

**COMMENTS OF FEDERAL WATER QUALITY COALITION ON THE
PROPOSED RULE DEFINING “WATERS OF THE UNITED STATES”**

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**COMMENTS OF FEDERAL WATER QUALITY COALITION ON THE
PROPOSED RULE DEFINING “WATERS OF THE UNITED STATES”**

The Federal Water Quality Coalition (“FWQC” or “the Coalition”) is submitting these comments on the Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule published by the Department of Defense, Department of the Army, Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”) (together “the agencies”) on April 21, 2014. *See* 79 Fed. Reg. 22188 (Apr. 21, 2014) (hereinafter “proposed rule”).

The Coalition is a group of industrial companies, municipal entities, property owners, and trade associations that are directly affected, or which have members that are directly affected, by regulatory and policy decisions made pursuant to the Federal Water Pollution Control Act (herein referred to as “the Clean Water Act,” “the Act,” or “CWA”). Coalition members for purposes of these comments are as follows: Alcoa, Inc., American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Iron and Steel Institute, American Petroleum Institute, Association of Idaho Cities, Auto Industry Water Quality Coalition, City of Superior (WI), Edison Electric Institute, Freeport-McMoRan Copper & Gold, Inc., General Electric Company, Hecla Mining Company, Indiana Coal Council, Kennecott Utah Copper LLC, Mid America CropLife Association, Monsanto Company, National Association of Home Builders, Orange County Sanitation District, Pharmaceutical Research and Manufacturers of America, Rayonier Advanced Materials, Rubber Manufacturers Association, San Juan Water Commission, Shell, Utility Water Act Group, Western Coalition of Arid States, Western States Petroleum Association, and Weyerhaeuser Company.

Coalition member entities – or their members – own and operate facilities located on or near lakes, rivers, streams, ponds, wetlands, ditches, swales, and other “waters” as defined by the proposed rule. Many member facilities may be located in a floodplain or riparian area, depending on how these terms are interpreted. Many member facilities have water management features on-site, including ditches, stormwater management features, fire water ponds, and cooling ponds. Some of these features may have an outlet that discharges to a lake, river, or stream. Many do not. Other member facilities store or manage drinking water. These storage

facilities generally do not have an outlet to a lake, river, or stream, but may interface with groundwater. Based on the expanded definition of waters of the U.S. in the proposed rule, and based on EPA's Draft Connectivity Report that asserts that all water is part of an aquatic ecosystem, FWQC members must now reevaluate the regulatory status of all water located on their property, or near their activities, irrespective of the location or disposition of that water. That reevaluation could affect their ability to use water management features, because under CWA section 402 discharges into waters of the U.S. must be permitted and meet water quality standards. That reevaluation also could affect FWQC members' ability to maintain those features, because under CWA section 404 dredging or filling a water of the U.S must be permitted and mitigated.

I. Executive Summary.

Since releasing the proposed rule for public comment, the agencies, particularly EPA, have been trying to defend it by asserting that the rule (1) is not an expansion of jurisdiction, (2) is supported by the statute and Supreme Court precedent, (3) is based on science, and (4) will clarify jurisdiction. These assertions do not withstand scrutiny. In fact, the proposed rule is a dramatic expansion of jurisdiction that is not supported by the statute, Supreme Court precedent, or the scientific studies referenced by the agencies. In addition, the proposed expansion has caused great uncertainty and confusion, as evidenced by the numerous requests for clarification that have been reported in the trade press. The result will be increased costs, regulatory burden, litigation, and reduced economic activity.

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.

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.

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.

Fifth, even if the scientific studies cited by the agencies to support their rule could form a basis for expanded federal jurisdiction, the studies cited and the proposed rule do not align and the Draft Connectivity Report cannot support the factual determinations made by the agencies to justify the rule.

Sixth, the proposed rule lacks clarity and has caused confusion among regulators and the regulated community alike.

Seventh, the proposed expansion of federal jurisdiction will significantly increase litigation and the burden on the regulated community, state and local governments, and regulators.

Finally, the proposed rule is procedurally flawed due to the agencies' failure to comply with the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Federalism Executive Order.

For all of these reasons, we urge the agencies to withdraw the proposed rule and in dialogue with states and the regulated community to develop a new, narrower, and more focused proposal that articulates legal and technical rationales for regulating water under the CWA that are consistent

with the text, structure, and purpose of the CWA and Supreme Court precedent, and that reflects 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.

II. The Proposed Rule Represents a Dramatic and Unfounded Expansion of Asserted Federal Authority.

The existing definition of waters of the U.S. relies on the authority granted by Congress to protect from pollution waters that can be used in interstate commerce. 42 Fed. Reg. 37122, 37127-28 (July 19, 1977).¹ In the proposed rule, the agencies have created an entirely new legal justification for federal jurisdiction. Instead of focusing on water pollution, the agencies have structured the proposed rule relying on the premise that the statute grants the agencies the authority to assert federal control over any water, located anywhere, if the agencies can find a “significant nexus” between that water and a navigable or interstate water or territorial sea. Building on this premise, the agencies assert that the “significant nexus” that creates federal jurisdiction can be based on the movement of animals and insects from one water body to another or on the flow or retention of water, irrespective of the movement of pollutants and the potential for those pollutants to impact navigable waters. Relying on ecological studies that show, unsurprisingly, that land, water, animals, and plants are all linked, the agencies claim the authority, as a threshold matter, to assert federal control over all waters. After claiming this jurisdiction, the agencies then create a few narrow exemptions. This is an expansion of jurisdiction.

A. Navigable and Interstate Waters and Territorial Seas.

The proposed rule asserts jurisdiction over navigable waters, interstate waters, and territorial seas. These waters are jurisdictional under the current regulatory definition of waters of the U.S. 33 C.F.R. § 328.3(a)(1), (2) & (6).

There is no question whether the Constitution or the CWA authorizes federal jurisdiction over navigable waters and territorial seas.² However, the proposed rule has created uncertainty

¹ The 1977 definition was reorganized in 1986. 51 Fed. Reg. 41206, 41216 (Nov. 13, 1986).

² Territorial seas are navigable. 33 C.F.R. § 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.”).

regarding what is considered “navigable.” The preamble suggests that commercial navigation can be demonstrated by an experimental canoe trip taken solely to demonstrate navigability. 79 Fed. Reg. at 22253. 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. Further, under the Commerce Clause, Congress can regulate only 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.

The proposed rule also expands the agencies’ asserted jurisdiction over interstate water by expanding the concept of “water.” As discussed below, under the proposed rule “waters” can be dry; they can be erosion features on the land; they can be ponds or pools that are hydrologically isolated from any navigable water. Moreover, under the rule, if so-called “water” crosses state lines, it is automatically subject to federal jurisdiction, and other “water” connected to this “interstate water” also would be *per se* jurisdictional.

The agencies cite a number of cases to support jurisdiction over interstate waters. 79 Fed. Reg. at 22256-57. But each of the cases cited involved waters that were traditional navigable waters and the geographic scope of federal Clean Water Act jurisdiction was not a question presented to the Court. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (Lake Michigan); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (Lake Michigan); *International Paper v. Ouellette*, 479 U.S. 481 (1987) (Lake Champlain); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (a tributary of the Illinois River twenty-two miles from the state border). We are not aware of any case where the issue of federal jurisdiction over interstate water that was not traditional navigable water was litigated. We also are not aware of any jurisdictional determination issued by the Corps finding federal jurisdiction over an interstate wetland.

The proposed expansion in jurisdiction over navigable and interstate water has created tremendous uncertainty regarding the status of a ditch or pond or wetland that has no connection to navigable water but lies on a state boundary.

B. All “Tributaries.”

The proposed rule asserts jurisdiction over all tributaries of navigable or interstate water or territorial seas or impoundments thereof. Tributaries are jurisdictional under the current regulatory definition of waters of the U.S. 33 C.F.R. § 328.3(a)(5). However, the term “tributaries” is not currently defined.

