that they are working together in the region to provide those functions to the nearest traditional navigable water, interstate water, or the territorial seas. Preamble, III and IV; Technical Support Document, II and VII.

Specific Comments

Barona Band of Mission Tribes (Doc. #2476)

10.555 The proposed definition of "tributary" exceeds the power of Congress under the Commerce Clause- it proves too much. Proposed rule Section 328(c)(5) defines "tributary" expansively to include,

> "a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 C.F.R. 328.3(e) which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(l)

[1076] http://www.cityofmadison.com/engineering/stormwater/TreatmentStructures.cfm
[1077] http://www.fairfaxcounty.gov/dpwes/stormwater/projects/brookfield_pond.htm

> through (4) of this section .... A water that qualifies as a tributary· under this section does not lose its status as a tributary if, for any length there are ... one or more natural breaks ... so long as a bed and banks and an ordinary high water mark can be identified upstream of the break."

Taken literally, this standard would define most of the land area of the United States as "waters of the United States." Much rain that falls is not absorbed into the ground and, instead, runs off and is collected through ever-increasing courses, from trickles, to runnels, to rivulets, to gullies, to rills, to brooklets, to streamlets, to brooks, to creeks, to streams, and to rivers that empty into the ocean. During and after rains, such flows, even if only occasional, all drain into the ocean and other indisputably jurisdictional waters, from the smallest drainage feature to the largest, through a network of tributaries of tributaries of tributaries, etc. Each of these drainage features, from the smallest to the largest, from the most occasional and ephemeral to the most massive and continuous, contributes to the flow of water into some navigable water. Presumably, a drop of rain falling on the west edge of the continental divide in Colorado that is not absorbed or diverted will eventually find its way into the Colorado River and thence into the Pacific Ocean. Presumably, that drop could also carry a molecule of a pollutant from the continental divide into the Pacific Ocean. As one district court observed long ago,

> "Congress has jurisdiction under its authority to regulate commerce with the foreign nations and among the several States." Does that apply to immediate tributaries, and if it applies to immediate tributaries, does it apply to tributaries to tributaries, and if so, where is the end? *Grand River Dam Authority v. Going,* 29 F.Supp. 316,323 (N.D.Okla., 1939)

That single drop of water, along with others like it, will have a cumulative effect on the physical, biological, and chemical integrity of the indisputably jurisdictional waters into which they eventually flow. The EPA is correct in this conclusion. See 79 F.R. at p. 22206. But the mere fact that such a cumulative effect may exist does not, in itself, justify the regulation of that drop of water from the very first point, near the continental divide, where it first enters the most evanescent, ephemeral, and tiny drainage with a bed, banks, and OHWM, especially if that confluence of characteristics immediately ceases and does not reappear for many miles. If this conclusion did follow, then virtually the entire land mass of the United States would become "waters of the United States". At some point, virtually every drop of rain that is not absorbed or diverted will enter something that qualifies as a "tributary". From that point onward, even if there is a no further confluence of bed, banks, and OHWM for any indefinite distance, the land over which that drop passes on its way to the sea will be "waters of the United States", thereby expanding the jurisdiction of the EPA and ACE under the Clean Water Act from not just "waters of the United States" to "lands of the United States". (p. 2-3)

Agency Response: **The agencies disagree that "virtually the entire land mass" would become waters of the United States under the agencies' definition of "tributary." Further, the definition provides clear boundaries and the agencies' determination that tributaries, as defined, have a significant nexus is based on the information and conclusions in the Science Report, other relevant scientific literature, the Technical Support Document, the relevant Supreme Court decisions,**

the agencies' technical expertise and experience, and the objectives and requirements of the CWA. Preamble, III; Technical Support Document, II and VII.

Attorney General of Texas (Doc. #5143.2)

10.556 The federal agencies' new proposed rule proposes, for the first time, a sweeping definition of the term "tributary"…This definition is problematic for landowners for a number of reasons. From a practical standpoint, determining the "ordinary high water mark" of a bed and bank is a notoriously difficult task—one that both the *Rapanos* plurality and Justice Kennedy admonished. The *Rapanos* plurality stated that the ordinary high water mark standard "extended the waters of the United States to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris". *Rapanos*, 547 U.S. at 725 (internal quotations omitted). Justice Kennedy disparaged the ordinary high water mark as providing "no such assurance" of a reliable standard for determining a significant nexus. *Id*. at 780-8 1 (Kennedy. J., concurring in the judgment).

The irony here is that while on one hand embracing Justice Kennedy's vague "significant nexus" test for expanding its own jurisdiction over land and waters, the federal agencies conveniently omit that Justice Kennedy eschewed the "ordinary high water mark" as an appropriate standard for determining that tributaries are "waters of the United States," noting that "the breadth of this standard.. . leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). (p. 3-4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Offices of the Attorney Generals of Oklahoma, West Virginia and Nebraska (Doc. #7988)

10.557 The Proposed Rule declares that all "tributaries" of both core waters and impoundments of core waters (dams or reservoirs) are *always and per se* covered by the CWA. 40 C.F.R. § 230.3(s)(5). The Proposed definition of "tributaries" is extremely broad, sweeping up ponds, ephemeral streams, and usually dry channels. 40 C.F.R. § 230.3(u)(5). (p. 5)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule does not define tributary to include ponds.

10.558 The Proposed Rule declares that all "tributaries" of core waters and impoundments of core waters are always and per se "waters of the United States." 40 C.F.R. § 230.3(s)(5), see also 79 Fed. Reg. 22,199 (April 21, 2014). The Proposed Rule then defines a "tributary" as anything with "presence of a bed and banks and ordinary high water mark…which contributes flow" into a core water, even if such a flow is "ephemeral." 40 C.F.R. § 230.3(u)(5), 79 Fed. Reg. 22,201-02.

This definition of "tributary" fails the test set out by the four-Justice *Rapanos* plurality. While the plurality emphasized the requirement that the non-core water must have a "continuous surface connection" with a core water, the Proposed Rule's definition of "tributary" requires only any flow into a core water—or even an impoundment of a core water—making the proposed definition clearly overbroad. Indeed, the plurality

specifically rejected CWA jurisdiction for "streams whose flow is [c]oming and going at intervals . . . [b]roken, fitful, or existing only, or no longer than, a day, diurnal . . . short-lived," which contradicts the Proposed Rule's assertion that "tributaries" are per se "waters of the United States." *Rapanos*, 547 U.S. at 733 n.5.

The "tributary" definition just as clearly fails Justice Kennedy's "significant nexus" test. Under the Proposed Rule, even roadside ditches or depressions that ever send any flow into core waters are "waters of the United States." This falls far short of a "significant nexus" as, under the Proposed Rule, the flow need not have any impact on "the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." *Id*. at 780. Indeed, Justice Kennedy rejected CWA jurisdiction for any "wetlands [that] lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters" and specifically rejected an interpretation that would grant CWA jurisdiction over even a "continuously flowing stream (however small)." *Id*. at 776-79. This reasoning is directly at odds with the Proposed Rule's "tributary" definition, which includes even "ephemeral" flows.

In addition, the Proposed Rule's attempt to sweep in any tributary of an impoundment of a core water would be unlawful under Justice Kennedy's test. The inclusion of any tributary to any impoundment—that is, a dam or reservoir of a core water—is effectively a "double nexus" approach. Under Justice Kennedy's test, only one nexus is allowed: a non-core water can be covered under the Act if that non-core water has a significant nexus to a core water. But here, the Proposed Rule asserts federal jurisdiction over a chain of waters, with only the final one being a core water. Under the Proposed Rule, so long as a non-core water (like an dam or reservoir) has a "significant nexus" to a core water, any water that has a "significant nexus" to that dam or reservoir is also included in "Waters of the United States." This is directly contrary to Justice Kennedy's approach of requiring each non-core water covered under the Act to have a "significant nexus" connection to an actual core water. *Id*. at 779. (p. 7-8)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. Many ditches, as well as depressions, are excluded from "waters of the United States." Preamble, IV.

Citizen's Advisory Commission on Federal Areas, Alaska Department of Natural Resources (Doc. #16596)

10.559 It bears mentioning that the *Rapanos* Court was only considering the definition of WOTUS found in the current regulations. The discussion is thereby limited to the terms outlined there - e.g., captioning undefined terms like "tributaries" and "adjacent wetlands." Nothing in the opinion, or other precedent, supports or lends credibility to the proposed rule's new and expanded definitions of "tributaries" and "adjacent wetlands." These new definitions appear to capitalize on the Court's limited discussion of these terms to see where expansion is possible consistent with those discussions, while ignoring the context under which they were developed. (p. 2)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

San Bernadino Department of Public Works (Doc. #16489)

10.560 In 2006, the Supreme Court issued its opinion in "*Rapanos*" evaluating the extent and limits of §404 jurisdiction within tributary systems. Though the facts in *Rapanos* focus on tributaries to navigable-in-fact waters,"[1078] the USACE existing definition of "tributaries" is much broader. The USACE currently defines tributaries as rivers and streams which are tributary to either: (1) navigable-in-fact waters, (2) interstate waters/wetlands, (3) "other waters" (including playa lakes), and (4) "impoundments of waters that might otherwise be defined as waters of the United States under the definition".[1079] Prior to *Rapanos*, the CWA jurisdiction conceivably extended to any tributary feature with an OHWM.[1080] By including all tributaries, including first order ephemeral streams,[1081] CWA jurisdiction could conceivably extend to any definable flood control or water conveyance facility within a watershed, without respect to rate/persistence of flow, volume, or to its relative proximity/remoteness and affect upon downstream resources. Similarly, based on the existing regulations, CWA jurisdiction would also extend to playa-lakes and other non-navigable features within isolated watersheds provided an independent nexus to interstate or foreign commerce is evident. In finding for the petitioners, the Court found, as they had in *SWANCC*, that the USACE' expansive interpretation of the term "waters of the United States" is not "based on a permissible construction of the statute."[1082]

The holding in *Rapanos* however, generated a certain amount of confusion, which has frustrated administrative efforts to apply concise rules from the Court's rationale. One of the primary sources of confusion is because *Rapanos* was not decided by a clear majority, but rather as a combination of a plurality and concurring opinions. Three justices joined

[1078] *Rapanos*, et al., (2006), joined two cases, *Rapanos* and *Carabell*. *Rapanos* involved three properties encompassing 54 acres of "sometimes-saturated soil", connected indirectly to navigable waters ranging from 11 to 20 miles downstream. *Rapanos*, 547 U.S. 719, 729 (2006), citing *Rapanos*, 376 F.3d 629, 643 (2004). In *Carabell*, petitioners sought authorization to fill wetlands separated by a four-foot wide impermeable berm from a drainage ditch with indirect connectivity to navigable waters located approximately one-mile downstream. Rapanos, 547 U.S. 719, 729 (2006), citing Carabell, 391 F. 3d 704, 708 (2004).

[1079] See 33 CFR 328.3(a)(5). Note that "impoundments" typically refer to resources associated with dams.33 CFR 328.3(a)4).

[1080] The term "ordinary high water mark" (OHWM) means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e). With respect to non-tidal water, jurisdiction extends to the OHWM. 33 CFR §328.4(c)(1); or when adjacent wetlands are present, beyond the OHWM to the limit of the adjacent wetland. 33 CFR §328.4(c)(2).

[1081] "Stream-order" refers to "Strahler stream-order" developed by Arthur Newell Strahler (1957). Stream order is used to define stream size based on a hierarchy of tributaries. First order ephemeral streams are generally the smallest drainage features with a definable OHWM. These features are typically located at the top (highest elevation) within a watershed, conveying flow only during, and immediately after storm events.

[1082] *Rapanos*, 547 U.S. 739 (2006), citing, *Chevron U.S.S. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Justice Scalia's plurality opinion for the court:[1083] But in his concurring opinion, Justice Kennedy proceeds to put forth a rule which is not wholly congruous with the plurality.[1084]

Notwithstanding their differences, both the plurality and concurrence are fundamentally consistent with *SWANCC*, in that they emphasize that the term "navigable" must be given at least some effect.[1085] But whereas the ruling in SWANCC simply removed the MBR as a tool for asserting jurisdiction over isolated waters, both the plurality and the concurrence rules in *Rapanos* are predicated in part on a rationale requiring either the presence of relatively permanent water[1086], or surface connectivity or adjacency to navigable waters.[1087] It might be argued that the connectivity/adjacency (to navigable waters) requirement is distinguishable based on the fact patterns in *Rapanos* and *Carabell* (both of which involve tributaries to navigable waters), but the Court fails to carve out such limitations in their opinion. As such, *Rapanos* seems to apply to all tributary types set forth in 33 CFR 328.3(a)(4), including tributaries of "intra-state" and "other waters". 54 In many ways this does not make sense because "other waters" by definition includes non-navigable resources such as shallow, ephemeral dry lakes (playa-lakes) with no connectivity to traditional navigable waters. Such a distinction is important, because neither the plurality nor the concurrence rationale make sense when applied to watersheds that lack navigable-in-fact waters.

The proposed regulations establish that all tributaries that flow to resources crossing state lines be considered jurisdictional by rule. While such a rule may be logically applied to interstate navigable resources it is problematic when applied to tributaries of dry lakes and other such resources crossing state lines with no surface connectivity to navigable waters (or territorial seas).This disconnect between *Rapanos* and the existing regulatory framework is highlighted in both the plurality and concurring opinions.

The plurality attempts to set forth a simple de facto rule for delineating federal jurisdiction. This de facto or bright-line rule is based on the physical presence of water in a continuous temporal sense. The plurality applies a plain-language dictionary meaning to the term "waters" and (tributary) "streams", asserting that "the waters of the United States" include only relatively permanent, standing or flowing bodies of water."[1088] But the plurality is reluctant to set down specific temporal limits that define "relatively permanent". This reluctance is based on the plurality's recognition that the nation is subject to significant regional diversity in climate and hydro-geomorphology.[1089] This is an important distinction both legally and practically, particularly in the arid west states where the presence of continuously flowing or standing water results mostly from seasonal storms. Notwithstanding these regional variations, the plurality asserts that

[1083] Plurality opinion issued by Justice Scalia, and joined by Chief Justice Roberts, Justice Thomas, and Justice Alito. 547 U.S. 715, (2006).
[1084] Concurring opinion of Justice Kennedy. 547 U.S. 759, (2006).
[1085] See *Rapanos*, 547 U.S. 715, 779 (2006). See *SWANCC*, 531 U.S. at 172 (2001).
[1086] See *Rapanos*, 547 U.S. at 732 (2006).
[1087] See *Rapanos*, 547 U.S. 715, at 742,779 (2006).
[1088] 33 CFR 328.3(a)(4).
[1089] See *Rapanos*, 547 U.S. at 732 (2006).

ephemeral streams "existing only, or no longer than a day; diurnal . .. short-lived" are not relatively permanent and therefore not jurisdictional.[1090]

When applying the plurality rule to the "arid Southwest", many ephemeral streams/washes, and playa-lakes, within the Southwest would be de facto non-jurisdictional because they only support flow or standing water during or for a short duration after seasonal storm events. However, if these resources meet the standard of "relative permanence", the plurality does not offer a foundation for satisfying interstate commerce requirements when navigable-in-fact resources are not present in the watershed.

Justice Kennedy's concurred with the holding of the plurality but did not join the opinion because he disagreed conceptually with the temporal concept underlying "relatively permanent waters" asserting that it "makes little practical sense in a statute concerned with downstream water quality".[1091] To exemplify this point, the concurrence points out that the "merest trickle, if continuous, would count as a Water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not".[1092] This is to say that a small continuous stream with low volume may have no significant impact on downstream jurisdictional resources, but during a major storm a typically dry-stream gully may carry large volumes of water, resulting in very significant impacts to downstream navigation.

At the heart of Justice Kennedy's opinion is "water quality", which builds on the stated "objective" of the 1972 amendments, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters".[1093] "Water quality" is also the basis for the "significant nexus" concept, and justification for the "limited effect" doctrine, used to expand jurisdiction beyond the banks of navigable waters in *Riverside Bayview Homes*.[1094] Yet unlike *Riverside Bayview Homes*, which asserts that the term "navigable" was of "limited effect", in *Rapanos*, both the plurality and concurring opinion seek to establish boundaries to the "limited effect" doctrine. As such, both *Rapanos* opinions suggest that CWA jurisdiction may not extend to the far reaches of a watershed, even in watersheds that connect to TNWs, interstate waters or the territorial seas.

But in formulating a jurisdictional test based on "water quality" and a "significant nexus" to downstream navigable waters, Justice Kennedy creates a result that is potentially in conflict with the plurality's "relatively permanent rule".[1095] These complications are particularly evident when evaluating ephemeral or intermittent waters that do not meet the "relatively permanent" standard. These features are de facto non-jurisdictional to the

[1090] See footnote 5, *Rapanos*, 547 U.S. at 733 (2006).
[1091] See *Rapanos*, 547 U.S. at 769 (2006).
[1092] *Id*.
[1093] See *Rapanos*, 547 U.S. at 759 (2006), citing 33 U.S.C. §1251(a).
[1094] See *Riverside Bayview Homes*, 474 U.S. at 134-135 (1985). In justifying expansion of CWA jurisdiction beyond the OHWM to adjacent wetlands, the court in *Riverside Bayview*, asserts that the term "navigable" should be given "limited effect".
[1095] See *Rapanos*, 547 U.S. at 780, 782 (2006).

plurality, but may be jurisdictional if a significant chemical, physical or biological nexus to downstream navigable waters is established.[1096]

Because *Rapanos* was a plurality decision, the USACE and EPA continue to struggle with formulating concise jurisdictional rules.[1097] Also, neither the plurality nor the concurrence provided any real metrics for determining either "relatively permanent waters" or "significant nexus". This has proved to be a particularly vexing problem given the issues of regional hydro-geomorphic diversity discussed in the case. The Agencies' answer was to generally combine the rules into a fairly complicated jurisdictional flowchart-analysis[1098], and then to generate a set of detailed supplementary guidance documents addressing jurisdictional issues relating to "OHWM" and "wetland" determination for every major hydro-climatic region in the United States.[1099] The task set before the USACE was daunting, and resulted in significant delays in the issue of §404 permits, and virtually no jurisdictional determinations during the year following publication of the *Rapanos* opinion.[1100]

With the proposed Rule, the Agencies move substantially closer to making a "bright-line rule" which will allow for greater predictability, certainty, and consistency *in* administrative jurisdictional determinations. However, the Agencies make this rule at the expense of the existing scientific data set forth in the USACE's regional guidelines, and also in conflict with opinions set forth in *Rapanos* that purport to limit the extent of CWA jurisdiction within tributaries.

From a case law perspective, the primary concern is the proposed Rule's nearly complete reliance on Justice Kennedy's "significant nexus" rule, while substantially ignoring the plurality's "relatively permanent waters" rule, which was joined by four of the Supreme

[1096] *Id*. Note that Justice Kennedy's rule is commonly called the "significant nexus test" or "significant nexus determination". Also note that a significant nexus test/determination must be established on a "case by case basis". See *Rapanos*, 547 U.S. at 782 (2006).