1. Scope of Proposed Definition.

The proposed rule expands jurisdiction over this category of water by proposing to define tributaries to include features on the land where an EPA or Corps employee believes he or she can discern a bed, bank, and ordinary high water mark (OHWM), even if these features disappear underground, as long as these features can be identified upstream of where they disappear.³ And even these features would not be required for a wetland, lake, or pond to qualify as a tributary. A tributary would include wetlands and manmade conveyances. A tributary must contribute flow to a navigable or interstate water or territorial sea, but there are no temporal limits on how often a tributary contributes such flow. It could take years, decades, or even centuries for flow to reach a navigable water. There also are no geographic limits on how distant the flow that is *per se* jurisdictional is from navigable water and no need to show that the flow could carry pollutants to navigable water. Finally, given the fact that a tributary that disappears remains a tributary, it appears that the flow can be contributed through groundwater, which can take centuries to recharge to surface water.⁴

2. Impact of Expansion on States.

The proposal to include ephemeral waters and other minor features as federally regulated waters will require states to expand their regulatory programs.⁵ For example, Tennessee’s approved

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.” Proposed 33 C.F.R. § 328.3(c)(5).

⁴ Nadeau, T.-L., and M. C. Rains, Hydrological connectivity of headwaters to downstream waters: Introduction to the featured collection. *Journal of the American Water Resources Association* 43:1-4 (2007), at 126 (a survey article cited in the Draft Connectivity Report).

⁵ See Report on State Definitions, Jurisdiction and Mitigation Requirements in State Programs for Ephemeral, Intermittent and Perennial Streams in the United States (April 2014) (attached). EPA’s ATTAINS database tracks TMDL development and shows a total of 3,533,205 river and stream miles in the United States, based on data reported by states using the National Hydrography Dataset (NHD). Available at

water quality standards program excludes “wet weather conveyances,” from the definition of “stream.” Under Tennessee law, wet weather conveyances are “man-made or natural watercourses, including natural watercourses that have been modified by channelization, (a) that flow only in direct response to precipitation runoff in their immediate locality, (b) whose channels are at all times above the ground water table, (c) that are not suitable for drinking water supplies; and (d) in which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months.”⁶

Kansas also excludes ephemeral waters from its approved program.⁷ In comments on the agencies’ 2011 guidance, which the proposed rule largely mirrors, Kansas noted that expanding federal jurisdiction to include ephemeral water would bring approximately 100,000 miles of dry erosion features into Kansas’ state clean water act program. Kansas then would be compelled to develop water quality standards and total maximum daily loads for “what amounts to surface depressions that function only during sufficient precipitation.”⁸ In comments on the Proposed Rule, Kansas reiterates its concern that the federal agencies’ quest to reduce their own burden will greatly increase state workloads.⁹

Missouri provides another example. After an extensive stakeholder process, the State of Missouri recently adopted changes to its stream classification program, expanding it to include all streams represented in the 1:100,000 scale of the USGS National Hydrology Dataset.¹⁰ The

http://ofmpub.epa.gov/waters10/attains_nation_cy.control. The NHD is a database that identifies stream segments that comprise the Nation’s surface water drainage system and is based on the USGS 1988 1:100,000-scale Digital Line Graph (DLG) hydrography dataset integrated with reach-related information from the USEPA Reach File Version 3.0-Alpha release (RF3-Alpha). See http://water.epa.gov/scitech/datait/tools/waters/docs/nhd_model.cfm. [Most ephemeral features do not show up at this scale and thus are not reported in these data bases.](#)

⁶ T.C.A. 69-3-1-3(43); TDEC Rule 1200-04-03-.04.

⁷ K.S.A. 82a-2001(a)(2).

⁸ July 14, 2011 Comments of the State of Kansas on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act (attached).

⁹ October 23, 2014, comments filed by Governor Brownback, et al.

¹⁰ See 10 CSR 20-7.031(2)(A) (adopting fishable, swimmable standards for: “1. All perennial rivers and streams; 2. All streams with permanent pools; 3. All rivers and streams included within the 1:100,000 scale National Hydrography Dataset (NHD) described in subsection (1)(R) of this rule.”) (attached) This decision expanded the miles of classified streams in Missouri from 25,025 to a total of 109,870. Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards (June 3, 2011, at 26 (attached)).

decision to exclude smaller streams (those represented at the 1:24,000 scale) was based on the state's determination that the presence of aquatic communities in such small streams was not demonstrated and, if they did exist, could be added on a case-by-case basis.¹¹

3. Evolution of the expansion of “tributary” jurisdiction.

The agencies did not originally assert jurisdiction under the CWA over ephemeral water features. In fact, their assertion of authority over ephemeral water is relatively recent. In 1975, the preamble to the Corps' interim final regulations specified that the upstream limit of jurisdiction is the headwaters, or point where average annual stream flow is five cubic feet per second.¹² In 1977, the preamble to the final Corps regulations specified that jurisdiction extends to the entire surface tributary system.¹³ In 1994, the Corps Baltimore District issued a guidance letter specifying that ephemeral waters act as rain gutters, conveying water for a brief period of time following rain events. As such, they do not ordinarily develop an ordinary high water mark that would indicate they are part of a tributary system. Consequently, they were not regulated.¹⁴ However, in 2000, the Corps Nationwide Permits preamble specified that federal jurisdiction extends to ephemeral streams, provided they have an ordinary high water mark, overturning the Baltimore District's presumption that ephemeral streams would not have an ordinary high water mark.¹⁵ This assertion of jurisdiction led to abuses.¹⁶ Moreover, even though the Corps took this position in 2000, as discussed below, both the plurality and Justice Kennedy were not persuaded that an ordinary high water mark is a basis for jurisdiction.

The agencies also did not assert authority over ditches until relatively recently. In fact, the 1977 Corps definition of waters of the U.S. expressly excluded “manmade nontidal drainage and

¹¹ Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards (June 3, 2011), at 35 (hereinafter MO Regulatory Impact Report).

¹² 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).

¹³ 42 Fed. Reg. at 37,129.

¹⁴ Branch Guidance Letter, COE, Baltimore District, CENAB-OP-R, No.95-01, Oct. 17, 1994 (“Project Managers are frequently required to determine the upstream limits of regulatory jurisdiction, including differentiating between intermittent streams, which are regulated (33 CFR § 328.3(a)(3)), and ephemeral streams, which are not regulated.”) (attached). This has been relied upon by numerous entities. See attached Montgomery County, MD guidance.

¹⁵ 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).

¹⁶ For example, in a March 30, 2004, hearing of the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure on “Inconsistent Regulation of Wetlands and Other Water,” one witness testified that a Corps official used a 25-year old skidder rut to connect a wetland to a ditch to a stream. House Doc. No. 108-58 at 81-82 (attached). Under the proposed rule, Corps officials would remain free to conclude that a skidder rut has an OHWM and therefore is part of the tributary system.

irrigation ditches excavated on dry land” from the definition of tributaries, stating that they “are not considered waters of the United States under this definition.” 33 C.F.R. § 323.2(a)(3)(1977).¹⁷

In addition, the agencies have not traditionally asserted jurisdiction over water based on subsurface connections that are not diversions of former surface streams and have never done so categorically.¹⁸ For example, a 2001 policy issued by the Galveston District of the Corps of Engineers states that it does not use groundwater connections to establish jurisdiction.¹⁹ Moreover, directly contradicting the position in the proposed rule, in litigation, EPA has taken the position that identification of a connection to surface water via groundwater must be made on a site-specific basis.²⁰

Yet the agencies now claim that all waters proposed to be defined as “tributaries,” including ephemeral waters, ditches, and waters with subsurface connections, have a “significant nexus” to navigable or interstate waters or the territorial sea and therefore are *per se* jurisdictional. This is an expansion of jurisdiction.

This proposed expansion of the definition of tributary has created tremendous uncertainty regarding the status of land that exhibits erosion features from wind or water even if dry for many years, the status of water conveyance systems, the status of water drainage systems, the status of ephemeral streams, and the status of features that have no continuous surface connection to navigable water.

¹⁷ “We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered ‘waters of the United States’ under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 208 and 402.” 42 Fed. Reg. at 37127. Even though the preamble stated that the regulations were merely reorganized, the 1986 definition of waters of the U.S. moved this clarification from rule language to preamble language and reserved the right to regulate ditches on a case by case basis. 51 Fed. Reg. at 41217.

¹⁸ Waters and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (GAO-04-297), at 24 (discussing using connections through subsurface closed conveyances to establish jurisdiction only if the pipe replaced a historic stream) (attached). No such limitation appears in the proposed rule.

¹⁹ Adjacent/Isolated Criteria, Galveston District Policy Number 01-001 (attached).

²⁰ *Conservation Law Foundation et al. v U.S. EPA, et. al.*, Case No. 1:10-cv-11455-MLW, Memorandum in Support of Defendants’ Motion for Summary Judgment, at 20-21 (noting that a hydrological connection to surface water via groundwater is a site-specific determination) (attached).

C. Adjacent Waters.

The current regulations assert jurisdiction over wetlands that are adjacent to waters (other than waters that are themselves wetlands) that are considered jurisdictional waters of the U.S. 33 C.F.R. § 328.3(a)(7). “Adjacent” is defined in current regulations as “bordering, contiguous, or neighboring.”

The proposed rule expands this category in two ways. First, the proposed rule would assert jurisdiction over “*all waters*” (not defined), rather than wetlands only, that are “adjacent” to a navigable or interstate water or territorial sea or an impoundment or tributary thereof.²¹ Second, the proposed rule expands the definition of “adjacent” by adding a definition of “neighboring” that includes all water located in (1) a “floodplain” (defined only as an area formed by sediment deposition from inland or coastal waters under “present climactic conditions” (not defined) and that is inundated during periods of “moderate to high flows” (not defined)), (2) a “riparian area” (defined as an area where surface or subsurface hydrology directly influences ecological processes and plant and animal community structure), (3) an area that has a shallow subsurface hydrologic connection (not defined), or (4) an area with a confined surface hydrologic connection (not defined – apparently less than a tributary, but could be a non-jurisdictional feature such as a rill, gully or non-wetland swale) to such water.²²

These new definitions do not reflect current practice. Currently, not all waters in a floodplain are considered jurisdictional.²³ Currently, “riparian area” is a concept used in mitigation, not jurisdiction. In its Nationwide Permit Program, the Corps defines “riparian area” as land.²⁴ Recognizing the ecological value of riparian areas, under Condition 23 of the Nationwide Permits, restoration of a riparian area can be used to mitigate impacts to wetlands, but riparian areas and wetlands are not one and the same.²⁵ Currently, Corps districts do not consistently use

²¹ Current law exercises federal jurisdiction over adjacent wetlands only. *See San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007) (holding that mere adjacency provides a basis for CWA coverage only when the relevant water body is a “wetland”).

²² 79 Fed. Reg. at 22262-63 (proposed 33 C.F.R. § 328.3).

²³ GAO-04-297, at 17-18 (identifying only one Corps district that used location in the floodplain alone, without other evidence, as a basis for establishing jurisdiction over a wetland). Even in that District (Galveston) jurisdiction was not automatic. *See Galveston District guidance, supra* n. 19.

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

²⁵ *Id.* at 10285.

surface connections outside a defined channel to establish jurisdiction.²⁶ And, as discussed above, even if a subsurface connection could be used to establish jurisdiction, proximity to navigable water would be highly relevant.²⁷

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

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

D. Other “Waters.”

Current regulations assert jurisdiction over “other waters” the use, degradation, or destruction of which could affect interstate or foreign commerce, and provide specific examples of water bodies that may be included in this category. 33 C.F.R. § 328.3(a)(3). The proposed rule would assert jurisdiction over all “other waters” (not defined) that alone or in combination with other similarly situated waters have a significant nexus to a navigable or interstate water or territorial sea. “Significant nexus” is defined as a nexus that is more than speculative or insubstantial.²⁸ Once the “significant nexus” is established for a single water, or a category of waters that are “similarly situated,” all are *per se* jurisdictional.

As with ditches and ephemeral waters, the history of the expansion of federal jurisdiction over isolated waters is instructive. In the early 1970s, the Corps did not attempt to assert jurisdiction over isolated waters. In 1975, the Corps’ interim final regulations regulated navigable intrastate lakes up to their ordinary high water mark, if they were utilized in interstate commerce.²⁹ In 1977, the final Corps regulations regulated isolated lakes and other isolated intrastate waters if

²⁶ GAO-04-297. at 18. It is unclear what is meant by the term “confined” in defining a surface connection, and whether or not that requires a channel.

²⁷ See *supra* notes 18-20 and accompanying text.

²⁸ 79 Fed. Reg. at 22263 (proposed 33 C.F.R. § 328.3(c)(7)).

²⁹ 40 Fed. Reg. at 31324.

the degradation or destruction of the waters could affect interstate commerce.³⁰ Further expansion of jurisdiction over isolated waters occurred in the 1980s. In 1985, the EPA General Counsel issued a memorandum stating that waters that are used or would be used by migratory birds or endangered species are regulated (Migratory Bird Rule).³¹ In 1986, the preamble to a final Corps regulation included a recitation of the Migratory Bird Rule.³² In 1989, in *Tabb Lakes v. U.S.*, the Fourth Circuit held that the Migratory Bird Rule is invalid because it was illegally promulgated without notice and comment rulemaking.³³ However, federal regulators continued to apply it.³⁴ In 1997, in *U.S. v. Wilson*, the Fourth Circuit went further and held that asserting jurisdiction over isolated waters merely because they “could affect” interstate commerce is invalid because it goes beyond the authority provided by the Commerce Clause, which requires a showing of actual, substantial, effects.³⁵ In 1998, the Agencies issued a memorandum instructing federal regulators to follow the *Wilson* case only in the Fourth Circuit, and to continue to assert jurisdiction over isolated waters in other parts of the country, even absent proof of actual use in interstate commerce.

Of course, for a particular ‘isolated,’ intrastate water body, Corps or EPA field staff may be able to document only some relatively small-scale connections between that water body and interstate and foreign commerce (*e.g.*, that the isolated water body serves as habitat for migratory birds). Nonetheless, EPA and the Corps believe, and if necessary will demonstrate, that each of these classes of interstate commerce-related activities associated with isolated waters (*e.g.*, migratory bird usage of isolated waters), taken as a whole or in the aggregate, has a substantial effect on interstate or foreign commerce.....³⁶

As discussed below, in 2001, in *SWANCC*, the Supreme Court invalidated the use of the Migratory Bird Rule as a basis for federal jurisdiction.

³⁰ 42 Fed. Reg. at 37127-28.

³¹ Memorandum from Francis S. Blake, EPA General Counsel, to Richard E. Samderson, Acting Assistant Administrator, EPA Office of External Affairs (Sept. 12, 1985).

³² 51 Fed. Reg. at 41217.

³³ *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

³⁴ Memorandum from John Elmore, Department of the Army, Directorate of Civil Works, and David Davis, EPA, Office of Wetlands Protection, Re: *Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of Tabb Lakes v. United States* (January 24, 1990).

³⁵ *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

³⁶ Robert Wayland, Office of Water, EPA, and Charlie Hess, Director of Civil Works, U.S. Army Corps of Engineers, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998).

The agencies have replaced the Migratory Bird Rule with “significant nexus.” This rationale for federal jurisdiction is an inappropriate outgrowth of the Kennedy opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), discussed below.