[1097] The frustration was evident in Chief Justice Roberts concurring opinion. See *Rapanos*, 547 U.S. at 758 (2006). A plurality occurs when one opinion did not receive the support of more than half the justices, but received more support than any other opinion, leading to confusion as to what rule(s) apply from the case. The generally accepted test for plurality decision was laid out in, *Marks v. United States*, which establishes that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193-94 (1977); *Marks*, may require analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test…that lower courts should apply". *Waters v. Churchill*, 511 U.S . 661, 685 (1994).

[1098] See, U.S. Army Corp of Engineers Jurisdictional Determination Form Instructional Guidebook, USACE/EPA, (May 30, 2007) at pages 8-13.

[1099] Note that the firsts such regional guidance were generated for the Arid West Region in 2008. A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States, USACE, (August 2008); Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), USACE, (September 2008; Note that interim Guidance was published at an earlier date.). To this day, the Corps continues to develop regional guidance for other climatic regions in the U.S.

[1100] Note that during this time period, the Corps continued to process jurisdictional determinations associated with §404 permit applications. Those applications submitted prior to publication of *Rapanos* (June 19, 2006), were given the option of using pre-*Rapanos* jurisdictional evaluation criteria for processing permits. This option was considered to be generally protective of the environment because federal jurisdiction prior to *Rapanos* was generally regarded as broader in reach and scope.

Court justices. It should also be noted that Justice Scalia, in authoring the plurality opinion in *Rapanos,* ardently disagrees with Justice Kennedy's use of the phrase "either alone or in combination with similarly situated lands" to justify a *significant nexus to downstream TNW's,* asserting that this language seeks justification by "ignoring the text of the statute".[1101] And yet this "aggregate" (similarly situated) concept is one of the core legal (and scientific) justifications used by the proposed Rule to establish a "significant nexus" in all tributaries.[1102] In essence the proposed Rule, reaffirms the boundless scope of the "limited effect" doctrine from *Riverside-Bayview,* but fails to grasp that the purpose of *Rapanos,* including both the plurality and concurring opinions, was that not all tributaries (and adjacent wetlands) are subject to CWA jurisdiction. As such, the DPW seriously questions whether the proposed Rule can be justified as permissible statutory construction in light of *Rapanos.* (p. 12-17)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C, IV.

Snowmass Water and Sanitation District (Doc. #16529)

10.561 The assertion of jurisdiction over relatively remote intermittent and ephemeral drainages is not supported by Justice Scalia's plurality opinion that announced the decision of the U.S Supreme Court in *Rapanos v. United States.*[1103] As described in that opinion, CWA jurisdiction would extend only to "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]…oceans, rivers, [and] lakes."[1104] The *Rapanos* plurality stated that CWA jurisdiction does "not include channels through which water flows only intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[1105] Even Justice Kennedy's concurring opinion in *Rapanos,* upon which this rulemaking effort relies most heavily, does not support a broad regulation of tributaries in the absence of more specific criteria.[1106](p. 4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

[1101] *Rapanos,* 547 U.S. at 755-756 (2006).
[1102] Federal Register, at 22204(3).
[1103] *Rapanos v. United States,* 547 U.S. 715 (2006).
[1104] *Id*. at 739.
[1105] *Id*.
[1106] Justice Kennedy's opinion in *Rapanos* concurred in the judgment but not in the plurality opinion's rationale regarding Congress's limits on the reach of CWA jurisdiction. Justice Kennedy's concurring opinion noted that the agencies' existing standard for tributaries (which relies on the presence of a connection to a traditional navigable water and certain physical characteristics indicating an ordinary high water mark) was too expansive to provide the basis for a jurisdictional determination regarding adjacent wetlands because it seemed to "leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it." *Rapanos,* 547 U.S. at 781. He suggested that the agencies could "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." ld.

City of Jackson Department of Public Works (Doc. #18937)

10.562 The proposed rule contradicts the Supreme Court's guidance in *Rapanos* and otherwise exceeds the Agency's CWA authority. The proposed rule explicitly refers to Justice Kennedy's concurrence in *Rapanos v. United States* as the basis for the new definition, but the definition drastically expands the reach of the CWA. In *Rapanos*, 547 U.S. 715 (2006), the court split 4-1-4. Four justices upheld the United States' interpretation of what wetlands should be considered jurisdictional, and four others ruled that only "relatively permanent waters" are jurisdictional. *Rapanos v. United States*, 547 U.S. 715, 757, 787 (2006). Justice Kennedy rejected both tests and instead held that waters are jurisdictional if they have a "significant nexus" to navigable waters. *Id*. at 759. His opinion is the prevailing view of the Supreme Court on what wetlands are jurisdictional under the Act and purportedly serves as the basis for the proposed rule. 79 Fed. Reg. at 22192.

However, the proposed rule actually looks similar to the position that the federal government argued, and lost, in *Rapanos*. In *Rapanos*, the federal government argued that "the connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream." Brief of the United States in *Rapanos*, at 15. The federal government explicitly rejected the notion "that some tributaries may have such an attenuated connection to traditional navigable waters that federal protection of those tributaries would be unwarranted." *Id*.

The Supreme Court, and Justice Kennedy, disagreed with the federal government's position. Justice Kennedy rejected many of the government's assertions, holding that a wetland cannot be determined to have a significant nexus simply because it is adjacent to an ordinary highwater- mark tributary:

> "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark ... the breadth of this standard — which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it — precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 805-806."

Despite Justice Kennedy's admonition, the Agencies propose to define tributaries as "water physically characterized by the presence of a bed and banks and ordinary high water mark." They wrongly have adopted the view that all adjacent waters are per se jurisdictional because of a "significant nexus" finding. While Justice Kennedy's opinion recognized that the federal government could opt to protect tributaries that "are likely, in the majority of cases" to have a significant nexus to traditionally navigable water, that opinion also rejected the notion that the CWA protects every discernible water that contributes flow directly, or indirectly, to a traditionally navigable water, no matter how remote or insubstantial. *Id*. at 781. Given the similarity between the Agencies' proposed

language and the arguments made by the federal government and rejected by the Supreme Court in *Rapanos*, the Agencies should avoid such an expansive jurisdictional overreach. (p. 5)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Maui County (Doc. #19543)

10.563 The County of Maui submits that a per se inclusion of tributaries that are not relatively permanent, and wetlands adjacent to tributaries, exceeds the jurisdiction as described by Justice Kennedy in *Rapanos.* (p. 2)

Agency Response: The agencies disagree. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

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

10.564 The proposed definition claims to offer a streamlined review of jurisdictional waters by adopting a jurisdictional-by-rule approach to certain waters. However, the expansion of the definition of tributaries, adjacent waters and "other waters" is troublesome and, in many cases, will still require case-by-case analysis to determine a "significant nexus" as proscribed by the Supreme Court.

A concern with the jurisdictional by-rule approach to tributaries is that it leaves behind Justice Kennedy's narrow "significant nexus" test from *Rapanos* and adopts merely a "nexus" test, regardless of volume of flow, proximity to navigable waters or other relevant factors to the significance of a tributary to a Water. Justice Kennedy had the opportunity before him in *Rapanos* to adopt merely a "nexus" or "connection" test, but opted not to. Under the proposed rule, tributaries need not flow directly to a jurisdictional water but only need to "contribute flow" directly to a Water or to "waters which eventually flow" to a Water. We are particularly concerned that the agencies propose to extend jurisdiction to tributaries with ephemeral or intermittent flow.

Also of concern is the application of "tributary" status to wetlands outside the channel of a tributary, but are contributing flow to the channel. While using Ordinary High Water Mark (OHWM) as a determining factor in establishing jurisdictional tributaries, the agencies acknowledge that at there are places along a tributary where the OHWM may disappear, such as in a wetland. Under the proposed rule, the agencies would still extend Federal jurisdiction to these areas, if not as tributaries, then as "adjacent waters." Therefore, when there is a question as to the applicability of the CWA to a wetland, the rule favors Federal jurisdiction. The agencies request specific comment on how to best provide certainty on wetlands where no OHWM is evident and the Association feels declining jurisdiction over such wetlands would provide best certainty to the regulated community. (p. 1-2)

Agency Response: For the reasons articulated in the Preamble, the Science Report, and the Technical Support Document, the agencies disagree that the rule is based on a mere "nexus" test. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule does not define tributary to include wetlands. Preamble, IV.

California Building Industry Association (Doc. #14523)

10.565 This broadly inclusive defining of features that may constitute a tributary, and the lack of any parameters of the requisite level or consistency of flow necessary to support exertion of jurisdiction sounds strikingly reminiscent of the "any hydrologic connection" basis for jurisdiction flatly rejected by five Justices in *Rapanos*. Justice Kennedy criticized the agencies' "existing standard" that "deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high water mark" because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes towards it." See *Rapanos* at 786 (Kennedy, J., concurring). And Justice Kennedy further challenged the *Rapanos* dissent position that, in his words, "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." He continued, "The deference owed to the Corps' interpretation does not extend so far." *Rapanos* at 778-79 (Kennedy, J., concurring). In fact, the Proposed Rule's new categorical inclusion of features as "tributaries" and "adjacent waters," as respectively defined, would most certainly rope in without any on-site or case-specific analysis the types of features embraced by the *Rapanos* dissent but expressly rejected by both Justice Kennedy and the Scalia plurality. See, e.g., *Rapanos* at 787-88 (Stevens, J., dissenting). (p. 19)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Florida Department of Agriculture and Consumer Services (Doc. #10260)

10.566 In discussing the Corps's definition of "tributary," even Justice Kennedy recognized that minor tributaries, though they may be capable of meeting the then-applicable requirements of feeding into a traditional navigable water (or tributary thereof) and possessing an ordinary high water mark (OHWM), may not bear a sufficient enough nexus to the regulated waters to themselves be considered "navigable waters" under the Act. Rapanos, 547 U.S. at 781. Justice Kennedy suggested the Corps identify categories of tributaries that, due to (1) volume of flow, (2) proximity to navigable waters, or (3) other relevant considerations, are "significant enough" to warrant inclusion of wetlands adjacent to them. Id. The proposed rule goes much further than Justice Kennedy's suggestion. The proposed definition of "tributary" is a water that is physically characterized by the presence of a bed, banks, and OHWM, but also includes wetlands, lakes, and ponds, even if they lack a bed, banks, or OHWM, if they contribute flow, either directly or through another water, to a jurisdictional water. A tributary, including wetlands, can be a natural, man-altered, or man-made water, which includes rivers, streams, lakes, ponds, impoundments, canals, and ditches that are not specifically excluded as having been wholly excavated out of uplands, drain only uplands, and have less than perennial flow or those that do not contribute flow, either directly or through another water, to a traditional navigable water. (p. 72-73)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.567 Prior to *Rapanos*, courts of appeal upheld the agencies' contention that the definition of "waters of the U.S." included every tributary, including artificial roadside ditches, that

had a "hydrological connection" with a traditional navigable water and any wetland adjacent to that water. See *U.S. v. Deaton*, 332 F.3d 698, 710-712 (4th Cir. 2003); *U.S. v. Johnson*, 437 F.3d157, 179-181 (1st Cir. 2006); *U.S. v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997); *U.S. v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003); *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704, 710 (6th Cir 2004).But in *Rapanos*, five justices, through the plurality opinion and the concurring Kennedy opinion, all agreed that the hydrological connection standard was overly broad. 547 U.S. at 742, 784. Since *Rapanos*, the EPA and the Corps have been evaluating "tributaries" consistent with Justice Kennedy's suggestion: on a case-by-case basis to determine if the water in question met the significant nexus test." See June 2007 Legal Memorandum: "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v.United States* & *Carabell v. United States*." This discrete, individualized approach is the basis on which the agencies now argue that inclusion of the categorical definition of "tributary" gives greater certainty to the public over which waters are included. However, such categorical determination also broadens the scope of "waters of the U.S.," perhaps foreshadowing a return to the pre-*Rapanos*, hydrological connection standard or perhaps to an even broader standard given the removal of the requirement of an OHWM in "other waters" in the proposed rule. The most egregious problem with the proposed rule's emphasis on flow, regardless of volume and contributed either directly or through another water (read: nominal hydrologic connection), is that it has already been rejected by the Supreme Court. (p. 73-74)

Agency Response: The rule is narrower in scope than the existing rule and is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Texas Commission of Environmental Quality (Doc. #14279.1)

10.568 Non-navigable tributaries should meet a jurisdictional test for relatively permanent, standing, or continuous flow and continuous surface connectivity for federal jurisdiction to be applied. The TCEQ asserts that the blanket application of the EPA's/USACE's jurisdiction over all tributaries is improper. Under the U.S. Supreme Court's plurality opinion in *Rapanos v. United States* written by Justice Scalia, if a non-navigable tributary does not have a"relatively permanent, standing, or continuous" flow and a"continuous surface connection" to a navigable water body, there is no federal jurisdiction over the tributary. The TCEQ requests that EPA/USACE implement this concept in any interpretation of "waters of the United States."

The TCEQ's position is that EPA/USACE should follow Justice Scalia's opinion in *Rapanos*, which represented the opinion of four justices, rather than Justice Kennedy's concurring opinion setting out a"significant nexus" test, for both legal and policy reasons. From a legal standpoint, the TCEQ agrees with the Texas Attorney General's comments submitted on August ii, 2014 explaining why Justice Scalia's plurality opinion should be followed rather than Justice Kennedy's concurring opinion based on *Marks v. U.S.* establishing which opinion represents the holding of the Court when there is not a majority. From a policy standpoint, the plurality opinion sets out a narrower, more objective standard to apply thus creating greater certainty for the states and other stakeholders while also allowing for the protection of water quality.

By contrast, the concurring opinion sets out a broader; more subjective standard which conflicts with the primary role of the states by allowing the EPA/USACE broad discretion, and will create greater uncertainty for the regulated community. However, even Justice Kennedy, in his concurring opinion, expressed skepticism with the breadth of USACE's then-existing standard for tributaries, which was similar to the proposed rule deflnition, because it "seems to leave wide room for regulation of drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Rapanos v. United States*; 547 U.S. 759, 781. Nonetheless, in the proposed rule, EPA/USACE purporting to follow Justice Kennedy's concurring opinion, propose that all tributaries are jurisdictional by rule.

States should be allowed to exercise the primary responsibility set forth by the CWA by applying state-determined, flexible, site-specific strategies that will achieve long term water quality objectives. This rulemaking is another example of overreach by the EPA/USACE. The *Solid Waste Agency of Northern Cook County v. USACE* (*SWANCC*) and *Rapanos* Supreme Court decisions limited the extent to which EPA's and the USACE's jurisdiction extends beyond navigable-in-fact waters. Current and future regulatory actions by EPA/USACE should follow the decisions made by the Court. (p. 3-4)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

Office of the Governor, State of Wyoming (Doc. #14584)

10.569 The proposed rule unlawfully enlarges the scope of federal jurisdiction with the proposed definition of "tributaries." The U.S. Supreme Court, in a plurality opinion in *Rapanos v. United States*, indicated that federal jurisdiction should be constrained to "relatively permanent, standing, or continually flowing bodies of water," specifically excluding "channels through which water flows intermittently, or ephemerally, or channels that periodically provide drainage for rainfall." 547 U.S. 715, 739-42 (2006) (Kennedy, J., concurring in judgment). Even Justice Kennedy, on whose opinion the Agencies rely, did not agree the Agencies have jurisdiction over "remote and insubstantial" waters that "may flow into traditional navigable waters." *Id*. at 778- 779. Justice Kennedy objected to an interpretation of the Act that extended jurisdiction to remote features carrying little and even no water. *Id*. In contrast, the proposed rule defines tributaries, for jurisdictional purposes, to include any feature, carrying water or not, with a "bed and bank and ordinary high water mark ... which contributes flow, either directly or through another water." 79 Fed. Reg. 22274. The Agencies have disregarded the opinion of the plurality, as well as Justice Kennedy"s interpretation. They act *ultra vires*, under the proposed rule, in trying to take jurisdictional authority over more waters in contradiction to the case law. (p.3)

Agency Response: **The rule is narrower in scope than the existing regulation and is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

City of Newport News (Doc. #10956)

10.570 The agencies state that while Rapanos dealt with adjacent wetlands, that it is reasonable to assume that Justice Kennedy meant to establish the same test regardless of the water

involved and that the tributary definition is appropriate because the five justices that decided Rapanos did not reject current regulations that extended jurisdiction to some non-navigable water. Page 22204. This is a fallacious argument as this was not an issue before the Court. (p. 2)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Association of California Water Agencies (Doc. #12978)

10.571 The proposed rule broadly concludes that all tributaries as defined in the rule have a significant nexus to "waters of the United States" and are therefore subject to CWA jurisdiction. This means that the jurisdictional scope of the proposed rule is expanded from current practice to include features in the bright-line categories that might not be found to have a significant nexus to "waters of the United States" on a case by case basis. This same approach was rejected by Justice Kennedy in *Rapanos*. As stated in *Rapanos*, the Corps deemed a water a tributary "if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark." *Rapanos*, at 781. Justice Kennedy found this standard too broad because it seemed "to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id*. In this way, the breadth of the standard "precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id*. Likewise, the breadth of the definition of "tributary" in the proposed rule precludes its adoption. Under the current proposal, many remote and ephemeral tributaries in the arid west would become jurisdictional, resulting in significant additional and unnecessary regulatory burdens on water agencies. ACWA requests that the Agencies evaluate tributaries, such as ephemeral streams, on a case-by-case basis to ensure they pass the "significant nexus" test. (p. 6-7)

Agency Response: The rule is narrower in the scope than the existing rule and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Utah Association of Counties (Doc. #14756)

10.572 33 CFR 328.3 Current Rule: (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

UAC Proposed Change to 33 CFR 328.3: (5) **All** tributaries of waters (**other than waters that are themselves wetlands**) identified in paragraphs (a)(1) through (4) of this section, **provided the tributaries have a significant nexus to such waters;** (p. 9-10)

Agency Response: This a description not a comment. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C

10.573 UAC Proposed Change to 33 CFR 328.3: **(5) (4)** Tributary. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. ~~**In addition, wetlands, lakes, and ponds are tributaries (even if they lack a**~~

~~bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section~~. (p. 17-18)

Agency Response: The agencies do not define tributary to include wetlands, lakes or ponds. The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Coalition of Local Governments (Doc. #15516)

10.574 The Proposed Rule plans to extend the definition of a tributary to include those waters with flows that may be "ephemeral, intermittent or perennial." 79 Fed. Reg. at 22202. Tributaries also would include any "natural, man-altered, or man-made water and includes waters such as…impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4)." *Id*. This policy change violates the plurality opinion in *Rapanos*, which expressly held that a jurisdictional water "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]…oceans, rivers, [and] lakes.'" 547 U.S. at 739. It does not include channels where water flows intermittently or ephemerally, or channels where rainfall periodically drains. *Id*. This definition clearly does not include natural or man-made impoundments, canals, and ditches or any ephemeral or intermittent waters. As the plurality stated, the Corps stretches the term "waters of the United States" beyond its authority granted under the CWA by applying it to "ephemeral streams, wet meadows, storm sewers and culverts, direction sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert." *Id*. at 734. These type of tributaries contribute little to no water to the "waters of the United States" and never reach navigability. (p. 9)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.575 Stream that only flow seasonally or after rain have not always been protected by the CWA. The Proposed Rule would violate the plurality opinion under *Rapanos*, which expressly held that a jurisdictional water "includes only those relatively permanent, standing or continuously flowing bodies of water," not those channels where water flows intermittently or ephemerally. 547 U.S. at 739. The current regulations make no reference to ephemeral streams or ditches. (p. 18)

Agency Response: The rule is narrower in scope than the existing rule and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.576 As was discussed supra Section III, the proposed rule protects a variety of waters that were not historically covered under the CWA and expands the holdings of the Supreme Court. The proposed rule includes all ephemeral, intermittent or perennial streams as water of the United States. It proposes to include all waters located within floodplains and riparian areas of waters of the United States, or any water with a surface or subsurface connection with a jurisdictional water. These proposed changes will bring hundreds and thousands of more waters within the control of the EPA. The Proposed Rule reflects a broader interpretation of jurisdiction established by the Supreme Court in *Riverside Bayview Homes Inc*., *SWANCC*, and *Rapanos*. (p. 20-12)

Agency Response: The rule is narrower in scope than the existing rule and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C

Landmark Legal Foundation (Doc. #15364)

10.577 The Proposed Rule is impermissibly broad. The application of the proposed rule does not survive scrutiny under the standards established by Justice Kennedy in *Rapanos*. As presently constituted, the Agencies will consider "ephemeral" tributaries subject to regulation. "Ephemeral" means "lasting a very short time." Merriam-Webster.com. Merriam-Webster, 2014 Web. Nov. 5,2014.(p. 9)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Waters Advocacy Coalition (Doc. #17921.1)

10.578 The proposed definition of tributaries is inconsistent with *Rapanos* and will sweep in waters and features well beyond the reach of the agencies' CWA authority. Under the proposed rule, tributaries, impoundments of tributaries, and waters adjacent to tributaries are all per se jurisdictional. 79 Fed. Reg. 22,262-63. The proposed rule defines "tributary" as "a water physically characterized by the presence of a bed and banks and ordinary high water mark…which contributes flow, either directly or through another water" to a TNW, interstate water, territorial sea, or impoundment. *Id*. at 22,263. Wetlands, lakes, and ponds can be treated as tributaries if they contribute flow to a TNW, interstate water, or territorial sea, even if they lack a bed, banks, and OHWM. *Id*. A water does not lose its status as a jurisdictional tributary due to manmade breaks (e.g., bridges, culverts, pipes, or dams) of any length, so long as a bed, banks, and OHWM can be identified upstream of the break. *Id*. A tributary "can be a natural, manaltered, or manmade water and includes water such as rivers, streams lakes, ponds, impoundments, canals, and ditches [unless otherwise excluded]." *Id*.