Under the proposed rule a significant nexus can be based on the movement of biota, so any water could be considered jurisdictional if used by a bird, insect, amphibian, or mammal. If any single water is considered jurisdictional using that criterion, then all waters that are “similarly situated” (*i.e.*, perform the same functions, such as ponds, wetlands, swales, *etc.*) also are jurisdictional. Thus, any water located anywhere could be considered jurisdictional, and the landowner has to worry not just about water on his or her own property, but must also be concerned with the status of water anywhere in the watershed that could be considered “similarly situated.”³⁷ This is an expansion of federal jurisdiction that has caused enormous uncertainty.

E. Exemptions.

The agencies have proposed to recodify exemptions from the current regulations and to codify additional exemptions drawn from language in the preambles of prior rulemakings. However, whether the exemptions were stated previously in rule language or preamble language, they are now exemptions from a *new* underlying rule that is vastly different from the current regulatory definitions of waters of the U.S. This fact has led to confusion regarding what waters are covered by the exemptions.

For example, the proposed exemptions drawn from prior rulemaking preambles describe features that the prior definitions of waters of the U.S. did not reach, because the features *did not qualify* as jurisdictional water under the terms of the prior definitions. However, but for an exemption, the proposed rule would regulate most water features. Thus, the proposed exemptions likely will be interpreted narrowly and will apply only to the features described in each exemption. Further, no explanation for the exemptions is provided other than “longstanding practice” and the observation in the plurality opinion in *Rapanos* that there were certain features that were not primarily the focus of the CWA (*citing* 547 U.S. at 734). 79 Fed. Reg. at 22218. Unfortunately, the explanations from the preambles of prior rules may no longer be relevant because the agencies have changed the underlying definition of waters of the U.S. We agree that there are

³⁷ See 79 Fed. Reg. at 22211; 79 Fed. Reg. at 22263 (proposed 33 C.F.R. § 328.3(c)(7) (defining significant nexus)).

many waters that are not the primary focus of the CWA. The agencies should articulate a clear rationale for distinguishing between waters that are federally regulated and waters that are left to state jurisdiction and expand the exemptions based on that rationale. Their failure to do so has led to significant uncertainty.

1. Waste Treatment Systems and Prior Converted Cropland.

Current regulations include exemptions for waste treatment systems, including impoundments “designed to meet the requirements of the Clean Water Act,” and for prior converted croplands. While the words of the wastewater treatment exemption are not being changed, the agencies are proposing to add a comma before the “designed to” clause, potentially applying that clause to all waste treatment systems, not just impoundments. This change would create significant uncertainty about the scope of the long-standing waste treatment system exemption.

2. Ditches.

Instead of being generally excluded, under the proposed rule ditches will be considered tributaries and therefore waters of the U.S. unless they meet the terms of an exemption. Under the proposed rule a ditch is exempt *only if* (1) it is excavated (not a natural feature such as an erosion feature) wholly in uplands, drains only uplands (uplands is not defined), and has less than perennial flow (meaning that during normal years it does not hold water all 12 months of the year); or (2) the ditch does not contribute flow to a water of the U.S., directly or indirectly. It is not clear if “contribute flow” means surface flow only or both surface flow and groundwater.

The agencies claim that with these exclusions for certain ditches, they have narrowed the definition of waters of the U.S.³⁸ This claim is not true. In fact, the proposed rule constitutes the first time that the regulatory definition has expressly included ditches.

³⁸ In a blog posted on EPA’s website, former Acting Assistant Administrator for Water, Nancy Stoner, says: “For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, that drain only dry lands, and don’t flow all year, are not “waters of the U.S.” This includes many roadside ditches, and many ditches collecting runoff or drainage from crop fields. Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.” <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/>. This statement does not accurately describe the history of attempts to regulate ditches (which is recent) or the scope of the proposed rule (which includes far more ditches than human-altered streams).

As discussed below, the ditch exemptions have created significant uncertainty about the status of ditches because, under the structure of the rule, all ditches that are not excluded are waters of the U.S.

3. Artificial lakes or ponds.

Under the proposed rule, artificial lakes or ponds that are *used exclusively* for purposes such as stock watering, irrigation, settling basins, or rice growing are not waters of the U.S. Expressly excluding only specific types of artificial lakes and ponds has created significant uncertainty about the status of other artificial lakes and ponds not explicitly included in the exemption language, such as cooling ponds and fire water retention ponds.

4. Artificial pools.

Under the proposed rule, artificial reflecting pools or swimming pools created by excavating and/or diking dry land are not jurisdictional. Limiting the exemption to reflecting or swimming pools has created significant uncertainty about the status of other artificial pools that can hold water, such as concrete tanks and even secondary containment structures.

5. Small ornamental waters.

Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons are not jurisdictional. Limiting the exemption to small ornamental waters has created significant uncertainty about the status of large ornamental waters or ornamental waters that are not primarily aesthetic, such as waters that both capture stormwater and are ornamental.

6. Water-filled depressions.

Water-filled depressions created incidental to construction activity are not jurisdictional. Limiting the exemption to depressions created incidental to construction activity has raised significant uncertainty about the status of other depressions on the ground that could collect water, even tire ruts.

7. Groundwater.

Groundwater, including groundwater drained through subsurface drainage systems, is not jurisdictional. We appreciate the affirmation that the CWA does not regulate groundwater.

However, the frequent use of groundwater in the proposed rule to establish a jurisdictional connection has caused significant confusion and concern. For example, the definition of “tributary” includes water that disappears underground and recharges surface water downstream. It is unclear whether the “tributary” retains its status as a water of the U.S. while underground.

8. Gullies and rills.

Under the proposed rule, gullies and rills would not be jurisdictional. However, neither term is defined. According to the preamble: “Gullies are relatively deep channels that are ordinarily formed on valley sides and floors where no channel previously existed.” “Rills are formed by overland water flows eroding the soil surface during rain storms.”³⁹ By contrast, “ephemeral streams” often would be jurisdictional. But again, although the term is used 75 times, the preamble does not define it. EPA’s Draft Connectivity Report defines “ephemeral stream” as: “A stream or river that flows briefly in direct response to precipitation; these channels are above the water table at all times.”⁴⁰ As a result, gullies and rills could be considered ephemeral streams. All are erosion features that carry water only when it rains. The agencies recognize they have not clearly distinguished between these features, even though one is categorically jurisdictional and the others are categorically exempt.⁴¹ Even if not jurisdictional themselves, gullies and rills may be used to establish a connection and turn isolated water into jurisdictional water.⁴² The expansion of jurisdiction to reach ephemeral streams, the lack of definitions, and the use of gullies and rills to make jurisdictional determinations have caused significant uncertainty about the status of these features.

9. Non-wetland swales.

Non-wetland swales are not jurisdictional. However, it is difficult to distinguish a swale from an ephemeral stream. According to the agencies: “Swales are distinct from streams in that they are

³⁹ 79 Fed. Reg. at 22218.

⁴⁰ See Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013 External Review Draft, EPA/600/R-11/098B) (hereinafter, “Draft Connectivity Report”), at Glossary.

⁴¹ “The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.” 79 Fed. Reg. at 22219.

⁴² “Examples of confined surface water hydrologic connections that demonstrate adjacency are swales, gullies, and rills.” 79 Fed. Reg. at 22210. It appears that the skidder rut that was described in Congressional testimony could meet this definition and be used to establish jurisdiction. See *supra* n. 16.

non-channelized, shallow trough-like depressions that carry water mainly during rainstorms or snowmelt.” 79 Fed. Reg. at 22219. Like gullies and rills, the agencies propose to use non-wetland swales to establish connections that would make other water jurisdictional. EPA recognizes that the distinction between a non-jurisdictional swale and a jurisdictional ephemeral stream is very vague. *Id.* As a result, landowners will not know if a swale on their property is considered a jurisdictional water or not. As with gullies and rills, the expansion of jurisdiction to reach ephemeral streams, the lack of definitions, and the use of non-wetland swales to make jurisdictional determinations have caused significant uncertainty about the status of these features.