As we have previously noted in comments,[1107] both the *Rapanos* plurality and Justice Kennedy were concerned about far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow. The plurality chastised the Corps for extending jurisdiction to "ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and

[1107] See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 61; AFBF Comments on 2008 *Rapanos* Guidance, Exhibit 2 at 22.

dry arroyos in the middle of the desert." *Rapanos*, 547 U.S. at 734. Similarly, Justice Kennedy criticized the agencies' "existing standard" for tributaries which "deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark" because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it." See *id*. at 781.

Contrary to the limits of CWA jurisdiction recognized by the *Rapanos* plurality and Justice Kennedy's concurrence, the proposed definition of tributary allows for per se jurisdiction over features with remote proximity and tenuous connections to TNWs, such as ephemeral drainages. The proposed definition does not require any consideration of frequency or duration of flow. Indeed, just like the agencies' previous standard that the Supreme Court considered to be too far-reaching, the proposed rule's tributary definition allows for regulation of drains, ditches, and streams with little or no relationship to traditional navigable waters. As such, the proposed rule's definition of "tributary" goes well beyond the agencies' previous assertions of jurisdiction that were criticized by the *Rapanos* Justices as exceeding the scope of their CWA authority.

Furthermore, the categorical determination that all channelized waters with an OHWM that contribute flow have a significant nexus and are therefore per se jurisdictional ignores Justice Kennedy's concerns about the breadth of a standard based on OHWM. Justice Kennedy was skeptical of the use of OHWM to establish jurisdiction and noted that the Corps district offices apply the OHWM standard inconsistently. *Id*. (citing GAO Report 04-297).[1108] Justice Kennedy stated that in many cases the waters that would be jurisdictional under such a broad standard would be "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." See *id*. at 781. Rather than limiting the scope of jurisdiction over tributaries in accordance with Justice Kennedy's concurrence, the agencies announce a similarly broad standard in the proposed rule and ignore Justice Kennedy's concern with the reliance on OHWM to determine jurisdiction. Again, the agencies' assertion of jurisdiction over all tributaries essentially amounts to the "any hydrological connection" standard that was rejected by a majority of the Justices in *Rapanos*. (p. 101-102)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

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

10.579 The Agencies must revise the proposed rule to define jurisdiction over tributaries consistent with the *Rapanos* plurality. Under the plurality's approach, the Agencies would define a tributary as a water that contributes direct flow to a traditional navigable water via a continuous surface connection. The plurality's approach is consistent with the plain language of the CWA and its policy to preserve States' authority over land and water use. It is also consistent with *SWANCC*. The plurality opinion provides a clear, defensible

[1108] Years later, the Corps OHWM standard is still being applied inconsistently across districts. See Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development of a National OHWM Delineation Technical Guidance (Mar. 14, 2014).

basis for Agencies to draw bright lines including certain types of water bodies within CWA jurisdiction and excluding other types of water bodies.

Under the proposed rule, a "tributary" is a water that is "physically characterized by the presence of a bed and banks and ordinary high water mark (OHWM)," which also contributes flow, either directly or through another water, to a traditional navigable water. The Agencies define the term "OHWM" to means the physical characteristics or markings that delineate the fluctuations of a water's flow pattern. The Agencies' definition for "tributary" explicitly states that a tributary "can be a natural" man-altered, or man-made water" and includes all "rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded" under the narrow jurisdictional exclusions provided by the rule. The Agencies' proposed rule also makes it abundantly clear that the Agencies intend to regulate even ephemeral streams as "tributaries," stating that "[t]he flow in the tributary may be ephemeral, intermittent or perennial."

The Agencies' proposed definition for "tributary" is overly broad and lacks sufficient clarity. As noted above, the Agencies' definition ignores the plurality opinion in *Rapanos* and the holding in *SWANCC*, and it relies almost exclusive on legally irrelevant portions of Justice Kennedy's concurring opinion in *Rapanos*. Moreover) even if the Agencies' definition for "tributary" were consistent with the law, it is ambiguous, leaving the regulated public to guess as to which water bodies the Agencies intend to regulate. The Agencies propose to identify a "tributary" based on the presence of a bed, bank, OHWM, and any minimal amount of flow that eventually reaches navigable waters. As Justice Kennedy stated in his *Rapanos* opinion, however, these terms are not sufficiently detailed to provide appropriate limits on the Agencies' exercise of jurisdiction. *Rapanos*, 547 U.S. at 734. (p. 4)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

10.580 The Agencies suggest that their regulation of manmade features under the CWA is appropriate because, in the Agencies} view, "man-made and man-altered tributaries perform many of the same functions as natural tributaries, especially the conveyance of water that carries nutrients, pollutants, and other substances to traditional navigable waters, interstate waters, or the territorial seas." This statement reflects a fundamentally flawed interpretation of Supreme Court precedent under which the scope of the Agencies' jurisdiction would always depend on the Agencies' ecological judgments regarding effects on traditional navigable waters. This interpretation is not supported by the Court's decisions. In particular, *SWANCC* rejected the notion that the ecological considerations that justified the Corps' jurisdiction over the adjacent wetlands in *Riverside Bayview* provided an independent basis for regulating physically isolated waters, finding that such ecological considerations were irrelevant outside the limited context of adjacent wetlands.

The Agencies should not consider ecological factors in determining whether manmade water bodies are jurisdictional "waters of the United States." Instead, as the Supreme Court has stated, the Agencies should consider the plain language of the CWA, giving real consideration to the Act's explicit policy to preserve local authority over land and water use, and giving at least some meaning to the term "navigable." Based on the Act's

plain language and the Supreme Court's decisions the Agencies should take this opportunity to reverse its historic position that manmade water bodies are jurisdictional "waters of the United States" and amend the rule's exclusions to more broadly exclude most types of artificial water bodies, such as irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities (whether or not they discharge subject to a NPDES permit), mine pits, man-made ponds/ impoundments} farm ponds, and landscape amenities. Excluding most artificial water bodies would be consistent with the term "navigable" and with the Act's policy of preserving local authority, allowing local authorities to draw the appropriate lines between regulated water bodies and unregulated manmade features. (p. 4-5)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule provides additional exclusions. Preamble IV.

Portland Cement Association (Doc. 13271)

10.581 The rule would include as jurisdictional waters any feature with a bed and bank and ordinary high water mark that contributes flow to any core water or impoundment of a core water. Obviously, this definition does not require water to be carried in these features for any length of time and therefore would include all ephemeral waters, which flow only in response to rainfall and snowmelt.

The Agencies are without jurisdiction to state that all ephemeral waters are automatically jurisdictional. As the Supreme Court said in *SWANCC*, "we cannot agree.. that Congress' separate definitional use of the phrase 'waters of the United States ' constitutes a basis for reading the term ' navigable waters' out of the statute." In other words, the Supreme Court has held that there must be some limit to the upstream jurisdiction of the Act. An interpretation of the CWA that includes every ephemeral feature with a bed and bank and ordinary high water mark regardless of how infrequently the feature carries water disregards Congress' use of the term "navigable" in the Act. (p. 14)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.582 Under the current regulations, a wetland need not directly abut a "flowing" water to be considered to be "adjacent" to it and therefore be jurisdictional. However, under the current regulations, and the caselaw decided pursuant to those regulations, a wetland that is not adjacent to a flowing water, but is adjacent to a wetland that is, is not jurisdictional.[1109]

. By defining wetlands that contribute flow to a flowing water of the US as tributaries, wetlands adjacent to them will be considered adjacent to a tributary (rather than just to a wetland) and will be considered to be jurisdictional. There is no valid rationale for the change and the change does not comport with the CWA. (p. 22)

[1109] 33 C.F.R § 328.3(A)(7) and 40 C.F.R. § 230.3(s)(7) (both defining the term "waters of the United States" to include "[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.")

Agency Response: **The rule does not define tributary to include wetlands. Preamble, IV.**

Home Builders Association of Central Arizona (Doc. #14285)

10.583 In the last 13 years, the agencies have twice been told by the United States Supreme Court that their existing rules[1110] defining "waters of the United States" exceed the scope of the agencies' allowable regulatory authority under the CWA. *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). For example, prior to these decisions, the agencies' rules provided that all tributaries of waters otherwise regulated under the CWA were themselves automatically regulated. In the arid West, this meant that the agencies regulated ephemeral systems to the very top of the watershed, without regard to the relationship or influence that the washes would have on traditional navigable waters ("TNWs"), and in fact without much regard at all for the boundary between land and waters. 2 See, e.g., 33 C.F.R. § 328.3(a) (Corps rule); 40 C.F.R. § 230.3(s) (EPA Section 404(b)(1) guidelines rule).

If there is one basic conclusion that can be drawn from the decision in *Rapanos*, it is that the Supreme Court concluded that the agencies had exceeded the allowable bounds of their authority established in the Clean Water Act. See, e.g., 547 U.S. at 731-32 (phrase "waters of the United States" as used in the CWA "cannot bear the expansive meaning the Corps would give it") (plurality opinion); *id*. at 758 (in CWA, Congress used "broad, somewhat ambiguous but nonetheless clearly limiting terms") (Roberts, C.J., concurring) ; *id*. at 784 (Kennedy, J., concurring) ("mere hydrologic connection" not sufficient to establish jurisdiction).

Now, almost a decade after *Rapanos*, the agencies are proposing a rule that would assert jurisdiction to essentially the same extent as it was asserted prior to the *SWANCC* and *Rapanos* decisions, and arguably assert authority even more broadly. For example, the proposal would once again assert jurisdiction automatically over all tributaries, regardless of their size, the frequency or duration of flow, or their distance from a downstream traditional navigable water, so long as they possess an ordinary high water mark ("OHWM") and contribute flow, directly or indirectly, to a downstream traditional navigable water. The proposal also would regulate a class of waters that has never before been identified as regulated in agency rules (i.e., all adjacent "waters"; existing regulations are limited to adjacent "wetlands"). The proposal also creates another class of regulated waters – tributaries to interstate waters – that completely sidesteps the direction of the Supreme Court. The over-breadth of the proposal is nowhere more evident than in the fact that it may provide a basis for regulating (as an "other water") the very isolated pond that was held non-jurisdictional in *SWANCC*. (p. 2-3)

Agency Response: **The rule is narrower in scope than the existing rule and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A. B. and C.**

[1110] See, e.g. , 33 C.F.R. § 328.3(a) (Corps rule); 40 C.F.R. § 230.3(s) (EPA Section 404(b)(1) guidelines rule).

Arizona Mining Association (Doc. #13951)

10.584 The agencies' proposal to regulate all tributaries unless specifically exempted under 33 C.F.R. § 328.3(b) (and analogous regulations under other CWA programs) is based on the conclusion that "tributaries and the ecological functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical and biological integrity of traditional navigable waters, interstate waters, and the territorial seas." *See* 79 Fed. Reg. at 22201 (emphasis added); *see also id*. at 22206 (tributaries, including headwater, intermittent and ephemeral streams, have a significant nexus, "especially when all tributaries in a watershed are considered in combination"). In other words, the agencies evaluated all tributaries in a watershed collectively, regardless of potentially differing characteristics among those tributaries (e.g., ephemeral vs. perennial tributaries, large vs. small tributaries, proximate to or far from a TNW, etc.). Having concluded that all tributaries, when evaluated collectively, are significant to downstream TNWs, the agencies then apparently conclude that this means each tributary *individually* is significant with respect to such waters, and that they are all (at least for regulatory purposes) equally significant. This renders the significant nexus test a nullity. (p. 2-3)

Agency Response: The rule is consistent with the statute and the caselaw and the science. Technical Support Document, I.A. and C, II and VII.

10.585 The regulation of all tributaries based on the potential for pollutant transport, as evidenced by an OHWM, is also inconsistent with Justice Kennedy's concurring opinion in *Rapanos*: Rather than focusing on a method for determining those tributaries likely to have a significant nexus on TNWs, as envisioned by Justice Kennedy, the agencies have taken a different approach in the proposal, concluding that all tributaries are regulated if they are "part of a tributary system that drains to" a TNW, so long as the tributary possesses a bed and banks and an ordinary high water mark… The assumption is that the presence of an ordinary high water mark and bed and banks demonstrates sufficient flow for a significant effect to be presumed…

…Justice Kennedy rejected this approach to determining jurisdiction. Immediately following his statements (quoted above) that it might be possible for agencies to identify categories of tributaries that are likely to have a significant nexus (based on objective criteria such as volume of flow and proximity to navigable waters), he stated as follows:

> "The Corps' existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark . . . This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application . . . it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act. *Yet the breadth of the standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system*

> *comprising navigable waters as traditionally understood."* 547 U.S. at 781 (emphasis added).

Later, when reviewing the facts of the particular cases before the Court, Justice Kennedy noted that the Court of Appeals in one of the cases had found evidence that adjacent wetlands had a surface water connection with the non-navigable tributary to which they were adjacent. Because that tributary, in turn, had a hydrologic connection with a downstream navigable-in-fact water, the Court of Appeals held that a significant nexus had been established "by the presence of a hydrologic connection." Justice Kennedy rejected this as a sufficient basis for jurisdiction, stating as follows:

> "Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain. Under the analysis described earlier . . . *mere hydrologic connection should not suffice in all cases*; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." 547 U.S. at 784-85 (emphasis added, internal citation omitted).

It is thus clear that the mere potential for contributing pollutants to downstream waters is insufficient to satisfy Justice Kennedy's concept of a "significant nexus." Yet that is precisely what the agencies have proposed as the basis for regulating all tributaries, up to the very point where the channel begins (which, in the arid West, could be dozens or even as much as a hundred or more miles from the nearest downstream TNW). This approach is simply not consistent with Justice Kennedy's opinion. Some standard needs to be established that would distinguish between tributaries that have a significant effect on downstream TNWs, and those that have merely a "speculative or insubstantial" effect (to use Justice Kennedy's phrase, see 547 U.S. at 780), and are thus outside the scope of the CWA. (p. 6-7)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

10.586 …the AMA believes that the agencies are not correctly following the controlling opinions in *Rapanos* by attempting to regulate all tributaries collectively. This becomes most evident when the proposed rule's definition of "tributary" is applied to dry desert (*i.e.*, ephemeral) features in the arid West. The proposed rule would regulate all tributaries (defined as features that have a bed, bank, and OHWM and "which contribute flow" to otherwise regulated waters), and deems all features meeting this definition to have the "significant nexus" required for jurisdiction no matter how minimal the actual chemical, physical, and biological impact. The rule suggests that the presence of an OHWM and beds and banks are evidence of flow. Left unanswered is the question of how much flow is enough, of what duration, and how frequently flow must occur. This approach cannot be legally or scientifically supported as applied to dry desert washes in arid systems. (p. 7)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

10.587 Lastly, we note that in his concurring opinion in *Rapanos*, Justice Kennedy suggested that presence of an OHWM "may" provide information relevant to a nexus determination

"[a]ssuming it is subject to reasonably consistent application." 547 U.S. at 781 (citing a 2004 GAO report noting inconsistencies in OHWM determinations among Corps Districts). As the Corps documents quoted above make abundantly clear, the nature of dry desert washes in the arid West makes it extremely difficult to reliably and consistently determine OHWM for such features within the region. Use of OHWM as a basis for determining jurisdiction over dry desert washes, as the agencies propose, therefore is not consistent with Justice Kennedy's vision of the "significant nexus" test. (p. 12)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.588 The preamble references *FPL Energy Marine Hydro v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002) where a navigability finding by the Federal Energy Regulatory Commission "based upon three experimental canoe trips taken specifically to demonstrate the river's navigability" was upheld. This "float a boat" test significantly misstates traditional federal approaches to navigability determinations.

As noted above, to be navigable, waters must be "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . . ." *The Daniel Ball, supra. The Montello,* 87 U.S. 430 (1874) (cited in the preamble) represented a refinement of *The Daniel Ball* test in holding that obstructions or obstacles to navigation do not defeat a finding of navigability. That case involved a river system that in its natural state could not have been used by steamboats or larger vessels due to the presence of rapids and other obstructions but nevertheless was used historically to carry a part of the "immense fur trade of the Northwest" over more than a century. *Id.* at 440. There was no question that a substantial canoe-based interstate commerce had been conducted on this waterway.