10. Puddles

The version of the proposed rule that was submitted to OMB for interagency review included an exemption for puddles.⁴³ However, the agencies dropped that exemption before publishing the proposed rule in the *Federal Register*. According to the agencies, the exemption was deleted because “puddles” is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood.⁴⁴ The agencies also claim that:

In addition, one commonly understood meaning for the term “puddle” is a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event. Such a puddle cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground. Puddles of this sort obviously are not, and have never been thought to be, waters of the United States subject to CWA jurisdiction. Listing puddles also could have created the misapprehension that anything larger than a puddle was jurisdictional. That is not the agencies’ intent. *Id.*

Unfortunately, because the agencies are proposing to assert jurisdiction over ephemeral features, puddles may in fact be viewed as jurisdictional if not excluded. Furthermore, because the agencies are proposing to establish jurisdiction based on biological connections, any water where biota, even insects, spend a part of their lifecycle, could be considered connected in a significant way to a navigable or interstate water or territorial sea. Moreover, the preamble language quoted above suggests that standing water that does not sink into the ground in a brief period of time

⁴³ See OMB Review Draft, EPA-HQ-OW-2011-0880-0007.

⁴⁴ 79 Fed. Reg. at 22218.

could be a water of the U.S. Of course, how quickly water sinks into the ground is a function of how saturated the ground is already. Finally, EPA describes vernal pools as “puddles,”⁴⁵ claims the authority to exercise jurisdiction over vernal pools on a case-by-case basis, and seeks comment on whether they should, as a category, be waters of the U.S.⁴⁶ Unless the agencies provide a rationale to distinguish between what is or is not “thought to be” waters of the U.S., all adjacent waters, including puddles, could become subject to federal jurisdiction, causing significant confusion and concern.

III. 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.⁴⁷ To support their 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.

⁴⁵ <http://water.epa.gov/type/wetlands/vernal.cfm>

⁴⁶ 79 Fed. Reg. at 22216.

⁴⁷ See *supra* n. 28.

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 supply⁴⁸ or to protect species and their habitat.⁴⁹ 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 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.*⁵⁰

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

⁴⁸ 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.”

⁴⁹ 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.”).

⁵⁰ 123 Cong. Rec. & S19677-78, (daily ed., Dec. 15, 1977) (emphasis added) (floor statement of Senator Wallop).

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).⁵¹

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.”⁵²

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.⁵³

⁵¹ Draft Connectivity Report, at 4-45.

⁵² 79 Fed. Reg. at 22214.

⁵³ 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.⁵⁴ 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.⁵⁵

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

⁵⁴ See *infra* pp. 23-28.

⁵⁵ *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).

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*.

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.⁵⁶

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.

⁵⁶ *Id.* at 132 (emphasis added).

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 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

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. SWANCC.

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.⁵⁸ The Court also noted that the gravel quarry in Cook County, Illinois, was a

⁵⁷ *Id.* at 132-33 (emphasis added).

⁵⁸ “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

“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.*⁵⁹

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.⁶⁰ 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.⁶¹

3. *Rapanos*.

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.⁶² The concurring opinion by Justice Kennedy held that to be subject to CWA jurisdiction, water must have a “significant

"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.

⁵⁹ 531 U.S. at 167-68 (emphasis added).

⁶⁰ 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).

⁶¹ EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction) (April 27, 2011).

⁶² 547 U.S. at 733.

nexus” to traditional navigable water.⁶³ 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.

C. The Agencies Cannot Rely on the Kennedy 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.⁶⁴ 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.⁶⁵

⁶³ 547 U.S. at 780.

⁶⁴ 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).

⁶⁵ 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).

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 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.’”⁶⁶ That result is not legally defensible.

D. 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.⁶⁷ 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.⁶⁸

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 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

⁶⁶ *United States v. Robinson*, (CV 04-PT-199-S) (U.S. Dist. Ct. No. Dist. Ala.) (mem. opinion Nov. 11, 2007), at 30.

⁶⁷ 79 Fed. Reg. at 22197.

⁶⁸ 79 Fed. Reg. at 22214.

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.

1. 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*.⁶⁹

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.⁷⁰ and for the first time in a rule defining waters of the U.S., asserts jurisdiction over ephemeral waters.⁷¹

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.⁷²

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.⁷³ 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

⁶⁹ Id. at 781-82 (Justice Kennedy, concurring).

⁷⁰ The 1977 Corps regulations expressly *excluded* manmade conveyances. 33 C.F.R. 323.2(a)(3)(1977).

⁷¹ 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.

⁷² 547 U.S. at 734.

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

streams are tributaries that have a significant nexus to downstream waters based on the *aggregate or cumulative* effects.⁷⁴ This expansion of jurisdiction is not supported by either the plurality or the Kennedy opinion.

2. 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

⁷⁴ 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).

jurisdiction to be established based exclusively on biological connections.⁷⁵ 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 effects, the agencies conclude that all “adjacent waters” are jurisdictional.⁷⁶ This expansion in jurisdiction related to adjacent waters also is not supported under either the plurality or the Kennedy opinion.

3. The Proposed Regulation of Other Waters is Overbroad.

In *SWANCC*, the Supreme Court invalidated the assertion of federal jurisdiction 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 goes far beyond the invalid Migratory 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 jurisdiction 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.⁷⁷ 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

⁷⁵ 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.

⁷⁶ 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.”).

⁷⁷ 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.”).

any opinion in *Rapanos* and directly contrary to prior direction from the Supreme Court in *SWANCC*.⁷⁸

IV. The Proposed Rule is Not Supported by the Record and 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.⁷⁹ 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.

A. Studies Related to Ecological Connections Do Not Support CWA Jurisdiction.

The Draft Connectivity Report includes studies that focus on the life cycle, habitat, and movement of animals and insects. The Draft Connectivity Report identifies connections between bodies of water based on these animals and insects, calling this “biological connectivity.” Draft Connectivity Report at 3-28. However, these studies, including studies of invertebrates, fish, phytoplankton, and the life cycle and movement of animals generally are not relevant to the CWA’s provisions.⁸⁰ The Draft Connectivity Report cites a study of the transport of live salmon

⁷⁸ 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).

⁷⁹ 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).

⁸⁰ See *generally* studies cited in sections 4.5, 4.7.2.4, and 4.7.3.3 relating to the movement of organisms actively and passively from streams to downstream waters; studies cited in sections 4.5 and 4.7.3.3 related to the movement of

or their carcasses by brown bears as a connection between streams and riparian areas.⁸¹ It cites a study of the movement of muskrats to establish connections between farm ponds and streams.⁸² It cites a study of the carcasses of anadromous fish to make the case that nutrients can be transported by biota.⁸³ The SAB Panel charged with reviewing the Draft Connectivity Report recommended adding references to a study of the impacts of the excretions of Franklin Gulls when nesting in cattails.⁸⁴ However, none of these studies or the connections they document is relevant to the Act’s focus on protecting the quality of navigable waters from human-related discharges of pollutants.⁸⁵

The goals of the CWA include restoring and maintaining “biological integrity of the Nation’s waters.” However, that goal, and the Act itself, are focused on the *quality of water* necessary to restore and maintain aquatic life, not on the aquatic life itself. Thus, to use the brown bear example cited above, nothing in that study provides any insight into water quality, or impacts of upstream waters on the ability of navigable water to maintain a healthy population of aquatic life. In fact, none of the studies in the Draft Connectivity Report finding “biological connectivity” based on the life cycle, habitat, and movement of animals and insects can be used to identify a connection to downstream navigable waters that has any legal significance under the CWA. The Supreme Court made this point very clearly in *SWANCC*⁸⁶ and it was reiterated by the plurality opinion in *Rapanos*.⁸⁷

In a small concession to the holding in *SWANCC*, in Appendix B (“Legal Analysis”) the preamble to the proposed rule states that use of habitat by non-aquatic species or by migratory

organisms from downstream waters to upstream waters; studies cited in sections 5.3.3, 5.4.4, 5.6.3.3, 5.8.3.3, 5.9.3.2 related to wetlands as sources of organisms, including plants, invertebrates, amphibians, reptiles, and fish, to downstream waters; studies cited in sections 5.3.3.2, 5.6.3.3 related to riparian/floodplain wetlands as feeding habitat for riverine organisms, such as fish, during periods of overbank flow; studies cited in section 5.3.3.1 related to wetlands as sinks for seeds and plant fragments deposited via overbank flow; studies cited in sections 5.3.3.2, 5.4.4 relating to wetlands as refuge for fish, aquatic insects, or other lotic organisms; studies cited in sections 5.4.4, 5.7.3.3, 5.9.3.2 relating to wetlands as habitat and breeding grounds.