In response to criticism that the decision would result in virtually any stream being considered navigable, the *Montello* Court said: "It is not, however, . . . 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." *Id.; see also Harrison v. Fite*, 148 F. 781 (8th Cir. 1906) ("Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes"); *North American Dredging Co. of Nev. v. Mintzer*, 245 F. 297 (9th Cir. 1917) (same). Obviously, in *The Montello*, the extensive fur trade conducted on the watercourse in question was the basis for a finding of navigability, not the mere use by canoes. It does not stand for the proposition that navigating a water body by canoe is enough to establish that a waterbody is navigable-in-fact.

Alaska v. Ahtna, Inc., 891 F.2d 1404 (9th Cir. 1989) (also cited in the preamble) similarly does not support a simple "float a boat" test. In *Ahtna*, the court upheld a finding of navigability of the Gulkana River in Alaska based on evidence of substantial flows in the river (3,600 to 4,800 cubic feet per second from May to September) and extensive

commercial recreational use. *Id*. at 1402-03. Thus, this case does not stand for the proposition that a few canoe trips are sufficient to establish navigability. (p. 17-18)

Agency Response: **The final rule makes no change to the agencies' longstanding regulatory text for traditional navigable waters. The preamble to the proposed rule and the Preamble and the Technical Support Document reflect the considerations the agencies will use when making traditional navigable waters determinations. When such a determination is part of a final agency action, if challenged, the federal courts will decide whether a particular water is a traditional navigable water for purposes of the Clean Water Act.**

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

10.589 Under the Proposed Rule, the Agencies seek to make a blanket regulatory determination that all tributaries of traditional navigable waters, interstate waters (including interstate wetlands), the territorial seas, and impoundments of these waters possess the requisite "significant nexus" and therefore would be categorically jurisdictional waters. See 79 Fed. Reg. at 22259-60.[1111] This one-size-fits-all approach, purported to be "based on existing science and the law," *id*. at 22193, wholly disregards the plurality opinion in *Rapanos* (which would exclude from jurisdiction, at a minimum, "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall"[1112]), but it also does away with the nuanced, case-by-case analysis urged by Justice Kennedy in his concurrence. Furthermore, the Agencies' approach in the Proposed Rule would read the "significance" requirement out of the "significant nexus" standard. Just because a connection is not speculative or inconsequential does not automatically render it "significant" in nature, and this fundamental qualitative threshold must be retained if the agency in good faith seeks to incorporate Justice Kennedy's standard. This blanket classification of tributaries as jurisdictional also ignores the limitations imposed by *Riverside Bayview* and *SWANCC*.

Finally, to the extent that the definition of "tributary" itself can include adjacent or intervening wetlands, see n.3, this would appear to be in direct conflict with even Justice

[1111] The proposed new definition of "tributary" is, unsurprisingly, extremely broad. See 79 Fed. Reg. at 22263 (proposed 33 C.F.R. § 328.3(c)(5), defining "tributary" as "a water physically characterized by the presence of a bed and banks and ordinary high water mark…which contributes flow, either directly or through another water, to a water identified in [33 C.F.R. § 328.3(a)(1) through (4)]. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through anther water[,] to a water identified in [33 C.F.R. § 328.3(a)(1) through (3)]. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in [33 C.F.R. § 328.3(b)(3) or (4)])." The referenced exclusions are to certain ditches that either (1) are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow, either directly or through another water, to an identified water. *Id*. (proposed 33 C.F.R. § 328.3(b)(3) and (4)). With regard to the first category, the critical term "uplands" is vague and undefined; with regard to the second category, its application is anticipated to be fairly limited as many ditches would be expected to have the potential to contribute at least some flow.

[1112] *Rapanos*, 547 U.S. at 739.

Kennedy's view of the agency's prior approach to tributaries as articulated in *Rapanos*: "[T]he breadth of this standard [for defining tributary]—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781-82. (p. 6-7)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The definition of tributary in the rule does not include wetlands. Preamble, IV.

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

10.590 The Agencies' categorical assertion of jurisdiction over tributaries and adjacent waters is inconsistent with Supreme Court precendent. As noted above, the proposed definition of tributaries captures non-adjacent, non-navigable tributaries of limited flow on a per se basis based on a blanket generalization that tributary systems are (of course and unsurprisingly) at some level connected to navigable waters. The Agencies assert that this connectivity constitutes a "significant nexus" for tributary systems as a whole. But even Justice Kennedy's concurring opinion in *Rapanos* does not support this new and expansive definition of tributary that reaches to the most remote and ephemeral stretches of the hydrological system.

In fact, Justice Kennedy's opinion is replete with language demonstrating that he did not contemplate that all tributaries would be considered jurisdictional. For example, according to Justice Kennedy, the CWA does not go so far as to establish federal jurisdiction "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that may eventually flow into traditional navigable waters."[1113] He further explained that an OHWM standard for what constitutes a "tributary" presumably provides a rough measure of the volume and regularity flow, and so "assuming it is subject to reasonably consistent application" [but citing a study suggesting otherwise], "it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable water' under the [CWA]."[1114] Moreover, Justice Kennedy state that a "[m]ere hydrological connection should not be sufficient [to establish jurisdiction] in all cases; the connection may be too insubstantial for the hydrological linkage to establish the required nexus with navigable waters as traditionally understood."[1115]

Moreover, under the Agencies' construct, the extension of CWA jurisdiction to all tributaries no matter how ephemeral in nature automatically gives the Agencies jurisdiction over all wetlands and water bodies considered to be adjacent to these

[1113] *Id.*
[1114] *Id*. At 781 (emphasis added).
[1115] *Id*. At 786

"tributaries" under the Agencies' expansive definition. However, Justice Kennedy made clear that such blanket assertions of jurisdictions go too far:

> "[T]he breadth of this standard [i.e., the use of an OHWM alone to establish jurisdiction over a tributary] – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated pools held to fall beyond the Act's scope in *SWANCC*."[1116]

The proposed rule ignores these limits on federal jurisdiction. Instead, the Agencies are attempting to hurdle these statutory limits, as interpreted by the Supreme Court, by latching onto the concept of a "significant nexus", untethering it from the underlying opinions, and using aggregation to avoid any specific analysis or reasonable limits, such as breaks in the OHWM. The proposed definition of tributaries reaches too far and therefore is not supported by the CWA. (p. 9-10)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

American Petroleum Institute (Doc. #15115)

10.591 This test for jurisdiction over tributaries and wetlands embodies both opinions constituting the majority opinion in *Rapanos*, and it should form the basis for this rulemaking for wetlands, tributaries, adjacent waters, and isolated "other waters." The application of this jurisdictional test would be clear and straightforward.

Although the Agencies have based major portions of the 2014 Proposed Rule on the wrong jurisdictional test, they also misinterpret and misapply Justice Kennedy's significant nexus test. By asserting jurisdiction over landscape features that have a bed, bank, and ordinary high water mark—but almost never actually contain water—the Agencies claim jurisdiction over landscape features that have insignificant or nonexistent connections to a navigable water. By asserting jurisdiction over all waters "adjacent" to navigable waters but not actually connected to them, the Agencies assert jurisdiction over many waters that lack a substantial connection to a navigable water. And with respect to "other waters," the Agencies have stretched the application of the significant nexus beyond its breaking point by adopting a watershed aggregation approach to evaluate the nexus between an isolated intrastate water and a navigable water within the same watershed. (p. 3)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

[1116] *Id*. At 781-82.

Oregon Cattlemen's Association (Doc. #5273.1)

10.592 However, the jurisdictional status of "tributaries" was not at issue in *Rapanos*. Because *Rapanos* concerned the jurisdictional status of "wetlands," which already had a precise regulatory definition under 40 C.F.R. 230.3(t), and not the jurisdictional status of "tributaries," which would be given a regulatory definition for the first time under this proposed rule, the Court had no occasion to comment on this issue. Further, as the *Rapanos* Court expressly found, Congressional acquiescence to a regulation is not the same thing as approval of that regulation. *Rapanos*, 547 U.S. at 749-750. Writing for the plurality, Justice Scalia explained that absent "overwhelming" evidence of acquiescence, the Court should not substitute an Agency's interpretation of a Federal statute for the actual text of that statute. *Id.* at 750 (citing *SWANCC*, 531 U.S. at 169-170). The *Rapanos* holding does not give the Agencies license to impose the regulations they propose.

Further, the *Rapanos* Court could not possibly have assented to the exercise of jurisdiction over wetlands because "tributaries" (as the agencies propose to define the term) was not defined in the regulations at issue as to include "wetlands." *See* 40 C.F.R. 230.3(s)(5). The Agencies should rely on the natural use of words as defined by Webster's Dictionary, as did Justice Scalia in his *Rapanos* opinion. *Rapanos*, 547 U.S. at 732. It is illogical and contrary to the natural use of words for the Agencies to conclude that a "tributary" means anything other than "a stream that flows into a larger stream or river or into a lake." Webster's New International Dictionary (2d ed. 1954). (p. 4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule does not define tributary to include wetlands.

Alameda County Cattlewomen (Doc. #8674)

10.593 ACCW assert that only stream features with "relatively permanent, standing or continuous" flow, pursuant to Justice Scalia's Plurality Opinion in *Rapanos* should be included in the definition of "tributary."[1117] This would limit the number of features that can be considered "tributaries" to those that could actually have a significant impact on the water quality of downstream waters, pursuant to the decision in *Rapanos*.[1118] It would also provide needed clarity to the ranching community. ACCW assert that intermittent and ephemeral features should NOT be considered "waters of the U.S." because these features are best regulated by states and localities, and were not intended by Congress to be regulated by the federal government. EPA's own *Rapanos* Guidance states, "Justice Scalia emphasizes that relatively permanent waters do not include tributaries 'whose flow is coming and going at intervals…broken, fitful.'"[1119] While ACCW disagree with the guidance's ultimate position of being able to claim jurisdiction over intermittent or

[1117] *Rapanos*, J. Scalia, at 20 (In sum, on its only plausible interpretation, the phrase :the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features "that are described in ordinary parlance as "stream[,]…oceans, rivers, [and] lakes.").
[1118] *Id.*
[1119] EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, at 7 (Dec. 2, 2008)."

ephemeral streams under a significant nexus analysis, we request the agencies explain the rationale of this significant policy shift. (p. 10)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The 2008 Guidance was practical implementation guidance and not an interpretation of the CWA; to the extent there is a change in policy position, the agencies have provided a rationale. Preamble and Technical Support Document, I.C.

National Sorghum Producers (Doc. #10847)

10.594 First, the proposed rule assigns an impermissibly expansive definition of "tributaries" to be regulated as waters of the United States. The proposed rule defines "tributary" to mean "a water physically characterized by the presence of a bed and banks and ordinary high water mark…which contributes flow, either directly or through another water, to a [jurisdictional water]." A "water" does not lose its status as a tributary despite any man-made (e.g. bridges, culverts, pipes, or dams) or natural breaks provided that there is the presence of a bed, banks, and an ordinary high water mark upstream of the break. An ordinary high water mark means any sign that water has been there. A bed and banks means a slight change in elevation. The frequency, duration, and volume of water involved bears no relevance. For the first time, ditches would fall within the reach of the EPA and Corps regulations, including roadside, storm water, and irrigation ditches as well as other man-made conveyances. Ditches governable under the proposed rule could carry any amount of water which eventually flows over any distance through any number of other ditches to a navigable water. The exceptions to the rule are ditches that do not flow directly or indirectly to a jurisdictional water and ditches excavated wholly in uplands, that drain only in uplands, and that have less than perennial flow. Ephemeral streams would come within regulatory reach under the proposed rule even if they are dry most of the year. Parcels of land not wet most of the year but hosting water-tolerant vegetation are also subject to federal jurisdiction as are lakes and ponds even when there is no presence of a bed, banks, and an ordinary high water mark. Based on this all-encompassing definition, we are hard-pressed to imagine what "water" the EPA and the Corps could not assert jurisdiction over. (p. 1-2)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The agencies disagree that the rule would regulate ditches for the first time. Preamble, IV; Technical Support Document, I.B. Many ditches will be excluded under the rule. Preamble, IV.

Alameda County Cattlewomen (Doc. #8674)

10.595 Even the Congressional Research Service (CRS) stated that the proposed rule has a "broadly defined" new definition of tributary, validating our concern that the proposed rule is a significant expansion compared to current regulations.[1120] The agencies cannot

[1120] Congressional Research Service, *EPA and the Army Corps' Proposed Rule to Define "Waters of the United States", available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&sqi=2&ved=0CB4QFjAA&url=http%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2FR43455.pdf&ei=JRYGVJJIzqjIBPjvgcgK&usg=A

claim that the proposed definition is not an expansion based on jurisdiction they asserted under their Migratory Bird rule, because that theory of jurisdiction was struck down by the Supreme Court in *SWANCC*.[1121] The agencies cannot claim the proposed rule is not an expansion based on their "any hydrological connection" theory because that too was struck down by the Supreme Court in *Rapanos*.[1122] The agencies cannot claim the proposed rule is not an expansion based on previous guidance documents, because guidance documents are not legally binding, cannot change the substance of the underlying regulation, and rarely can receive judicial review. (p. 6)

Agency Response: **The existing rule did not define tributary and so had no limits on the scope of tributaries that were jurisdictional; the definition in the rule establishes limits for the first time on tributary. The rule is narrower in scope than the existing rule and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A. B. and C.**

10.596 The agencies claim jurisdiction broadly over all tributaries with no site-specific analysis needed. By rule, the agencies have declared anything with a bed, bank and OHWM that might ever contribute flow to be a jurisdictional water, without regard to their impact to downstream TNWs and therefore without regard to whether each will satisfy the significant nexus test. The negative impact of such a broad categorical sweep is compounded by the fact that due to the agencies' new category of per se jurisdictional "adjacent waters" all open water "adjacent" to these tributaries will also become jurisdictional. This is an expansion of the agencies' authority and cannot be reconciled with the Supreme Court decisions.

The definition of "tributary" under the proposed rule is overly broad, encompassing any wet or dry feature that has a bed, a bank, and an OHWM that might ever contribute flow "directly or through another water,…" to either a Traditional Navigable Waters (TNW), an interstate water or wetland, a territorial sea or an impoundment a TNW, an interstate water or wetland, or a territorial sea. It also encompasses waters that lack a bed, bank and OHWM if they contribute flow directly or through another water to a TNW, an interstate water or wetland, or a territorial sea. (Proposed Rule at 22241).

This definition cannot be supported by either the plurality or Justice Kennedy's concurrence in *Rapanos*. The plurality opinion stated, "The breadth of the Corps' existing standard for tributaries—which seems to leave room for regulating drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it— precludes that standard's adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[1123] Justice Kennedy stated, "[t]hrough regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their

FQjCNGq5dlTONe-KCN-v-5FOmTuh38v2w&sig2=UBrr5c69WZitk_UwSF9Odg&bvm=bv.74115972,d.aWw. (accessed on Sept. 2, 2014) ("the term "tributary" is newly and broadly defined in the proposal")."

[1121] *Supra* Note 9.

[1122] *Rapanos*, J. Scalia, at 3 ("A wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection.").

[1123] *Rapanos*, J. Scalia, at 4."

proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform Important functions for an aquatic system incorporating navigable waters." Even Justice Kennedy's concurrence in *Rapanos* recognized that the Corps' definition of "tributary" at that time left "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it…"[1124] It can easily be determined that both the plurality and Justice Kennedy would *not* find all waters with a bed, bank, and OHWM to meet the requisite significant nexus test that "perform important functions for an aquatic system incorporating navigable waters." To the contrary, Kennedy actually criticized the plurality opinion for potentially wrapping in many such waters that simply have a trickle of water running, but a trickle that runs into an otherwise navigable water either year-round or seasonally.[1125] (p. 6-7)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Michigan Farm Bureau (Doc. #10196)

10.597 …lacking the support for a categorical finding of significant nexus undermines the attempt by EPA and USACE to categorically regulate all tributaries as the agencies define them. The decision in *Rapanos* on which the agencies relies requires the test for significant nexus, but categorical inclusion of all tributaries, particularly the way they are defined in the proposed rule, falls short of that standard. This standard is missed even further by EPA and USACE's contention that waters are still categorically included even if separated by man-made or natural breaks, regardless of whether those breaks actually interrupt the significance of that water's connection downstream. (p. 5)

Agency Response: The rule is consistent with the statute and the caselaw and the science. Preamble, Technical Support Document, I.A. and C; II and VII.

California Association of Winegrape Growers (Doc. #14593)

10.598 Justice's Kennedy's "significant nexus" standard was specific to determining jurisdiction for wetlands and does not apply to all waters such as tributaries. (Id. at 780-781.) Kennedy expressly rejected the propriety of expanding this aggregation standard to tributaries. Thus, to apply the significant nexus standard to tributaries directly contravenes the clear distinction drawn in Justice Kennedy's concurring opinion. (p. 9)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Multiple Agricultural Organizations (Doc. #16357.1)

10.599 The Agencies claim the proposal is faithful to key Supreme Court decisions, yet the Supreme Court admonished the Agencies' for using the OHWM indicator. The plurality

[1124] *Rapanos*, J. Kennedy, at 24-25 (stating that when looking at adjacent wetlands the Corps can only find "adjacent wetlands" jurisdictional for "certain major tributaries" because the Corps current definition for "tributary" was so broad as to include remote drains, ditches, and streams remote from any TNW)."

[1125] *Rapanos*, J. Kennedy, at 12 (criticizing the plurality for allowing "[t]he merest trickle, if continuous, would count as a "water" subject to federal regulation…")."

opinion in *Rapanos v. United States* criticized the use of the OHWM as an indicator of jurisdiction because it "extended the waters of the United States to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris." 547 U.S. 715, 725 (2006) (internal quotations omitted). Justice Kennedy disparaged the OHWM as providing "no such assurance" of a reliable standard for determining a significant nexus. *Id*. at 780-81 (Kennedy. J., concurring in the judgment). If a determination that a particular channel has an OHWM is so broad and subjective, how can a farmer or rancher know whether a particular low area across his land is simply land or instead is a regulated ephemeral tributary? (p. 8)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Goehring Vineyards, Inc. (Doc. #19464)

10.600 The Proposed Rule categorically asserts jurisdiction broadly over all tributaries with no site-specific analysis required. By rule, anything with a bed, bank, and ordinary high water mark which may directly or indirectly contribute flow to a jurisdictional water, without regard to its impact on downstream waters. Further, again by rule, wetlands, lakes, and ponds are tributaries even if they lack beds, banks, or ordinary high water marks. (79 Fed. Reg. 22201 (April 21, 2014.) The Agencies' decision to use the presence of an ordinary high water mark as one of the factors for considering a water to be a tributary under Kennedy's standard is directly counter to Kennedy's clear directive. Kennedy clearly stated:

> "As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a "line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics," § 328.3(e). This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act. Yet the breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." (*Rapanos*, supra, at 780-782, citations omitted.)