⁸¹ Draft Connectivity Report, at 3-8.

⁸² *Id.* at 5-32.

⁸³ *Id.* at 3-27.

⁸⁴ October 17, 2014 SAB Review of the Draft EPA Report on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, at 52 (hereinafter “SAB Report Review”).

⁸⁵ *See supra* pp. 18-21.

⁸⁶ The Supreme Court has clearly said that use of body of water by a migratory bird does not establish a significant nexus to navigable water. *SWANCC*, at 172. The same conclusion would apply to any flora or fauna.

⁸⁷ *See supra* n. 78 and accompanying text.

birds will not be used when making a jurisdictional determination for “other waters.”⁸⁸ However, ignoring the rationale of *SWANCC*, that the presence and migration of biota do not suffice as a foundation for jurisdiction, the agencies rely on the presence and migration of aquatic species, including insects, as relevant to determining jurisdiction throughout the proposed rule, including for “other waters.” Furthermore, Appendix A (“Scientific Evidence”) of the preamble makes it clear that non-aquatic species and migratory birds were used to determine that all tributaries and all adjacent waters, as categories, have a significant nexus to downstream waters and are *per se* jurisdictional.⁸⁹ The Draft Connectivity Report also is replete with references to studies of nonaquatic species and migratory birds.⁹⁰ For example, it asserts:

Migratory birds are known for dispersing over very large distances, and they both (1) consume and excrete viable plant seeds (Murkin and Caldwell, 2000; Amezaga et al., 2002; Figuerola and Green, 2002), and (2) move between geographically isolated wetlands and river networks, depending on temporally dynamic habitat availability (Murkin and Caldwell, 2000 and references therein; Haukos et al., 2006).⁹¹

Accordingly, the record that the agencies have relied on includes studies that are not related to the protection of the quality of navigable waters and even includes studies that the agency lawyers agree cannot be used to establish jurisdiction on a case-by-case basis. This record does not support the proposed rule.

B. Studies Related to Water Bodies or Structures that Provide or Withhold Flow to Navigable Waters Do Not Support CWA Jurisdiction.

The Draft Connectivity Report also discusses studies that focus on “hydrologic connectivity.” If, as a result of hydrologic connectivity, pollutants may be carried from upstream surface water to downstream navigable waters, then hydrologic connectivity may be relevant to a determination whether upstream surface water has a relatively permanent connection to downstream navigable waters that is significant. However, studies related to the flow of water alone are not relevant to

⁸⁸ 79 Fed. Reg. at 22214.

⁸⁹ 79 Fed. Reg. at 22231 and 22234 (muskrats and flying insects creating connections for tributaries); 79 Fed. Reg. at 22239 (terrestrial species in riparian areas), 22240 (movement of animals move back and forth between riparian or floodplain waters and the river network); and 22245 (use of adjacent water by migratory birds).

⁹⁰ The Draft Connectivity Report references use of water by migratory birds specifically thirteen times and use by birds generally ten additional times, citing numerous studies. The SAB panel reviewing the report recommends even greater reliance on the movement of animals. *See, e.g.*, SAB Report Review, at 18, 20, and 30.

⁹¹ Draft Connectivity Report, at 5-31 to 5-32.

CWA goals. Water is not a pollutant.⁹² The CWA does not address the ability to either supply or withhold water. In fact, Congress has made it very clear that the CWA addresses only water quality, not water quantity.⁹³

Accordingly, studies related to the volume of water contributed by streams or wetlands are not relevant to CWA jurisdiction.⁹⁴ Similarly, the function of upstream areas as “sinks” that can hold water also is irrelevant to any evaluation of CWA jurisdiction.⁹⁵

Even studies regarding the transport of pollutants do not support a categorical conclusion that a connection always exists that is relevant to CWA jurisdiction. The SAB panel that reviewed the Draft Connectivity Report made a similar point. The panel agreed that “at sufficiently large spatial and temporal scales, all waters and wetlands are connected.”⁹⁶ However, the panel also noted that connections exist along a gradient and recommended that the agencies recognize that “connections may not be relevant if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters.”⁹⁷

Accordingly, the record that the agencies have compiled shows that the existence of hydrologic connectivity of “tributaries” or “adjacent waters” does not support their determination that such connectivity is “significant.” This is another reason why the record fails to support the proposed rule.

⁹² *Virginia Department of Transportation v. EPA*, No. 1:12-CV-775, (E.D. Va., 01/03/2013) (vacating a TMDL that purported to regulate flow of water under the Clean Water Act as a surrogate for pollutants).

⁹³ CWA § 101(g).

⁹⁴ See generally, studies cited in sections 5.3.1.1, 5.4.2.1, 5.6.3.1, 5.7.2.3, 5.8.3.1 related to wetlands as sources of downstream water; studies cited in section 5.3.1.1 relating to the ability of wetlands to temporarily store water following overbank flow, which then can move back to the stream over time as baseflow due to wetland storage capacity.

⁹⁵ See generally, studies cited in sections 4.3.1, 4.8.3, 4.8.4.2, 4.8.5.1 relating to how streams divert surface flow from downstream waters via infiltration into underlying soil and evapotranspiration to the atmosphere; studies cited in sections 5.3.1.1, 5.4.2.3, 5.8.3.1 relating to how wetlands can be sinks for water by intercepting overland or subsurface flow; studies cited in section 5.4.2.3 related to the impact of wetlands storage capacity on the time for stream discharge to rise and fall in response to a precipitation event.

⁹⁶ SAB Report Review, at 17.

⁹⁷ SAB Report Review, at 5 (“The Report also should recognize that all aquatic habitats have some degree of connection, although such connections *may not be relevant* if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters.”) (emphasis added).

C. Studies Related to Ground Water Do Not Support CWA Jurisdiction.

Some of the studies cited in the Draft Connectivity Report examine the augmentation of flow to navigable waters by groundwater, as a basis for establishing connections. Groundwater is regulated and controlled by states. It is not a water of the United States.⁹⁸ The only regulatory role EPA has in the protection of drinking water aquifers is through a permitting regime for underground injection wells under the Safe Drinking Water Act. The ability to regulate something is the ability to control it. If CWA jurisdiction can be based on groundwater and its supply of flow to navigable waters, then EPA could control ground water withdrawal to maintain such flows. However, EPA has no such authority. As noted above, the disposition of water resources remains with the states. *See* CWA § 101(b) and (g). Accordingly, studies relating to groundwater are not relevant to CWA jurisdiction.

D. Studies Related to Land Do Not Support CWA Jurisdiction.

In numerous places, the Draft Connectivity Report refers to land, not water. It does so in the discussion of wetlands, riparian areas, and flood plains. In section 101(b) of the CWA Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." As discussed above, Congress added section 101(g) to the Act to forestall efforts by federal agencies to use the CWA for purposes such as "Federal land use planning, plant siting and production planning purposes."⁹⁹

Unfortunately the Draft Connectivity Report does not distinguish between land and water when identifying connections. Under the report, a wetland is defined as:

An area that generally exhibits *at least one* of the following three attributes (Cowardin et al., 1979): (1) is inundated or saturated at a frequency sufficient to support, at least periodically, plants adapted to a wet environment; (2) contains undrained hydric soil; or (3) contains nonsoil saturated by shallow water for part of the growing season.¹⁰⁰

⁹⁸ *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).