As evidenced in the above language, Kennedy determined that the inconsistent application of the ordinary high-water mark precludes its use as a factor for determining if a waterbody meets the definition of a tributary. (*Ibid*.) By disregarding the directive, the Proposed Rule's reliance on the ordinary high-water mark is not a reasonable measure of whether a tributary processes a significant nexus with a traditional navigable water. (p. 10-11)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.**

Clearwater Watershed District, et. al. (Doc. #9560.1)

10.601 Wetland s that are connected hydrologically to a stream with perennial flow into navigable water certainly meet the hydrological connection test authored by Justice Scalia under *Rapanos* and likely also meet the significant nexus test authored by Justice Kennedy. We are concerned that the proposed rule attempts to define wetlands as jurisdictional tributaries if the wetland, when at full retention capacity, overflows across upland during a rainfall event, thereby establishing a hydrological connection to a perennially flowing tributary. All wetlands, when at full retention capacity within their basin, flow overtop upland when additional rainfall occurs. That connection, in and of itself, does not make the wetland jurisdictional as a tributary to other tributaries or covered waters.

The agencies must evaluate the connectivity and nexus of waters and wetlands under "normal circumstances." For example, when delineating a wetland, evidence gathered under conditions that are too wet or too dry are typically not considered as credible indicators for identifying whether the land is classified as "wetland." Similarly, using hydrological connections between wetlands during extreme rainfall events and tributaries does not create a credible indicator that the wetland has a jurisdictional connection that significantly impacts the integrity of navigable waters.

We believe that the agencies' attempt to describe some wetlands as tributaries is an attempt to bring more wetlands into jurisdiction as "navigable waters" without proper scientific or legal justification. If a wetland's outlet is the justification for a finding of "significant nexus" under Justice Kennedy's test in *Rapanos*, then the wetland is jurisdictional as an "adjacent wetland." Claiming jurisdiction over the wetland as a tributary only further confuses the regulated community and prevents clear, bright-line rules that can be understood in the field. (p. 11)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The rule does not define tributary to include wetlands. Preamble, IV.**

North Dakota EmPower Commission (Doc. #13604)

10.602 EmPowerND is concerned with this new definition for several reasons. In conducting agricultural, mining, or other land disturbance activities, one encounters many hydrologic and ephemeral connections. This power grab disregards the holding in both the *SWANCC* and *Rapanos* decisions where the Court found that the CWA does not support an expansive meaning of the term "waters of the United Sates" to include ephemeral channels and drains as tributaries. In *Rapanos*, the Court expressly held that including "ephemeral streams, wet meadows, storm sewers…within the meaning of 'waters of the U.S.' has stretched the term beyond parody."[1126] In fact, ephemeral streams are typically dry channels or erosional features that are small and carry water only in response to precipitation, and lack more than an attenuated connection to traditionally navigable

[1126] *Rapanos* at 732.

waters. The EPA and Corps cannot simply create a regulatory presumption of jurisdiction over ephemeral waters and impose jurisdiction under the CWA contrary to the Court's decisions. (p. 4)

Agency Response: The rule is consistent with the statute and the caselaw and the science. Preamble, III and IV. Technical Support Document, I.A. and C., II and VII.

Murray Energy Corporation (Doc. #13954)

10.603 …The Agencies' blanket assertion of jurisdiction over all tributaries contravenes Justice Kennedy's significant nexus test, which was designed to rule out minor tributaries involving insignificant connections to TNWs. *Rapanos* at 781-782 ("This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application…it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."). Thus, Justice Kennedy's significant nexus test does not support the sort of broad and unlimited assertion of jurisdiction over all tributaries without regard to the strength of their connection to downstream waters.

Yet the Proposed Rule, with its revised definition of "tributary" seeks to do just that, sweeping all tributaries, including most ditches, into the definition of waters of the U.S., without regard to flow, duration of flow, proximity to or effect upon traditional navigable waters… (p. 10)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Southern Company (Doc. #14134)

10.604 Kennedy opposed the regulation of drains, ditches, and streams remote from TNWs, even if they were connected hydrologically. Yet the agencies' position directly contradicts Justice Kennedy's very own words and is an entirely inaccurate reading of his opinion. The fact that Kennedy concluded that not all tributaries are jurisdictional should not be lost, nor should the fact that the government's proposal presumptively concludes otherwise. Kennedy rejected the "any hydrologic connection" test, which puts the government's proposal directly at odds with it. Simply put, nowhere in Kennedy's opinion is their support for the government's sweeping and unbounded claims of jurisdiction even in the absence of hydrological connection. (p. 26)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

10.605 Unfortunately and unwisely, the agencies ground these expansions in untested and unstable legal interpretations. This is particularly reckless in the context of the *per se* jurisdictional expansions over "tributaries" and "adjacent waters," not to mention in direct conflict with even Justice Kennedy's opinion. The agencies must exercise caution and restraint when making waters jurisdictional by rule. (p. 29)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

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

10.606 As the plurality of the U.S. Supreme Court explained in *Rapanos*, the CWA gives federal and delegated state authorities regulatory jurisdiction over discharges of pollutants into "navigable waters," which the Act defines as "waters of the United States [WOTUS], including the territorial seas.[1127] Soon after the initial enactment of the CWA in 1972, the Corps adopted the traditional jurisdictional definition of "navigable waters" (and, thus, WOTUS) to mean "navigable in fact," although federal agencies have deliberately since sought time and time again to expand their jurisdiction by continually expanding their interpretation of WOTUS.[1128]

However, in *Rapanos*, the plurality of the U.S. Supreme Court noted that even though the meaning of "navigable waters" (and, thus, WOTUS) is broader than the traditional understanding of that term, the plurality emphasized that "navigable is not devoid of significance."[1129] The CWA only confers jurisdiction over "relatively permanent, standing, or flowing bodies of water"[1130] and only if there is "at a bare minimum, the ordinary presence of water."[1131] EPA and the Corps downplay the plurality's clear emphasis that the agencies only have CWA jurisdiction over features where there is a relatively permanent or ordinary presence water by suggesting that the plurality's reference to "seasonal rivers" that are jurisdictional even though they are dry some months of the year justifies the reach of the Proposed Rule to dry land.[1132] However, EPA's and the Corp's reliance on "seasonal rivers" that are jurisdictional takes the plurality' s footnote out of context. When read in context, the plurality stated that:

> "By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months--such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. . . . It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent' s "intermittent" and "ephemeral" streams-- that is, streams whose flow is "[c]oming and going at intervals...[b]roken, fitful,"…or "existing only, or no longer than, a day…–are not."[1133]

Thus, the U.S. Supreme Court plurality in *Rapanos* clearly stated that "seasonal" rivers that contain some flow during some months of the year are subject to CWA regulation, but also stated that intermittent and ephemeral streams are not subject to CWA regulation. The plurality in *Rapanos* summarized as follows :

[1127] *Rapanos*., 547 U.S. at 722-23, citing in part 33 U.S.C. § 1311(a) and 33 U.S.C. § 1362(7) and (12).
[1128] *Jd*., at 723-26.
[1129] *ld*., at 731, citing *SWANCC*, 531 U.S. at 172 and 2 12; *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121. At 133 (1985).
[1130] *Id*., at 733; see also *id*. at 734 (the CWA "confers jurisdiction only over relatively permanent bodies of water." (emphasis in the *Rapanos* plurality opinion)).
[1131] *Id*., at 734.
[1132] 79 Fed.Reg , 22252, citing *Rapanos*, 547 U.S. at 732, n. 5.
[1133] *Rapanos*, 547 U.S. at 732, n. 5.

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[.]…oceans, rivers, [and] lakes."…The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[1134]

Further, only wetlands with a continuous surface connection to bodies that are WOTUS in their own right are WOTUS; wetlands with only an intermittent, physically remote hydrologic connection to WOTUS lack the necessary connection to be WOTUS.[1135]

For the same reasons that the "Land is Waters" approach to federal CWA jurisdiction, as termed and described in *Rapanos*, was vacated, the Proposed Rule is beyond the legal authority of EPA and the Corps because the Proposed Rule would regulate land and water features without regard to whether there is a relatively permanent source of water.[1136] Thus, the Proposed Rule's new definitions of "tributary", "neighboring," "riparian," and "floodplain" when read together would extend EPA's and the Corps' CWA regulatory authority beyond the bounds the U.S. Supreme Court has set. The significant nexus test in the Proposed Rule would extend even further beyond those bounds. (p. 10-11)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

Chesapeake Bay Foundation (Doc. #14620)

10.607 Recognizing the *Rapanos* decision's importance to the health of the Chesapeake Bay and its tributaries, CBF submitted an amicus curiae brief in the *Rapanos* case supporting the U.S. Army Corps of Engineers' (Corps) jurisdiction over non-tidal wetlands and headwater streams. CBF explained that without CWA jurisdiction over non-navigable tributaries and adjacent wetlands, the Bay states could not achieve the stricter water quality standards and waste load allocations necessary to restore the water quality of the Chesapeake Bay. This remains true today and is even more pressing in light of the upcoming 2017 and 2025 benchmark deadlines for the Chesapeake Bay TMDL for sediment, nitrogen, and phosphorous. (p. 2-3)

Agency Response: The agencies agree that the CWA protects non-navigable territories and their adjacent wetlands.

National Federation of Independent Business (Doc. #8319)

10.608 The Proposed Regulation provides that any "natural, man-altered, or man-made water body" with an ordinary high water mark will be considered a tributary, and therein requires the Agencies to assert jurisdiction over practically any land over which water occasionally flows by applying either the 'continuous surface connection" or "nexus"

[1134] *Id*., at 739, citing Webster's Second 2882 and *Chevron U.S.A. Inc. v. NRDC.* 467 U.S. 837,843 (1984).
[1135] *Id*., at 742, citing SWANCC. 531 U.S. at 167.
[1136] *Id*., at 734. The plurality of the U.S. Supreme Court stated that "In applying the definition [of WOTUS] to "ephemeral streams," ... man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term" waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction."

tests. But, both *Rapanos* tests such an expansive interpretation of CWA jurisdiction. *Rapanos*, 547 U.S. at 731-32. Justice Kennedy's "significant nexus test" was not intended to apply beyond wetlands to tributaries. And the plurality's "continuous surface connection" test was intended to strictly limit CWA jurisdiction over tributaries, and would not justify assertions of jurisdiction over "ditches, channels and conduits." *Id.* at 737-39. (p. 6)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

National Waterways Conference (Doc. #12979)

10.609 The Proposed Rule classifies tributaries as jurisdictional by rule and, for the first time, defines the term. The agencies' conclusion that all tributaries have a significant nexus to jurisdictional waters without any case-specific review to identify factors of significance exceeds the intended limits of *Rapanos*. Thus both the proposed assertion of jurisdiction over all tributaries without any analysis, as well as the definition of the term "tributary," are excessively broad.

"Tributary" is defined in the Proposed Rule as "a water physically characterized by the presence of a bed and banks and ordinary high water mark [("OHWM")]…which contributes flow, either directly or through another [jurisdictional water]," and, additionally, "wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow."[1137] While a bed, banks and OHWM can be easily identified in some locations, in others those features are not evident, especially an OHWM. Despite that difficulty, the proposed rule would deem any area with those features to be jurisdictional. Realistically, that has the potential to require examination of miles of upstream tributary features both at the project site and between there and a traditionally navigable waterway. The applicant may not even have access to the entire area due to legal or physical constraints.

The agencies themselves do not yet fully understand the potential reach associated with extending jurisdiction based on these features. In August 2014, well into the comment period for this rulemaking, the Corps released two new documents pertaining to OHWM determinations, one of which readily acknowledges a "need for nationally consistent and defensible regulatory practices."[1138] That can only mean that the Corps' own experts in this area would concede that today's practices have not proven to be nationally consistent and defensible. In fact, the Corps has produced an entire report with the stated objective of determining "the most appropriate factors to include in a national OHWM classification."[1139] As the factors to be used in identifying OHWM have yet to be

[1137] 79 Fed. Reg. at 22,263.

[1138] Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark Classification, at 1-2 (August 2014) (hereinafter "OHWM Classification Review"); see also Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014).

[1139] OHWM Classification Review, supra note 36, at 3.

determined, the agencies may not credibly claim that the proposed rule provides clarification or that is does not expand jurisdiction.

The definition contains no reference to the volume or frequency of flow, which would seem an important consideration in determining whether an area constitutes a "water" or not. That creates additional uncertainty and potential for jurisdictional over-reaching. The definition thus could encompass impermanent waters that lack consistent flow, clearly deviating from the standard articulated by Justice Scalia in the *Rapanos* plurality opinion[1140] and raising serious problems under the "significant nexus" test. (p. 9-10)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The Corps has a longstanding definition of ordinary high water mark and the rule is not being changed (it is being incorporated into EPA's definition of "waters of the United States." The existence of practical implementation guidance provides additional clarity.

Southeastern Legal Foundation, Inc. (Doc. #16592)

10.610 The definition of tributary impermissibly expands federal jurisdiction. In defining "tributary" in the Proposed Rule, the Agencies once again disregarded Supreme Court instruction. In *Rapanos*, Justice Kennedy suggested that some tributaries may be jurisdictional. "Through regulations..., the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough ... .'[1141] If only some categories of tributaries are "significant enough," that implies that some categories of tributaries are not "significant enough" to support jurisdiction either for themselves or adjacent wetlands. Based on this language, the Proposed Rule's inclusion of all tributaries as per se jurisdictional is mistaken. Looking at the Corps' "existing standard for tributaries"[1142] (which was less expansive than the definition of tributary in the Proposed Rule), Justice Kennedy held that "the breadth of this standard - which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it - precludes its adoption as the determinative measure…"[1143]

Despite Justice Kennedy clarifying that only some tributaries should qualify as jurisdictional, the Proposed Rule determines that all tributaries are per se jurisdictional. Despite Justice Kennedy determining that the Corps' tributary standard at the time could not be the determinative standard, the Proposed Rule defines tributaries to be more encompassing than the Corps' *Rapanos* standard. One reason the definition is so broad is that it contains no metrics for volume, duration or frequency of flow. All we know is that a tributary must "contribute flow," an undefined phrase, to Traditional Waters at some point which can be a far distance from the tributary. With no meaningful criteria, almost

[1140] 547 U.S. at 739 (finding that the agencies' authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters.).
[1141] *Rapanos*, 547 U.S. at 780-81.
[1142] A tributary "feeds into a traditional navigable water (or a tributary thereof) and possess an ordinary high-water mark." *Id*. at 781.
[1143] *Id*.

any water could qualify as a tributary and therefore as a WOTUS. This cannot be the standard; therefore, the Proposed Rule must be withdrawn. (p. 20-21)

Agency Response: The rule is narrower in scope than the existing regulation and the rule is consistent with the statute and the caselaw. Technical Support Document, I.A. B. and C.

Coalition of Alabama Waterways (Doc. #15101)

10.611 The agencies assert jurisdiction too broadly over tributaries. The Proposed Rule classifies tributaries as jurisdictional by rule and, for the first time, defines the term. The agencies' conclusion that all tributaries have a significant nexus to jurisdictional waters without any case-specific review to identify factors of significance exceeds the intended limits of *Rapanos*. Thus both the proposed assertion of jurisdiction over all tributaries without any analysis, as well as the definition of the term "tributary," are excessively broad.

"Tributary" is defined in the Proposed Rule as "a water physically characterized by the presence of a bed and banks and ordinary high water mark [("OHWM")]…which contributes flow, either directly or through another [jurisdictional water]," and, additionally, "wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow."[1144] While a bed, banks and OHWM can be easily identified in some locations, in others those features are not evident, especially an OHWM. Despite that difficulty, the proposed rule would deem any area with those features to be jurisdictional. Realistically, that has the potential to require examination of miles of upstream tributary features both at the project site and between there and a traditionally navigable waterway. The applicant may not even have access to the entire area due to legal or physical constraints.

The agencies themselves do not yet fully understand the potential reach associated with extending jurisdiction based on these features. In August 2014, well into the comment period for this rulemaking, the Corps released two new documents pertaining to OHWM determinations, one of which readily acknowledges a "need for nationally consistent and defensible regulatory practices."[1145] That can only mean that the Corps' own experts in this area would concede that today's practices have not proven to be nationally consistent and defensible. In fact, the corps has produced an entire report with the stated objective of determining "the most appropriate factors to include in a national OHWN classification."[1146] As the factors to be used in identifying OHWM have yet to be determined, the agencies may not credibly claim that the proposed rule provides clarification or that it does not expand jurisdiction.

[1144] 79 Fed. Reg. at 22,263

[1145] Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark Classification, at 1-2 (August 2014) (hereinafter "OHWM Classification Review"); see also Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014).

[1146] OHWM Classification Review, supra note 36, at 3.

The definition contains no reference to the volume or frequency of flow, which would seem an important consideration in determining whether an area constitutes a "water" or not. That creates additional uncertainty and potential for jurisdictional over-reaching. The definition thus could encompass impermanent waters that lack consistent flow, clearly deviating from the standard articulated by Justice Scalia in the *Rapanos* plurality opinion[1147] and raising serious problems under the "significant nexus" test.

The inclusion of ditches constitutes an impermissible expansion of jurisdiction. Although the Proposed Rule would exclude two types of ditches from CWA jurisdiction[1148] ditches that do not meet the criteria for exclusion could be considered waters of the United States. The proposed definition of "tributary" could be interpreted to include man-made waters with artificial features, such as drainage ditches or artificial ponds. Also, ditches with perennial flow are not covered by the exemption, but it is not clear what the agencies believe is meant by "perennial flow."

The agencies seem to suggest that the exclusions from jurisdiction in the Proposed Rule show restraint. However, the narrowness of the exclusions only serves to demonstrate how broadly the Proposed Rule applies. This is especially apparent with respect to the two exemptions for ditches. The agencies exclude from jurisdiction those ditches that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and those that "do not contribute flow, either directly or through another water," to various other categories of jurisdictional waters.[1149] Those exclusions are categorical, but the categories are tiny. Water flows downhill; the water in an upland ditch is no exception. Further, even if the ditch drains to a feature that generally contains water in an upland area, such that it does not typically affect downstream waters, the agencies' "fill and spill" theory[1150] means jurisdiction can be found on the basis of periodic overflow. How many ditches have the agencies identified that never, under any circumstances, contribute any amount of flow to downstream waters or wetlands?

A reasonable reading of the Proposed Rule would lead to the conclusion that the very drainage ditches considered in *Rapanos*—the same ones, according to the Court, that the agencies improperly brought within CWA jurisdiction—are jurisdictional. However, Justice Kennedy indicated that a ditch ought not to be jurisdictional where it is "located many miles from any navigable-in-fact water and carry only insubstantial flow towards it."[1151] (p. 10-12)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The Corps has a longstanding definition of ordinary high water mark and the rule is not being changed (it is being incorporated into EPA's definition of "waters of the United States." The existence of practical implementation guidance provides additional clarity.**

[1147] 547 U.S. at 739 (finding that the agencies' authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters.).
[1148] 79 Fed. Reg. at 22,263
[1149] *Id*.
[1150] *Id*. at 22,208.
[1151] *Rapanos*, 547 U.S. at 786.