⁹⁹ *See supra* p. 19.

¹⁰⁰ *See* Draft Connectivity Report Appendix A.

Under the Corps' wetlands delineation manual, an area must demonstrate all three characteristics to be considered a wetland, not just one, so this definition encompasses areas that are not considered wetlands under federal regulations. Accordingly, any study of an area of land identified as a wetland based on this definition is not relevant to the CWA.¹⁰¹

The Draft Connectivity Report finds connections via riparian areas. Riparian areas are defined as:

Transition areas or zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect water bodies with their adjacent uplands. They *include those portions of terrestrial ecosystems* that significantly influence exchanges of energy and matter with aquatic ecosystems. Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine-marine shorelines.¹⁰²

This definition describes land, not water. In fact, in the Draft Connectivity Report the term "riparian area" is distinct from the term "riparian wetland." Accordingly, any connections based on the identification of a riparian area are not relevant to CWA jurisdiction.

The Draft Connectivity Report also finds connections via floodplains. Floodplain is defined as:

A level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events. Floodplains formed under historic or prehistoric climatic conditions can be abandoned by rivers and form terraces.¹⁰³

Again, this definition describes land, not water. Furthermore, this definition provides no limit on the size of a storm required to turn land into water. Under this definition, huge areas of the United States would be considered floodplain, therefore connected to downstream waters, and therefore jurisdictional waters of the United States. The Draft Connectivity Report suggests the agencies are promoting this interpretation by defining "uplands" as both (1) "Higher elevation lands surrounding streams and their floodplains," and (2) "Within the wetland literature... any area

¹⁰¹ See generally studies cited in sections 5.4.2.1, 5.9.3.1, and 5.8.3.1 relating to wetlands as sources of water via overland flow.

¹⁰² See Draft Connectivity Report, Appendix A.

¹⁰³ *Id.*

that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition.”¹⁰⁴ Under the first definition, floodplains and uplands are mutually exclusive. This is inconsistent with the interpretation of the term “upland” used in the Corps’ 2012 nationwide permits.¹⁰⁵ However, by failing to define uplands, the agencies fail to explain whether uplands can exist in the floodplain. One thing is clear: the definition of floodplain is so broad that it should have no role in identifying what waters are subject to CWA jurisdiction.

Finally, the preamble references to “ephemeral streams” and “ephemeral tributaries” provide no basis for distinguishing between these drainage features and other uplands. “Ephemeral stream” is defined in the Draft Connectivity Report as: “A stream or river that flows briefly in direct response to precipitation.”¹⁰⁶ Water is found everywhere during and following storm events. Accordingly, any area of land could be considered an ephemeral stream under the Draft Connectivity Report. Thus, studies relating to drainage from ephemeral features, whether called a stream or not, do not provide a basis for identifying waters that are subject to the CWA.¹⁰⁷

E. Studies Finding Connections Through Point Sources Do Not Support CWA Jurisdiction.

Just as the Draft Connectivity Report does not distinguish between land and water, it also does not distinguish between bodies of water and point sources. For example, the Draft Connectivity Report discusses the flow of water through tile drains and through ditches. Tile drains may be point sources.¹⁰⁸ Ditches are specifically defined as point sources in the CWA.¹⁰⁹ Point sources cannot be waters of the United States.¹¹⁰ If they were, a discrete conveyance for the discharge of pollutants would be a water of the United States, and water flowing in the conveyance would have to meet applicable water quality standards. As a result, many cities and industrial facilities would have to discontinue the use of open conveyance systems and would be compelled to

¹⁰⁴ *Id.*

¹⁰⁵ 77 Fed. Reg. at 10244 (“We acknowledge that floodplains provide important ecological functions and services, but it must also be understood that most areas within 100- year floodplains are not subject to Clean Water Act jurisdiction, because a large proportion of the area within 100-year floodplains consists of uplands.”).

¹⁰⁶ See Draft Connectivity Report, Appendix A.

¹⁰⁷ See studies cited in section 4.8 relating to upland recharge and ephemeral drainages.

¹⁰⁸ However, tile drains will usually be exempt agricultural discharges. See *Pacific Coast Federation of Fishermen’s Association, et al. v. Bureau of Reclamation*, Case No. CIV S-2:11-2980-KJM-CKD (E.D.CA Sept. 16, 2013).

¹⁰⁹ See CWA § 502(14).

¹¹⁰ For example, in the 1990 preamble to the Phase 1 regulation, EPA stated that stormwater runoff *into* municipal sewers (including MS4-controlled ditches, roads, storm drains, etc.) is *not* a discharge of a pollutant into a WOTUS. 55 Fed. Reg. 47,900, 47,997 (Nov. 16, 1990).

install pipes to manage storm water and industrial wastewater. Further, water flowing from a point source that is also a water of the U.S. would be a water transfer that is not subject to NPDES permit regulations, reducing water quality protection.¹¹¹ This result is not consistent with the CWA. Accordingly, studies finding connections based on point sources are not relevant.¹¹²

F. Referenced Studies Related To the Transport of Pollutants Do Not Demonstrate An Impact on Navigable Waters.

The Draft Connectivity Report cites some studies relating to the transport of pollutants from upstream waters to downstream waters. The potential to transport pollutants at levels that would prevent navigable water from attaining CWA goals may establish a substantial impact on a highway of commerce that could support CWA jurisdiction. However, not all pollutant transport is substantial (the test under the Commerce Clause) or significant (if the test under Justice Kennedy’s opinion in *Rapanos* were the law of the land). Absent a determination of substantial impact or a metric that identifies which impacts are significant and which are not, EPA cannot, even under its own interpretation of *Rapanos*, draw categorical conclusions from these studies. As discussed below, the SAB panel that reviewed the Draft Connectivity Report made the same observation, recommending that the agencies quantify the effects of connections on a gradient and noting that “connections may not be relevant if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters.”¹¹³

In *Arkansas v. Oklahoma*, the Supreme Court upheld an EPA determination that a discharge cannot violate a water quality standard requiring no degradation of water quality unless “the discharge effected an ‘actually detectable or measurable’ change in water quality.” 503 U.S. 91, 111 (1992). Applying this standard, upstream water could be subject to CWA jurisdiction based on its nexus to downstream navigable waters only if pollutants from the upstream water could result in an actually detectable or measurable change in the quality of downstream navigable water.

¹¹¹ 40 C.F.R § 122.3(i).

¹¹² See generally studies cited in sections 5.4.2.1, 5.7.3.1, 5.8.3.1, 5.3.1.1, 5.4.2.1, 5.6.3.1, 5.7.2.3, 5.7.3.1, 5.8.3.1 5.2.3 relating to water provided via subsurface drains (“tile drains”) or surface ditches.

¹¹³ SAB Report Review, at 5 (“The Report also should recognize that all aquatic habitats have some degree of connection, although such connections may not be relevant if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters.”).

Dr. Murphy, one of the SAB Panel members who reviewed the proposed rule, makes the same point. According to Dr. Murphy:

Water quality criteria are an explicit result of measuring what constitutes a scientifically significant nexus between a surface water pathway exposure and a resident aquatic species. There is no better way of assessing the impact of a watershed connection than its potential to degrade the water quality of receiving waters or violate water quality standards for those waters. Yet no reference to either water quality standards or the science for setting them appears in the Proposed Rule.¹¹⁴

Most of the studies identified in the Draft Connectivity Report that address pollution transport do not address impact on the quality of water in downstream navigable waters.¹¹⁵ Accordingly, such studies cannot be used to help policy-makers identify the jurisdictional boundaries of the CWA.