10.8. SUPPLEMENTAL COMMENTS ON LEGAL ANALYSIS

Agency Summary Response

For the reasons articulated in the Preamble to the rule, the Technical Support Document, the Science Report, and the administrative record for the rule, the agencies conclude that the rule is consistent with the Clean Water Act, the Supreme Court decisions, and the Constitution.

Specific Comments

Eric W. Nagle (Doc. #0009.1)

10.612 EPA's proposed definition of "waters of the United States" is unduly narrow, because it rests on a fundamental misunderstanding of the constitutional authority upon which Congress relied when it enacted the Clean Water Act (CWA). The proposed definition relies exclusively on Commerce Clause authority, making the "interstate or foreign commerce" nexus the key factor in determining whether waters fall within CWA jurisdiction. This is simply wrong.

While the Commerce Clause is one constitutional basis for CWA jurisdiction, it is by no means the only basis. Nothing in the text of the CWA or in the Act's legislative history suggests that Congress relied solely on the Commerce Clause. To the contrary, when Congress enacted the 1972 FWPCA amendments, the Conference Committee stated that "[t]he conferees fully intend that the term 'navigable waters' be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess., 144, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3822 (emphasis added). When Congress amended the CWA in 1977, it chose to retain the "comprehensive jurisdiction over the Nation's waters" exercised in the 1972 Act. United States v. Riverside Bayview Homes, 474 U.S. 121, 137 (1985) (quoting Sen. Baker).

Thus, Congress clearly intended that the definition of "waters of the United States" should draw upon *all* sources of federal authority under the Constitution, and not just the Commerce Clause. Reading the CWA in this light is consistent with the established rule of federal constitutional law that "[i]n determining the reach of an exertion of legislative power, it is customary to read various granted powers together." Heart of Atlanta Motel v. United States, 379 U.S. 241, 280 (1964) (Douglas, J., concurring). See also Federal Power Comm'n v. Oregon, 349 U.S. 435, 442-43 (1955) (under Federal Power Act, federal licensing authority over water resource projects rests on Commerce Clause where navigable waters are involved, and on Property Clause where federal lands are involved). (p. 1 – 2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

M. Young (Doc. #1430)

10.613 Clearly even Justice Kennedy statement of requiring a need for establishing on a case-by-case basis the "significant nexus" (which I have to assume is in order to exercise

the much abused general welfare clause) has been ignored by the Environmental Protection Agency (EPA) and the Administration in their efforts to trample the 9th Amendment of the U.S. Constitution regarding rights reserved by the citizens and the 10th Amendment of the U.S. Constitution regarding the rights of the States.

Chief Justice Roberts and Justices Scalia, Thomas and Alito document compelling case law precedent that the COE and EPA position is flawed and cannot be allowed to stand. (p. 5)

Agency Response: The rule is consistent with decisions of the Supreme Court and the Constitution. Technical Support Document, I.C.

New York State Attorney General (Doc. #10940)

10.614 Third, by clarifying the scope of "waters of the United States," the proposed rule would promote predictability and consistency in the application of the law, and in turn help clear up a confusing body of case law that has emerged. Since the Supreme Court's plurality decision in *Rapanos v. United States,* 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain CWA jurisdiction, with some courts adopting Justice Kennedy's significant nexus test, some adopting the plurality's test, and some tending to defer to the agencies' fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for Agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act's application. The proposed rule's clear categories of waters subject to the Act would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would be of benefit to the states because it would ease some of the administrative burden of having to make many fact-based determinations employing uncertain tests. In this regard, in the rulemaking the agencies have requested comments as to how a final rule could ease that burden further. (p. 2 – 3)

Agency Response: The rule provides for increased clarity and certainty. Preamble, II and IV. The rule is consistent with caselaw. Technical Support Document, I.C.

Office of the Board Attorney, Board of Supervisors Jackson County, Mississippi (Doc. #12262)

10.615 On closer inspection, the proposed rule looks very similar to what the federal government argued, and lost, in Rapanos. In its brief, the government argued that "the connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream." Brief of the United States at 15, Rapanos v. United States, 547 U.S. 715 (2006). The federal government rejected the notion "that some tributaries may have such an attenuated connection to traditional navigable waters that federal protection of those tributaries would be unwarranted." Id.

The Supreme Court, and Justice Kennedy in particular, disagreed. Justice Kennedy rejected many of the assertions underpinning the rule, holding that one cannot

definitively state that a wetland has a significant nexus solely because it is adjacent to an ordinary high-watermark tributary:

> [T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics .. . . *the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood*. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC."

Rapanos, 547 U.S. at 805-806 (emphasis added). Yet, in its proposed rule, the EPA defined tributaries as "water physically characterized by the presence of a bed and banks and ordinary high water mark" and concluded that all adjacent waters are per se jurisdictional because of a "significant nexus" finding. Although Justice Kennedy's opinion recognized that the Corps could choose to identify and protect tributaries that "are likely, in the majority of cases" to have a significant nexus to traditionally navigable water, it rejected the idea that the CWA protects every discernible water that contributes flow directly, or indirectly, to a traditionally navigable water, no matter how remote and insubstantial. Id. at 781. (p. 5)

Agency Response: Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III, and Technical Support Document, I.B, I.C. and II.

Duke Energy (Doc. #13029)

10.616 [T]he proposed rule applies Justice Kennedy's "significant nexus" standard incorrectly in several ways.

- In his concurring opinion, Justice Kennedy adopted the language for the "significant nexus" test from the Riverside Bayview Homes case, where the Court upheld the Corps' jurisdiction over wetlands abutting on navigable-in-fact waterways. Since this standard was applied to only wetlands in Justice Kennedy's opinion, it cannot be extended and applied to all other non-wetlands as the proposed rule attempts to do.

-The proposed rule does not provide any metrics or criteria for determining significance and instead identifies factors that could be evidence of chemical, physical or biological activity. However, the agencies do not provide any information on when the presence of these factors rise to the level of significance which implicitly suggests that the *mere presence* of any of these factors is sufficient to satisfy the significant nexus standard. Asserting jurisdiction based on the presence of connections is reminiscent of the "any

hydrological connection" standard that was rejected by five Justices in Rapanos, including Justice Kennedy.

-The concept of aggregating all "similarly situated" waters within the same watershed conflicts with Justice Kennedy's "significant nexus" standard, which called for case-by-case determinations. This concept also allows for aggregation of features that are many miles apart from each other and are not "similarly situated" with respect to proximity to navigable waters, regularity or duration of flow. This completely ignores the quantity and frequency of flow that was central to Justice Kennedy's significant nexus analysis.

-The proposed rule's interpretation that a significant nexus exists whenever impacts are "more than speculative or insubstantial", ignores the traditional meaning of the word significant as "important" or "having or likely to have a major effect". As summarized above, there are numerous legal concerns with the proposed rule that seem to conflict with the legal precedents set by the Supreme Court. (p. 16-17)

Agency Response: The rule is consistent with decisions of the Supreme Court. Technical Support Document, I.C.

Todd Wilkinson (Doc. #13443)

10.617 The Agencies proposed approach has been rejected by Congress and the Courts. The U.S. Supreme Court in *SWANCC* and *Rapanos* significantly limited the jurisdictional boundaries of the Clean Water Act. Congress has refused to expand the Clean Water Act by removing the word "navigable." The proposal will do just that by advancing an overly broad interpretation of Justice Anthony Kennedy 'significant nexus text. The proposed WOTUS rule expands this list in a manner that would allow the Agency's jurisdiction over all types of waters. The Clean Water Act cannot be read to confer jurisdiction over physically isolated wholly intrastate waters. (p. 2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Florida Power & Light Company (Doc. #13615)

10.618 The proposed rule's standard collapses this continuum by ignoring the plain meaning of the word "significant."Additionally, there is no scientific articulation for the agencies' proposed standard. Recognizing that the term "significant nexus" is not a scientific term, but a legal term, the agencies should revise the proposed standard so that effects are measurable and must be "important" or "substantial" to satisfy Justice Kennedy's intended significant nexus standard to establish jurisdiction. We recommend that science-based metrics apply to such a jurisdictional determination. For example, the presence of hydric soils and hydrophytic vegetation will help ensure that the relationship is more than "speculative". (p. 3)

Agency Response: The rule and the agencies' significant nexus determinations are consistent with the statute and caselaw. Preamble, III; Technical Support Document, I.A and C, II.

Florida Stormwater Association (Doc. #14613)

10.619 Indeed, as drafted, the Proposed Regulations would exceed Congress's authority under the Commerce Clause and would contravene the U.S. Supreme Court's decision in

Rapanos. Congress intended for Clean Water Act jurisdiction to be tied to its ability to regulate channels of interstate commerce like navigable rivers, lakes and canals. SWANCC v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). According to the Court, the word "navigable" should have some meaning. In Rapanos, the Court thus rejected the "any hydrological connection" theory, reasoning that the theory "would stretch the outer limits of Congress's commerce power." Rapanos, 547 U.S. at 738. But by now extending jurisdiction to isolated wetlands and ponds, ephemeral drainage features, ditches, and other waters that have no navigable features and lack connections to truly navigable waters, the Proposed Regulations would exceed Congress's authority under the Commerce Clause. The Proposed Regulations also incorrectly conclude that Justice Kennedy's decision in Rapanos is controlling. The Proposed Regulations then stretch the "significant nexus" test in Justice Kennedy's opinion to waters other than wetlands – to "tributaries," "adjacent waters," and "other waters." But by its own terms, Justice Kennedy's opinion applies only to wetlands. And, even for wetlands, because Justice Kennedy's opinion alone cannot be the narrowest, it alone cannot control. See Marks v. United States, 430 U.S. 188, 193 (1977). (p. 6)

Agency Response: **All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.**

Continental Resources, Inc. (Doc. #14655)

10.620 A number of additional aspects of the proposed definition of "tributary" are also troublesome. First, there is no requirement that a tributary (or ditch) have a bed, bank, or ordinary high water mark ("OHWM"). The definition includes the entire length of the tributary including areas upstream of a natural or man-made break (e.g., bridges, culverts, pipes, dams, debris, or underground flow). Second, the definition of tributary no longer requires a certain volume of flow, frequency of flow, or notion of proximity to traditional navigable water. Third, all tributaries are *per se* jurisdictional if they contribute directly or indirectly to flow. *See generally* 79 Fed. Reg. at 22,262 (Proposed 33 C.F.R. § 328.3(a)(5)). The agencies' legal and scientific justifications for this expanded definition of tributaries are utterly insufficient. There is every reason to believe the majority of the justices in *Rapanos* would have struck down this definition of "tributary" in the Proposed Rule based on its lack of any statutory or judicial support and the agencies' not-so-subtle effort to expand markedly the limited extent of their jurisdictional reach.

The agencies' assertion of jurisdiction by rule over all tributaries is a blatant misreading of the CWA and Rapanos. First, in Rapanos, Justice Kennedy never applied a significant nexus test to tributaries; the agencies admit this but extend the test anyway. 79 Fed. Reg. at 22,204, 22,259-60. Second, even assuming Justice Kennedy's significant nexus test should apply to *all* tributaries, the Proposed Rule completely abandons the actual application of that test to any tributaries. The agencies claim it is "reasonable and appropriate" to review the scientific literature to determine whether to treat tributaries as *categorically* significantly affecting the chemical, physical or biological integrity of downstream waters. 79 Fed. Reg. at 22,259. Based on "existing science and the law" the agencies adopt a Proposed Rule that assumes all the waters meeting the expanded

definition of "tributary" must have a significant nexus to the downstream water in question. 79 Fed. Reg. at 22,193,22,197,22,259-60. Thus, if the water in question meets this new ambiguous definition of tributary, it is automatically considered jurisdictional-no significant nexus showing is required. Justice Kennedy never would have accepted this interpretation of the Act; he required a case-by-case significant nexus analysis in such circumstances. Alternatively, Justice Kennedy would have required any new regulations to address specifically the important hallmarks of a tributary, including: (l) volume of flow; (2) whether flow is year round, seasonal, intermittent, or ephemeral; (3) remoteness or proximity to navigable water; and (4) important functions performed and impact on biological, physical, and chemical properties of jurisdictional water. *Rapanos*, 547 U.S. at 780-81.

The agencies' statement that their new definition and treatment of tributaries complies with Justice Kennedy's opinion is plainly mistaken. 79 Fed. Reg. at 22,259. The Proposed Rule expands jurisdiction beyond what the majority in *Rapanos* would allow, ignoring Justice Kennedy's concurring opinion and Justice Scalia's plurality opinion. Justice Kennedy was critical of the existing regulations because they provided no assurance that "tributaries ... due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos*, 547 U.S. at 781; *see also id*. at 786 (noting there must be "substantial evidence supporting [jurisdiction]"). Justice Kennedy would never have approved of a rule that categorically assumes jurisdiction over all tributaries. *Rapanos*, 547 U.S. at 781 (dismissive of the regulation of drains, ditches, remote streams, and low-flowing, intermittent and ephemeral streams). For that reason, Justice Kennedy required that the Corps of Engineers "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries" because without this individualized analysis there is likely to be "unreasonable applications of the statute." *Rapanos*, 547 U.S. at 782. The agencies ignore these clear directives in Justice Kennedy's opinion and impose an *ultra vires* application ofthe CWA.

The agencies also ignore Justice Scalia's plurality opinion, which defined a water of the United States to "include only relatively permanent, standing or flowing bodies of water": the water must be "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel. ... None of these terms encompasses transitory puddles or ephemeral flows of water." *Rapanos*, 547 U.S. at 732-33. Given Justice Scalia's emphasis on "relatively permanent waters," he would strike any tributary definition that includes areas upstream of natural or man-made barriers. Similarly, Justice Scalia's plurality opinion was critical of the regulation of natural and man-made ditches, particularly roadside and man-made ditches with intermittent or ephemeral flow. *Rapanos*, 547 U.S. at 733-34 & n.5 (warning against asserting jurisdiction over tributaries "whose flow is 'coming and going at intervals ... broken, fitful"), 738. Because the Proposed Rule's treatment of tributaries would not gamer the support of a majority of the Supreme Court justices in *Rapanos*, it exceeds the agencies' CWA authority. (p. 7-8)

Agency Response: **The rule is consistent with the statute and the caselaw and the science. Preamble, III and IV. Technical Support Document, I.A. and C., II and VII.**

10.621 In the Proposed Rule, the agencies manifestly change their long-standing interpretation of Justice Kennedy's significant nexus test in *Rapano*s in three fundamental and unsupported ways. First, the agencies make a critical wording change in Justice Kennedy's test (replacing an "and" with an "or"). Second, the agencies abandon their current CWA interpretation that requires a case-by-case analysis to determine if a significant nexus exists and instead simply presume that all tributaries and all adjacent waters are *per se* jurisdictional without any individual consideration (or even an aggregated consideration). Third, the agencies abandon any notion of "significance" and instead assert that any nexus is sufficient. Each of these three assumptions distorts Justice Kennedy's significant nexus test rendering it unrecognizable. While both the regulated community and the agencies may seek improved clarity regarding when waters are governed by the CWA's significant nexus requirement, the Proposed Rule is not the answer. The agencies' across-the-board assumption that waters previously receiving a significant nexus analysis no longer require one is utterly unsupported by *Rapanos*, or by the law or science cited in the preamble. Each of these flawed interpretations and applications of the test is elaborated below.

1. The Proposed Rule improperly restates the significant nexus test replacing "and" with "or."

In the Proposed Rule, the agencies have intentionally re-written Justice Kennedy's significant nexus test. The Proposed Rule contorts the significant nexus test, replacing the "and" with an "or." Until now, the agencies have always articulated the significant nexus test as being met when the subject water "significantly affects the chemical, physical, *and* biological integrity of other covered waters more readily understood as navigable." *See, e.g.*, 2008 Guidance at 1. In making this simple one word edit, the agencies radically alter the meaning of the CWA and the well-established "significant nexus" test articulated by Justice Kennedy in *Rapanos*.

The statutory objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This CWA language was the springboard for Justice Kennedy's concurring opinion, and his opinion reiterates that a significant nexus requires the showing of all three types of impacts, not just one. *Rapanos*, 547 U.S. at 759, 779-80. The preamble to the Proposed Rule misstates the test: "Justice Kennedy was clear that waters with a significant nexus must significantly affect the chemical, physical, or biological integrity of a downstream navigable water[.]" 76 Fed. Reg. at 22,213 (emphasis added). The Proposed Rule also redefines the "significant nexus" test: the subject water only needs to "significantly affect[] the chemical, physical or biological integrity" of the reference water. See, e.g., 76 Fed. Reg. at 22,263 (Proposed 40 C.F.R. § 328.3(c)(7)) (emphasis added). This language deviates from all of the agency's prior interpretations (e.g., 2008 Guidance). It establishes a lower threshold for finding jurisdiction: the agencies no longer need to demonstrate that a water influences ***all three*** factors, but ***only one*** of the three factors. Contrary to the agencies' flimsy explanation, 76 Fed. Reg. at 22,261, the CWA and Justice Kennedy's opinion in *Rapano*s, and the well-accepted rules of statutory construction, the "and" in the significant nexus

test means "and." All three forms of integrity must be demonstrated for the required nexus to be met. The agencies are not at liberty to rewrite the CWA, nor are they empowered to mince .. Justice Kennedy's words. (p. 11)

Agency Response: **The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C. The 2008 Guidance was practical implementation guidance and not an interpretation of the CWA; to the extent there is a change in policy position, the agencies have provided a rationale. Preamble and Technical Support Document, I.C.**

The Heritage Foundation (Doc. #15055)

10.622 **The Proposed Rule is Inconsistent with Justice Kennedy's Concurrence in *Rapanos***

Both the EPA and Corps have consistently tried to expand their power under the CWA and regulate waters not covered under the law. The United States Supreme Court has shuck down this overreach twice in just over a decade in *SWANCC v. EPA*[1152] and Rapanos v. United States.[1153]

Instead of developing proposed rules that are well within the law (or even the outer bounds of the law), the agencies have developed these relations that go beyond even the Kennedy concurrence Rapanos that the agencies rely upon.[1154]

The Proposed Rule Improperly Expands Upon Justice Kennedy's "Significant Nexus" Test

The agencies have greatly exceeded Justice Kennedy's significant nexus test. As outlined by Justice Kennedy:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[1155]

The proposed rule would apply the significant nexus test to not just wetlands but to "a water, including wetlands."[1156] Within the proposed definition of "significant nexus," the term "other waters" is also used.[1157] It is not clear whether this covers waters that are

[1152] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al.*, 531 U.S. 159 (2001).
[1153] *Rapanos v. United States*, 547 U.S. 715, 780.
[1154] The agencies appear to completely ignore the plurality opinion. By focusing on the Kennedy concurrence in this comment, this in no way should suggest that this author does not believe the plurality opinion in Rapanos is governing or should have informed the agencies.
[1155] *Rapanos v. United States*, 547 U.S. 715, 780.
[1156] *Federal Register*, Vol. 79, No. 76 (April 21, 2014), http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf (Accessed November 14, 2014).
[1157] *Federal Register*, Vol. 79, No. 76 (April 21, 2014), p. 22189.

defined by the term "water'[1158] or by the definition of "other waters." Regardless, the proposed rule covers waters that are not a part of Justice Kennedy's significant nexus test.[1159]

Without even an explanation, the proposed rule changes the conjunctive "and" in the clause "significantly affect the chemical, physical, and biological integrity" with the conjunctive "or."[1160] This major change would allow the agencies to just meet one of the requirements, not all thee as is expressly stated by Justice Kennedy.

Justice Kennedy's language did not come out of the blue; it comes from the Clean Water Act itself.[1161] In his concurrence he states, "The 'objective' of the Clean Water Act (Act), is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" [Emphasis added].[1162] (p. 3 – 4)

Agency Response: The rule is consistent with the statute and the caselaw. Technical Support Document, I.A. and C.

American Foundry Society (Doc. #15148)

10.623 In addition, EPA and the Corps claimed that the proposed rule was needed to avoid having to evaluate the jurisdiction of individual waters on a case-by-case basis as dictated by recent U.S. Supreme Court decisions in *U.S. v. Riverside Bayview*, *Rapanos v. United States,* and *Solid Waste Agency of Northern Cook County v. U.S.* Army Corps of Engineers (SWANCC). EPA and the Corps falsely allege that the proposed rule will provide certainty, clarity and predictability to the regulated public regarding what areas are designated waters of the U.S. and subject to CWA jurisdiction. In contrast, if there is any certainty, it is that EPA and the Corps have expanded jurisdiction beyond the legal authority of the CWA. (p. 2 – 3)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

National Alliance of Forest Owners (Doc. #15247)

10.624 **The Proposed Rule Improperly Expands Jurisdiction Beyond Just Adjacent Wetlands**.

[1158] Footnote 3 of the proposed rule states: 'The agencies use the tell11 'water' and 'waters' UI the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms 'waters' and 'water bodies' interchangeably in this preamble. The te1~11dso not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features."

[1159] The agencies justify this expansion explaining, "in light of *Rapanos* and *SWANCC*, the "significant nexus" standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands also can reasonably be applied to other waters such as ponds, lakes, and non-adjacent wetlands that may have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas. Federal Register, Val. 79, No. 76 (April 21, 2014), p. 22261. As discussed in the section of my comment regarding adjacent waters, this type of overreach is not supported by Justice Kennedy's concurrence.

[1160] *Federal Register,* Vol. 79, No. 76 (April 21, 2014), p. 22192.

[1161] 33 U.S.C. §1251 (a).

[1162] *Rapanos v. United States*, 547 U.S. 715, 759 citing 33 U.S.C. §1251 (a).

Under the proposed rule, all waters, not just wetlands, that are "adjacent" to a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary, are jurisdictional.[1163] Although the proposed rule carries forward the definition of "adjacent" from the existing regulations (i.e., "bordering, contiguous, or neighboring"), it contains a new definition for the term "neighboring," which "includes waters located within the riparian area or floodplain of" a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary.[1164] "Neighboring" waters also include those "with a shallow subsurface hydrologic connection or a confined surface hydrologic connection to such a jurisdictional water."[1165] The proposed rule leaves it to the regulators' "best professional judgment" how to apply these new definitions in determining the extent of CWA jurisdiction.[1166] Thus, individual regulators have wide latitude to determine, e.g., which floodplain[1167] to use; how large a given riparian area[1168] is; or what it means to have a confined surface hydrologic connection. According to the Agencies, "[w]aters, including wetlands, that meet the proposed definition of adjacency, including the new proposed definition of neighboring, have a significant nexus to (a)(1) through (a)(3) waters, and this proposed rule would include all adjacent waters, including wetlands, as 'waters of the United States' by rule."[1169]

By extending the definition of "waters of the United States" to encompass all adjacent waters, not just wetlands, the Agencies have stretched the scope of CWA jurisdiction well beyond what the Supreme Court would allow and even beyond existing regulations and guidance. None of the relevant Supreme Court decisions addressed, much less affirmed, whether CWA jurisdiction extends to adjacent nonnavigable waters that are not wetlands. *Riverside Bayview*, for example, upheld the assertion of CWA jurisdiction over wetlands abutting a navigable-in-fact waterway.[1170] The Court made it clear in that case that it was not addressing "wetlands that are not adjacent to bodies of open water."[1171] Decades later, "*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent wetlands.[1172] Importantly, "[n]o justice, even in dictum, addressed the question of whether all waterbodies with a significant nexus to navigable waters are covered by the Act."[1173] And not even the Agencies' 2008 *Rapanos* Guidance goes so far as to address adjacent non-wetlands.

[1163] See 79 Fed. Reg. at 22,263.
[1164] Id.
[1165] Id.
[1166] See id at 22,208.
[1167] "Floodplain" is defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows." The proposed rule does not specify a particular flood interval.
[1168] "Riparian area" means "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." They are "transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."
[1169] 79 Fed. Reg. at 22,207.
[1170] See 474 U.S. at 135.
[1171] Id. at 131 n.8.
[1172] San Francisco Baykeeper, 481 F.3d at 707.
[1173] I d.

In addition to improperly extending CWA jurisdiction to adjacent non-wetlands, the proposed rule has defined "neighboring," "riparian area," and "floodplain" far too broadly. This new concept of adjacency runs headlong into both Justice Kennedy's and the plurality's opinions in *Rapanos*. Because all waters that are "adjacent" to tributaries (as newly defined under the proposed rule) are per se jurisdictional, the proposed rule will allow the Agencies to assert jurisdiction over waters that are "adjacent" to "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it."[1174] Justice Kennedy's opinion, however, does not leave room for such a categorical assertion of jurisdiction even over wetlands adjacent to those types of waters. Rather, he explained that a "more specific inquiry" is necessary to determine whether wetlands' "mere adjacency" to nonnavigable tributaries is sufficient to establish CWA jurisdiction.[1175]

The plurality opinion in *Rapanos*, for its part, found that "only those *wetlands* with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[1176] The plurality emphasized that wetlands with merely an "intermittent, physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*."[1177] Notably, the plurality spoke critically about how, despite the holding in *SWANCC*, "some of the Corps' district offices have concluded that wetlands are 'adjacent' to covered waters if they are hydrologically connected 'through directional sheet flow during storm events . . . or if they lie within the '100-year floodplain' of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years."[1178] Despite these criticisms, that is exactly what the proposed rule allows by, for example, failing to place any limits on the Agencies' ability to choose what floodplain interval to use when applying the new definition of "neighboring." As a result, waters that are miles away from the nearest jurisdictional water can now be deemed jurisdictional simply by an agency employee's selection of the 100-year (or perhaps even the 50-year) floodplain interval as the basis for identifying "adjacent" waters.

Similarly, waters that are currently considered to be isolated (and thus, nonjurisdictional) are nevertheless per se jurisdictional so long as a regulator determines that: (i) there is some subsurface connection to a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary; and (ii) the "adjacent" water is within "reasonable proximity" of the downstream jurisdictional water.[1179] The Agencies' categorical assertion of jurisdiction over such "adjacent" waters based on subsurface hydrologic connections is incompatible with the Supreme Court's rejection of the "any hydrologic connection" standard in *Rapanos*.

[1174] Rapanos, 547 U.S. at 781.
[1175] Id. at 780, 786.
[1176] Id. at 742 (emphasis added).
[1177] Id.
[1178] Id. at 728.
[1179] 79 Fed. Reg. at 22,263, 22,207-08.

Not only are the new definitions in the proposed rule overly broad, they are too vague to serve the Agencies' goal of providing clarity through this rulemaking. Individual regulators have discretion in determining how to apply the definitions of "floodplain" (e.g., which floodplain interval to use[1180]); how to apply the definition of "riparian area" (e.g., whether hydrology "directly influence[s]" ecological processes and plant and animal community structures[1181]); how deep subsurface connections can be; and how remote an adjacent water can be located from a jurisdictional water but still be within "reasonable proximity" of the jurisdictional water. These ambiguities are bound to result in inconsistent application of the rule and will further encourage citizen suit litigation against the forest industry.

The breadth of the adjacency standard is self-evident and troubling. Entire tributary (including ditch) systems are now *per se* jurisdictional under the proposed rule. Such systems likely have subsurface and surface hydrologic connections to a variety of water features, and their floodplains and riparian areas could cover vast reaches of lands and include countless small wetlands, ponds, playas, and other man-made and natural waterbodies. All of these features could now be jurisdictional under the proposed rule depending how regulators exercise their discretion in applying the new definitions in the proposed rule.

The proposed rule's new adjacency concept is deeply flawed. The Agencies should withdraw the proposed provisions relating to adjacency and carry forward existing provisions that extend jurisdiction only to adjacent wetlands. (p. 15-18)

Agency Response: **The rule no longer includes a provision defining "neighboring" based on a surface or subsurface hydrologic connection or provides that all waters within "floodplains," and "riparian areas" are "adjacent." Instead, the rule now provides specific distance limits for "neighboring" waters. In addition, where the definition continues to use the term "floodplain," it specifies the "100-year" floodplain and establishes a 1,500-foot maximum distance for neighboring waters in the rule. Preamble, IV. While the plurality questioned the use of the 100 year floodplain, the dissent did not, and for purposes of adjacency the agencies have established that a water must be located in the 100 year flood plain and within 1500 foot of the ordinary high water mark. The rule is consistent with the statute, caselaw and the Constitution. Technical Support Document, I.A. and C. The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for covered adjacent waters. Preamble, III and IV, and Technical Support Document, I and VIII.**

[1180] The proposal's lack of clarity with respect to floodplains is particularly problematic. The preamble provides that the term "floodplain" as used in the proposed rule does not necessarily equate to the 100-year floodplain defined by the Federal Emergency Management Agency (FEMA), but it does not specify how else a regulator might interpret the term. See 79 Fed. Reg. at 22,236. To add to the confusion, regulations from a number of federal agencies, including FEMA, refer to various floodplain categories. See, e.g., 7 C.F.R. § 761.2 (referencing 100-year and 500-year floodplains); 14 C.F.R. § 1216.204 (same); 24 C.F.R. § 55.12 (same); 40 C.F.R. § 280.43 (referencing 25-year floodplain); 40 C.F.R. part 300, Appx. A (referencing 10-year, 100- year, and 500-year floodplains).

[1181] 79 Fed. Reg. at 22,263.

Washington County Water Conservancy District (Doc. #15536)

10.625 The Agencies' jurisdictional-by-rule proposal is not supported by the law. The Agencies' reliance on Justice Kennedy's concurring opinion in *Rapanos* for their sweeping jurisdiction-by rule proposal is misplaced. First, as explained in Section I above, the *Rapanos* Court's holding cannot be extended to other types of non-wetland water bodies. Second, Justice Kennedy's *Rapanos* opinion does not support the agencies' specific proposal to treat certain waters as automatically jurisdictional-by-rule.[1182] Because Justice Kennedy's remarks regarding the Agencies' ability to adopt a jurisdictional-by-rule approach in a future rulemaking process were not necessary to resolve the issues in *Rapanos*, those remarks constitute non-binding dicta and should therefore be given less weight than the holdings in *SWANCC* and other prior decisions.[1183]

Even assuming the Agencies have the authority to use a jurisdictional-by-rule approach in general, Justice Kennedy's opinion does not support the specific approach proposed by the Agencies. To the extent that his opinion endorsed a jurisdictional-by-rule approach, his endorsement was limited to the context of wetlands adjacent to tributaries, and it was also limited by a requirement that the Agencies adopt "more specific" criteria for evaluating water bodies such as "their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations."[1184] Because the Agencies' jurisdictional-by-rule proposal extends beyond the narrow context of adjacent wetlands to all tributaries and all "adjacent" waters, and because it does not include the types of "specific criteria" that Justice Kennedy's opinion required, the proposal is not supported by that opinion. (p. 12)

Agency Response: The agencies' significant nexus determinations are consistent with the caselaw and available science. Preamble, III and IV and Technical Support Document, I, II, VI-IX.

Kenny Fox (Doc. #15754)

10.626 I strongly urge the EPA to withdraw the proposed rule (Clean Water Act; Definitions: Waters of the United States) because it is ARBITRARY AND CAPRICIOUS as it violates the United States Supreme Court Rulings referred to below, the United States Constitution and state sovereignty.

[1182] Justice Kennedy noted that the agencies' existing standard for tributaries, which relies solely on the presence of a connection to a traditional navigable water and certain physical characteristics indicating an ordinary high water mark, was too expansive to provide the basis for a jurisdictional determination regarding adjacent wetlands because it left "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." He also suggested that the Agencies could "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." Rapanos, 547 U.S. at 781.

[1183] See, e.g., Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 520 (2012) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." (quoting Cohens v. Virginia, 19 U.S. 264, 399 (1821)).

[1184]] Rapanos, 547 U.S. at 781.

United States Supreme Court Rulings that state the EPA has no authority over State law: Brown v. EPA, 521 F. 2d, 827, 838-842 (CA9 1975), Maryland v.EPA, 530 F. 2d 215 and New York v. United States, 505 U.S. 144(1992). Id., at 175-176. The Federal Government, we held, may not compel the States to enact or administer a federal regulatory program. Id.188.

New York v. United States, 505 U.S. 144(1992) also states We have held, however, that state legislatures are not subject to federal direction.

This case refers to state sovereignty. October 10, 2007 the United States Supreme Court heard case 06-984, Medellin v. Texas. On March 25, 2008, the United Stated Supreme Court returned a 6-3 decision in favor of Texas.

State law supersedes federal and international law end of story. With draw this proposed rule. (p. 1)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

City of Jackson, Mississippi (Doc. #15766)

10.627 **IV. The proposed rule contradicts the Supreme Court's guidance in *Rapanos* and otherwise exceeds the Agency's CWA authority**

The proposed rule explicitly refers to Justice Kennedy's concurrence in *Rapanos v. United States* as the basis for the new definition, but the definition drastically expands tire reach of the CWA. In *Rapanos*, 547 U.S. 715 (2006), the court split 4-1-4. Four justices upheld the United States' interpretation of what wetlands should be considered jurisdictional, and four others ruled that only "relatively permanent waters" are jurisdictional. *Rapanos v. United States*, 547 U.S. 715, 757, 787 (2006). Justice Kennedy rejected both tests and instead held that waters are jurisdictional if they have a "'significant nexus" to navigable waters. Id. at 759. His opinion is the prevailing view of the Supreme Court on what wetlands are jurisdictional under the Act and purportedly serves as the basis for the proposed rule. 79 Fed. Reg. at 22192.

However, the proposed rule actually looks similar to the position that the federal government argued, and lost, in *Rapanos*. In *Rapanos*, the federal government argued that "the connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream." Brief of the United States in *Rapanos*, at 15. The federal government explicitly rejected the notion "that some tributaries may have such an attenuated connection to traditional navigable waters that federal protection of those tributaries would be unwarranted," *Id*.

The Supreme Court, and Justice Kennedy, disagreed with the federal government's position. Justice Kennedy rejected many of the government's assertions, holding that a wetland cannot be determined to have a significant nexus simply because it is adjacent to an ordinary highwater-mark tributary:

> [T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark . . . *the breadth of this standard - which seems to leave wide room for regulation of drains,*

> *ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it - precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood*. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."

Rapanos, 547 U.S. at 805-806 (emphasis added). Despite Justice Kennedy's admonition, the Agencies propose to define tributaries as 'water physically characterized by the presence of a bed and banks and ordinary high water mark." They wrongly have adopted the view that all adjacent waters are per se jurisdictional because of a "significant nexus" finding. While Justice Kennedy's opinion recognized that the federal government could opt to protect tributaries that "are likely, in the majority of cases" to have a significant nexus to traditionally navigable water, that opinion also rejected the notion that the CWA protects every discernible water that contributes flow directly, or indirectly to a traditionally navigable water, no matter how remote or insubstantial. *Id* at 781. Given the similarity between the Agencies' proposed language and the arguments made by the federal government and rejected by the Supreme Court in *Rapanos*, the Agencies should avoid such an expansive jurisdictional overreach. (p. 5)

Agency Response: **Consistent with Justice Kennedy's opinion, the rule is not based on the "any connection theory" but is instead based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III and IV, and Technical Support Document, I.A, B., C. and II. The rule is consistent with caselaw. Technical Support Document, I.C.**

Independent Petroleum Association of New Mexico (Doc. #16915.1)

10.628 In the proposed regulation, the EPA and the Army Corps of Engineers, (hereinafter referred to as "the agencies") proposes to define 'waters of the United States" to mean "[t]raditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters,^ or the territorial seas; and adjacent waters, including adjacent wetlands: Id. at 22188. The agencies also propose an expansive definition 'other waters', wherein through a case-specific showing that, either alone or in combination with similarly situated "other waters" in the region, the Corps may obtain jurisdiction over the subject waters if they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. Id. at 22189. However, the determination of a 'significant nexus' is a legal exercise, and not a scientific one. Second, it is clear from the proposed expansion of the definition of waters of the United States' to include 'other waters' ignores the plurality decision in the *Rapanos* case (*Rapanos v. US*., 547 U.S. 715, 767 (2006)) and even impermissibly expands Justice Kennedy's concurring opinion regarding a 'significant nexus' standard. Finally, we would urge the agencies to go back to the drawing table, heeding both Justice Scalia and the

Science Advisory Board, to use actual science rather than legal standards for the determination of what waters can e under the Corps jurisdictional authority. (p. 3 – 4)

Agency Response: The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III and IV, and Technical Support Document, I.A, B., C. and II. The rule is consistent with caselaw. Technical Support Document, I.C.

Cook County, Minnesota, Board of Commissioners (Doc. #17004)

10.629 WHEREAS, we find it very disheartening to have to deal with a proposed rule that is counter to the latest Supreme Court decision (*Rapanos ET UX. Et Al v United States*), which has clearly addressed this matter. By using the current proposed rule the Agencies appear to be attempting to override the Rapanos Supreme Court decision, which for the most part dismissed the notion that intertwined "water connectivity" and the presence of some kind of nebulous "significant nexus" to navigable waters give the Agency's jurisdiction for permitting a much expanded jurisdictional authority, including authority over a broader suite of land use activities; and

WHEREAS, in the *Rapanos ET UX. Et Al v United States* decision, Justice Scalia's plurality opinion, section VII clearly addresses and shows the errors with the EPA and Corps notion that "water connectivity" and the presence of a "significant nexus" somehow come from and are part of the CWA. In this opinion, it is stated in the first paragraph of page 37:

> *"One would think, after reading JUSTICE KENNEDY's exegesis, that the crucial provision of the test of the CWA was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from SWANCC's cryptic characterization of the holding of Riverside Bayview"*

This statement alone should have been a red flag to the EPA and Corps that the occurrence of "water connectivity" and the presence of a "significant nexus" was somehow a mandate for them to take it upon themselves to redefine what constitutes "waters of the United States" for CWA purposes. We find it alarming that these agencies feel free to ignore the intent of Congress through bypassing the CWA and ignoring the findings of the Supreme Court. It is even more troubling that the agencies would attempt to convince the public that they are somehow empowered to greatly expand their jurisdictional authorities, which would open the door for them to substantially increase their influence in land use activities across the entire nation; and (p. 3)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

Arizona Rock Products Association (Doc. #17055)

10.630 The agencies' reliance on the "connectivity study" essentially transforms a handpicked aggregation of scientific studies into the controlling legal interpretation of "waters of the United States." The legal interpretation should start with the limits set out by Justice

Kennedy in his *Rapanos* opinion and determine how scientific evidence should be interpreted to define a "bright line" between "any nexus" and "significant nexus." (p. 3)

Agency Response: The rule is based on the agencies' careful examination of the science and the law to make a determination of significant nexus for specified waters and to provide that certain other waters may be jurisdictional where a case-specific determination has found a significant nexus. Preamble, III and IV, and Technical Support Document, I.A, B., C. and II. The rule is consistent with caselaw. Technical Support Document, I.C.

Atlantic Legal Foundation (Doc. #17361)

10.631 **2. The Rapanos Precedent**

Without explanation, the proposed rule unceremoniously, and without sufficient basis, disposes of Justice Scalia's plurality opinion in Rapanos v. United States and Carabell v. United States ("Rapanos") in favor of the nebulous "significant nexus" test found in Justice Kennedy's concurrence.[1185]In Rapanos, the plurality opinion held that "waters of the United States" covered relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters, in addition to adjacent wetlands with a continuous surface connection to such water bodies.' The proposed regulation substitutes the amorphous term "adjacent waters" for the phrase "adjacent wetlands." This skews the plurality's definition, giving the agencies vast discretion to interpret what constitutes an "adjacent water." Further, under the proposed rule these adjacent waters may be connected via subsurface hydrologic connections, completely at odds with the plurality's "continuous surface" connection requirement: 3 Not only does the proposed rule contradict the plurality's definition, but the agencies fail to explain why Justice Kennedy's amorphous definition should supplant Justice Scalia's more concrete and certain test. At a minimum, we believe the agencies should be required to give a detailed rationale for this decision. (p. 4 – 5)

Agency Response: All nine of the United States Courts of Appeals to have considered "the narrowest grounds" under *Marks* have stated that Justice Kennedy's significant standard may be used to establish applicability of the CWA. The rule is consistent with caselaw. Technical Support Document, I.C.

Georgia Association of Manufacturers (Doc. #18896)

10.632 The proposed rule misinterprets Justice Kennedy's " significant nexus" test to extend jurisdiction to "waters " that were never contemplated by the Court. (p. 2)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C.

United States Senate (Doc. #19309)

10.633 From a legal perspective, this waters of the U.S. rule ignores the limits and structure Congress put in place and the limits recognized by the U.S. Supreme Court. The U.S. Supreme Court has stated that all bodies of water are not under EPA's jurisdiction. In

[1185] *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006).

Rapanos v. United States, the court ruled the Corps' expansive interpretation of the Clean Water Act (CWA) was based on an impermissible construction of the statute. Yet, now the Corps and the EPA are again attempting to expand their regulatory reach through this latest waters of the U.S. rule. Far from abiding by the court's finding that "navigable waters" are to be regulated by the CWA, this rule will bring burdensome and intrusive regulation to thousands to thousands of ditches, ephemeral streams, and small, isolated ponds and wetlands. (p.1)

Agency Response: **The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C. The agencies have concluded the benefits of the rule exceed the costs. Preamble, V and Economic Assessment in the docket.**

M. Sedlock (Doc. #19524)

10.634 **Issue 2: Failure to provide legal justification for the proposed rule**

Reference: FR page 22188, column 3: *The SWANCC and Rapanos decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by Federal and State regulators.*

Discussion: We find this statement to be self-serving and misleading. There is no doubt that with the plurality decision in the SWANCC and Rapanos cases the Supreme Court has already provided a clear definition of "waters of the United States". (*See summary of the Supreme Court's decision in the attached "Syllabus of RAPANOS ET UX. Et AL v. UNITED STATES"*[1186]*)*

Interpreting the law and providing a clear meaning to the intent of laws when there is doubt or a dispute is the primary role of the Supreme Court. The Supreme Court has done its job concerning the definition of "waters of the United States" and "jurisdictional waters" under the CWA. We find that the Agencies have been and are continuing to struggle with "mission creep", i.e. self-determined expansion of their mission beyond their statutory authority, as demonstrated by their unwillingness to accept the (Rapanos) Supreme Court decision and instead formulating this proposed rule. Unwilling to accept the Supreme Court definitions, the Agencies are attempting to implement their own definition of the "waters of the United States", which has led to much confusion and uncertainty for the American public.

There can only be one reason for the Agencies' concern with having to evaluate jurisdiction of waters on a case-specific basis: The Agencies' desire to expand their scope of jurisdiction over the nation's waters. The perceived need to control land use activities across most of the nation, which has swept through the upper administrative levels of the Agencies, is not a need for states or the American public, nor is it a valid or acceptable justification for the proposed rule.

[1186] http://www.law.cornell.edu/supct/html/04-1034.ZS.html Accessed 06/24/14

The Agencies' bid to expand their scope of jurisdiction over the nation's waters and the need to control land use activities across most of the nation is clearly evident in the fact that the EPA has taken it upon themselves to commission the development of a "Water Body Connectivity Report" and to further go to the trouble of setting up their own EPA Science Advisory Board (SAB) review of the report. It is hard to believe the outcome of this self-serving process would lead to anything but a finding that all waters are connected in one way or another, and to conclude that the Agencies must be granted jurisdiction for permitting just about every land use activity in the nation.

Unfortunately for the Agencies, the Constitution does not grant power to any federal agency to establish their own authorities or jurisdictional boundaries independent of Congress and the Supreme Court.

Recommendation: Withdraw the proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law. Furthermore, they must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority. (p. 6 – 7)

Agency Response: The rule is consistent with the statute, Supreme Court decisions, and the Constitution. Technical Support Document, I.A., B., and C. The agencies' significant nexus determinations are reasonable and based on the science, the law, and the agencies' experience and technical expertise. Preamble III and IV, Technical Support Document, II and VI.

10.635 **Issue 3: Failure to provide justification for expansion of authority and jurisdiction**

Reference: FR page 22189, column 1: *The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or waters in the region, is significant based on data, science, the CWA, and case law.*

In addition, the agencies propose that ''other waters'' (those not fitting in any of the above categories) could be determined to be ''waters of the United States'' through a case-specific showing that, either alone or in combination with similarly situated ''other waters'' in the region, they have a ''significant nexus'' to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated ''other waters'' in the region should be identified.

Discussion: The above statements not examples of agencies adding clarity to existing laws. Instead, these statements are additional examples of "mission creep", i.e. self-determined expansion of their mission beyond statutory authority. These statements serve to usurp the authority and jurisdiction of state and local governments. Although the powers of the federal government are vested by the U.S. Constitution, it is state government that tends to have a greater influence over most Americans' daily lives.

The Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the U.S. Constitution; thus

the states, through local governments (county, municipal governments and the elected officials of soil and water conservation districts), handle the majority of issues most relevant to individuals within their respective jurisdictions.

Federal agencies are established by governments to provide specific services. The personnel of federal agencies are not elected officials, but rather civil servants. Agencies implement the actions required by laws (statutes) enacted by Congress, and may not take action that goes beyond their statutory authority or that violates the Constitution.

By virtue of the Acts of 1866, 1870, and 1877 the federal government divested itself of its authority over all non-navigable waters in the West, ceding that authority to the states. This action of Congress has only been changed in the past by the exemption of water from appropriation under state law. Thus, non-navigable waters of the West are still outside of the jurisdictional authority of the Agencies.

The proposed expansion of authority and jurisdiction over lands that may be or are covered with water for short periods of time cannot be justified. These are non-navigable waters. Clearly this expanded role is not the role the EPA and Corps were created to accomplish.

What is even more troubling with the proposed rule is the idea that because intertwined "water connectivity" and nebulous "significant nexus" to navigable waters might exist, somehow that connectivity and nexus should give the Agencies jurisdictional authority to fit their perceived needs. This is especially troublesome given the fact that what is being proposed has already resulted in multiple court cases that have gone as far as the Supreme Court of the United States, and has already resulted in the Supreme Court rendering multiple decisions that define "waters of the United States".

We finds it is very disheartening to have to deal with a proposed rule that is counter to the latest Supreme Court decision (Rapanos ET UX. Et Al v. United States), which has clearly addressed this matter. By issuing the current proposed rule the Agencies appear to be attempting to override the Rapanos Supreme Court decision, which for the most part dismissed the notion that intertwined "water connectivity" and the presence of some kind of nebulous "significant nexus" to navigable waters give the Agency's jurisdiction for permitting a much expanded jurisdictional authority, including authority over a broader suite of land use activities.

In the Rapanos ET UX. Et Al v. United States decision, Justice Scalia's plurality opinion, section VII, clearly addresses and shows the errors with the Agencies notion that "water connectivity" and the presence of a "significant nexus" somehow come from and are part of the CWA. In this opinion, it is stated in the first paragraph of page 37:

"One would think, after reading JUSTICE KENNEDY's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from SWANCC's cryptic characterization of the holding of Riverside Bayview."

This statement alone should have been a red flag to the Agencies that the occurrence of "water connectivity" and the presence of a "significant nexus" was somehow a mandate

for them to take it upon themselves to redefine what constitutes ”waters of the United States” for CWA purposes.

We find it alarming that the Agencies feel free to ignore the intent of Congress through bypassing the CWA and ignoring the findings of the Supreme Court. It is even more troubling that the Agencies would attempt to convince the public that they are somehow empowered to greatly expand their jurisdictional authorities, which would open the door for them to substantially increase their influence in land use activities across the entire nation.

Recommendation: Withdraw the current proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law, specifically incorporating the “waters of the United States” definition presented by the plurality Supreme Court opinion in the RAPANOS ET UX. Et AL v. UNITED STATES decision. Furthermore, the Agencies must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority. (p. 7 – 9)

Agency Response: The rule is consistent with the statute, caselaw, and the Constitution. Technical Support Document, I.A., B., and C.

Blake Follis (Doc. #19973)

10.636 (…) Because I also happen to be an attorney, you folks might get together with the USDA and review *Wickard v. Filburn*, 317 U.S. 111 (1942). (p. 1)

Agency Response: The rule is consistent with the Supreme Court decisions, and the Constitution. Technical Support Document, I.C and IV.

ATTACHMENTS AND REFERENCES

Comments included above in this document discuss the Proposed Rule, and some include citations to various attachments and references, which are listed below. The agencies do not respond to the attachments or references themselves, rather the agencies have responded to the substantive comments themselves above, as well as in other locations in the administrative record for this rule (e.g., the preamble to the final rule, the TSD, the Legal Compendium). In doing so, the agencies have responded to the commenters’ reference or citation to the report or document listed below as it was used to support the commenters’ comment. Relevant comment attachments include the following:

62-340.750 Exemption for Surface Waters or Wetlands Created by Mosquito Control Activities. (Doc. #4847.2)

Brief of the American Forest & Paper Association et al. as Amici Curiae in Support of Petitioners, SWANCC v. Corps, *531 U.S. 159 (2001) (No. 99-1178) (Doc. #15016.1, p. 51)*

Brief of American Petroleum Institute et al. as Amici Curiae in Support of Petitioners, Sackett v. EPA, *132 S. Ct. 1367 (2012) (No. 10-1062). (Doc. #15016.1, p. 2)*

Brief of Foundation for Environmental And Economic Progress et al. as Amici Curiae in Support of Petitioners, Rapanos v. United States, *547 U.S. 715 (2006) (Nos. 04-1034 & 04-1384). (Doc. 15016.1, p. 77)*

API Legal and Policy Comments on 2014 Proposed Rule. (Doc. #15115, p. 6)

Admirality and Maritime Law Document. (Doc. #3099.1)

Kingsport Horizontal Property Regime and Kingsport Homeowners Association, Inc., et al. v. United States. (Doc. #4847.1)

In addition, commenters submitted the following relevant references. These are copied into this document as they were submitted by commenters. HW has not verified the references, or the validity of hyperlinks.

5 Stat. 726 (1845). (Doc. #3099, p.6)

33 U.S.C. 403. (Doc. #3099, p.19)

94 Stat. 2371, 1980. *Alaska National Interest Lands Conservation Act ("ANILCA"),* Dec. 2, 1980, codified at 16 U.S.C. § 3101 et seq. (Doc. #3777.2, p.71)

155 F. Supp. 442. (Doc. #3099, p.19)

Additional Views of Representative Edgar and Representative Myers, H.R. Rep. No. 95-139, at 54 (1977); 123 Cong. Rec. 26725 (daily ed. Aug. 4, 1977). (Doc. #13610, p.5)

Adler , Jonathan. *Wetlands, Property Rights, and the Due Process Deficit, Cato Supreme Court Review*, 141 (2012). (Doc. #8319, p. 2)

Agins v. City of Tiburon, 447 U.S (1980). (Doc. #11978, p.3)

American College of Environmental Lawyers (ACOEL), "Memorandum for ECOS [The Environmental Council of the States] Concerning Waters of the United States, September 1l, 2014, p. 112. (Doc. #13563, p.3)

ANNEX OF PRE-RAPANOS, NON-CWA OPINIONS USING "SIGNIFICANT NEXUS" (Doc. #16406, p .7-13)

Antitrust

Loiterman v. Antani, No. 90 C 983, 1990 WL 91062, at *4 (N.D. Ill. June 28, 1990).

Bankruptcy

In re Barber, 266 B.R. 309, 318 (Bankr. E.D. Pa. 2001); In re Merriweather, 185 B.R. 235, 238 (Bankr. S.D. Tex. 1995); In re Penrose, No. 91-00882-7, 1991 WL 11002289, at *2 (Bankr. W.D. Wis. Oct. 10, 1991); In re Marshall, 118 B.R. 954, 962 (Bankr. W.D. Mich. 1990); Acolyte Elec. Corp. v. City of New York, 69 B.R. 155, 171 (Bankr. E.D.N.Y. 1986); In re Arnold Print Works, Inc., 54 B.R. 562, 566 (Bankr. D. Mass. 1985); In re Pied Piper Casuals, Inc., 50 B.R. 549, 551 (Bankr. S.D.N.Y. 1985); In re Burch, 34 B.R. 294, 294 (Bankr. W.D. Ky. 1983).

Black lung

Peabody Coal Co. v. Vigna, 22 F.3d 1388, 1393 (7th Cir. 1994).

Child neglect

In re Jesse W., 2005 WL 2650645, at *12 (Conn. Super. Ct. Sept. 22, 2005); In re Christopher C., No. CP035929A, 2004 WL 3106190, at *18 (Conn. Super. Ct. Dec. 15, 2004).

Choice of law

Jaurequi v. John Deere Co., 986 F.2d 170, 176 n.10 (7th Cir. 1993); State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 417 (2d Cir. 1990); N.Y. Protective Covering Indus. v. Stevens Technical Servs., No. 96 CV 0418, 1997 WL 104767, at *2 (E.D.N.Y. Feb. 18, 1997); Great Am. Ins. Co. v. J. Aron & Co., No. 94 Civ. 4420, 1995 WL 495492, at *3 (S.D.N.Y. Aug. 18, 1995); Newark Ins. Co. v. Blair, No. 92 Civ. 1648, 1994 WL 4410, at *3 (S.D.N.Y. Jan. 3, 1994); Contract Marine Carriers v. Abbott Labs., Int'l, No. 91 Civ. 1401, 1993 WL 106374, at *5 (S.D.N.Y. Apr. 6, 1993); Commercial Union Ins. Co. v. Horne, 787 F. Supp. 337, 339 (S.D.N.Y. 1992); In re Litig. Involving Alleged Loss of Cargo from Tug Atl. Seahorse, "Sea Barge 101" Between P.R. & Fla. in Dec. 1988, 772 F. Supp. 707, 711 (D.P.R. 1991); Ferens v. Deere & Co., 639 F. Supp. 1484, 1489 (W.D. Pa. 1986); Healy Tibbitts Constr. Co. v. Foremost Ins. Co., 482 F. Supp. 830, 835 (N.D. Cal. 1979); In re Maxwell Commc'n Corp., 170 B.R. 800, 807 (Bankr. S.D.N.Y. 1994); In re Prudential Lines, Inc., 148 B.R. 730, 738 (Bankr. S.D.N.Y. 1992); Sequa Corp. v. Aetna Cas. & Sur. Co., Civ. A. No. 89C-AP-1, 1995 WL 465192, at *1 (Del. Super. Ct. July 13, 1995); N. Am. Philips Corp. v. Aetna Cas. & Sur. Co., Civ. A. No. 88C-JA-155-1-CV, 1994 WL 555399, at *7 (Del. Super. Ct. Sept. 2, 1994); Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Civ. A. No. 89C-SE-35, 1994 WL 721651, at *5 (Del. Super. Ct. Mar. 28, 1994); Munzer v. St. Paul Fire & Marine Ins. Co., 610 N.Y.S.2d 389, 391 (N.Y. 1994).

Civil rights

Vento v. Colo. Nat'l Bank, No. 98-1236, 1999 WL 314566, at *2 (10th Cir. May 19, 1999); Sack v. Huggins, No. 93-7108, 1994 WL 413271, at *5 (10th Cir. Aug. 1, 1994); Cabututan v. Hunsaker, No. 92-4086, 1993 WL 55945, at *2 (10th Cir. Mar. 1, 1993); Johnson v. Kegans, 870 F.2d 992, 1004 (5th Cir. 1989); Hammond v. Bales, 843 F.2d 1320, 1323 (10th Cir. 1988); Shaffer v. Cook, 634 F.2d 1259, 1260 (10th Cir. 1980); Norton v. Liddel, 620 F.2d 1375, 1380 (10th Cir. 1980); Heffington v. Dist. Ct. of Sedgewick Cnty., No. 05-4028-SAC, 2005 WL 1421530, at *3 (D. Kan. June 17, 2005); Jackson v. Univ. of New Haven, 228 F. Supp. 2d 156, 162 (D. Conn. 2002); Reil v. Clinton Cnty., 75 F. Supp. 2d 37, 40 (N.D.N.Y. 1999); Church of Human Potential, Inc. v. Vorsky, 636 F. Supp. 93, 96 (D.N.J. 1986); Anderson v. Glismann, 577 F. Supp. 1506, 1509 (D. Colo. 1984); Whelehan v. Cnty. of Monroe, 558 F. Supp. 1093, 1108 (W.D.N.Y. 1983).

Conflict of laws

Altadis USA, Inc. v. NPR, Inc., 308 F. Supp. 2d 1304, 1307 (M.D. Fla. 2004); Howard v. Howard, No. 2:02CV1192, 2004 WL 724372, at *3 (D. Utah Mar. 12, 2004); Brentwood Investors v. Wal-Mart Stores, Inc., No. C-95-0856, 1998 WL 337968, at *7 (N.D. Cal. June 19, 1998); Interface Flooring Sys., Inc. v. Aetna Cas. & Sur. Co., 804 A.2d 201, 204 (Conn. 2002); Phelan v. Budget Rent A Car Sys. Inc., 699 N.Y.S.2d 568, 569 (N.Y. App. Div. 1999).

Constitutional law (federal)

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