G. The Studies Do Not Support the Lines Drawn by the Agencies Between Jurisdictional and Non-Jurisdictional Water.

As discussed above, the agencies have developed the proposed rule in reliance on (1) a sentence in the Kennedy opinion speculating about the cumulative effects of wetlands on other jurisdictional waters,¹¹⁶ (2) studies of physical, chemical and biological connectivity between waters, and (3) an assumption that the existence of connections, if aggregated, would support federal jurisdiction.¹¹⁷

As many of the SAB panel members who reviewed the proposed rule point out, this framework cannot support the rule, as proposed. Significant changes must be made to the rule to address the concerns raised by the Panel.

¹¹⁴ Attachment to September 2, 2014, Memorandum from Dr. Amanda D. Rodewald, to Dr. David Allen, “Comments to the chartered SAB on the adequacy of the Scientific and Technical Basis of the Proposed Rule Titled “Definition of ‘Waters of the United States’ Under the Clean Water Act,” at 93 (hereinafter SAB Rule Review) (attached).

¹¹⁵ See generally, studies cited in chapter 4 relating to the transport of debris and chemicals.

¹¹⁶ Justice Kennedy speculates that 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.

¹¹⁷ See *supra* p. 27.

1. The Existence of a Connection Does not Imply a Significant Effect on Downstream Water.

SAB panel members point out that connectivity occurs on a gradient.¹¹⁸ Applying that fact to the proposed rule, Dr. Aldous points out that: ‘Specific scientifically-grounded, objective methods must be put in place to draw the line between those waters having or not having a significant nexus to other jurisdictional waters.’¹¹⁹

In particular, SAB panel members noted that this gradient is critical to determining what waters have or do not have a “significant nexus” to downstream waters:

Panel members generally found that the term “significant nexus” was poorly defined in the proposed rule and that the use of the term “significant” was vague. Panel members commented that the little guidance was provided in the preamble of the rule to interpret these terms. There was agreement among Panel members that it was important to articulate in the proposed rule that (1) “significant nexus” is not a scientific term but rather legal term that requires a policy determination in light of the law and science and (2) the relative strength of downstream effects should inform the conclusions about the significance of those effects for purposes of interpreting the Clean Water Act.¹²⁰

According to the Panel members, developing such methods will require additional research:

Panel members commented that as the science continues to develop, other sets of wetlands may be identified as “similarly situated.” Panel members further noted that before such determinations are made, additional research will be required to establish degree of connectivity and analyze spatial and temporal variability and threshold levels of connectivity. This research will be a requisite step in further development of rules relative to the jurisdictional status of “additional other waters of the U.S.”¹²¹

In response to the agencies’ request for comments on including additional categories of water as jurisdictional by rule, Dr. Ali responded as follows:

The draft rule goes on to say that “*the [EPA science] Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule*” but there again, it is unclear to me whether that very

¹¹⁸ Incorporating a gradient approach to connectivity is one of the chief recommendations of the SAB review of the Draft Connectivity Report. SAB Report Review, at 2.

¹¹⁹ SAB Rule Review, at 2.

¹²⁰ September 2, 2014, Memorandum from Dr. Amanda D. Rodewald, to Dr. David Allen, “Comments to the chartered SAB on the adequacy of the Scientific and Technical Basis of the Proposed Rule Titled “Definition of ‘Waters of the United States’ Under the Clean Water Act,” at 6 (hereinafter Rodewald Memorandum) (attached).

¹²¹ Rodewald Memorandum, at 5.

qualitative terminology (“very strong”) is a synonym for “significant”. Having other groups or types of waters being determined jurisdictional by rule or category would only be possible if we could rank them according to the frequency and/or magnitude and/or duration with which they actively transfer materials (or prevent the transfer of materials) to downstream waters (see coarse schematic in Figure 1).¹²²

The concern regarding the need to address the frequency and magnitude of the transfer of materials to downstream waters applies equally to the waters the agencies have proposed to list as jurisdictional by rule, as to any additional categories that may be suggested by commenters.

2. The Record Is Unrelated to Categories Identified by the Agencies as Jurisdictional.

Just as the Draft Connectivity Report does not address the significance of connections, it also does not address the categories that the agencies propose to determine are *per se* jurisdictional. Specifically, the studies in the Draft Connectivity Report support ecological connections, but the waters addressed in the studies do not match the waters regulated in the proposed rule.

i. Tributaries.

For example, with respect to tributaries, the agencies assert:

While Justice Kennedy’s opinion focused on adjacent wetlands in light of the facts of the cases before him, the agencies determined it was reasonable and appropriate to undertake a detailed examination of the scientific literature to determine whether tributaries, as a category and as the agencies propose to define them, significantly affect the chemical, physical, or biological integrity of downstream navigable waters, interstate waters, or territorial seas into which they flow. Based on this extensive analysis, the agencies concluded that tributaries with bed and banks, and ordinary high water marks, alone or in combination with other tributaries, as defined by the proposed regulation, in the watershed perform these functions and should be considered, as a category, to be “waters of the United States.”¹²³

The “extensive analysis” referred to in the preamble does not exist. The agencies cite no studies supporting the premise that an OHWM means that a channel has sufficient flow to carry pollutants to navigable water.¹²⁴ The OHWM is intended to determine the lateral limits of

¹²² SAB Rule Review, at 12.

¹²³ 79 Fed. Reg. at 22259.

¹²⁴ 79 Fed. Reg. at 22202.

jurisdiction of a body of water, in the absence of wetlands.¹²⁵ There has never been a scientific basis for using the OHWM to trace the longitudinal limits of a tributary.¹²⁶ A 2004 GAO Report noted significant inconsistencies among Corps districts in identifying waters of the U.S., including identifying an OHWM.¹²⁷ Even Justice Kennedy noted this report in the *Rapanos* case. 547 U.S. at 781. The proposed rule suggests that a 2005 Corps Regulatory Guidance Letter and a 2008 field guide have solved the problem of inconsistency relating to identifying an OHWM.¹²⁸ However the guidance letter referred to in the preamble says: “There are no ‘required’ physical characteristics that must be present to make an OHWM determination.”¹²⁹ Also, the field guide referred to in the preamble applies only to the Arid West.¹³⁰

Recognizing that the definition of ordinary high water mark is vague, there are inconsistent interpretations of the OHWM concept, and there are inconsistent field indicators and delineation practices, the Corps is currently developing new guidance on identifying an OHWM.¹³¹ However, irrespective of how an OHWM is identified, there remains no scientific basis for using it to establish federal jurisdiction. As noted by Dr. Joselyn, an SAB Panel member:

The indicators used by the Corps and EPA to determine the ‘ordinary high water’ mark (e.g. natural line on the shore, matted vegetation, sediment sorting) can be observed in very small drainages that are not usually considered in the scientific studies that deal with headwater streams.

These low order features may have flow for only a few hours or days following storm events and are the most likely candidates for being on the low end of the

¹²⁵ 33 C.F.R. § 328.4(c)(1).

¹²⁶ Robert Pierce, Technical Principles Related To Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act (April 2003), at 1 (comments on the Corps’ 2003 Advanced Notice of Proposed Rulemaking, EPA-HQ-OWOW-2002-0050) (attached).

¹²⁷ GAO-04-297, at 3-4.

¹²⁸ 79 Fed. Reg. at 22259-60.

¹²⁹ Corps of Engineers Regulatory Guidance Letter, No. 05-05 (December 7, 2005), at 3. (attached).

¹³⁰ Robert W. Lichvar and Shawn M. McColley, A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States, A Delineation Manual (August 2008).

¹³¹ Matthew K. Mersel, Development of National OHWM Delineation Technical Guidance, Engineer Research and Development Center (March 4, 2014) (power point presentation on the Corps’ plans to develop guidance) (attached). To date, the Corps has issued a report to determine the most appropriate factors to include in a national OHWM classification. Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar. A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification, ERDC/CRREL TR-14-12, August 2014 (attached). However, that report makes no recommendations on streamflow duration, even though the report acknowledges that “[t]he frequency of streamflow in a channel may have a substantial influence on the occurrence and appearance of various physical and biological OHWM indicators.” *Id.* at 36.

gradient where effects on downstream systems are lowest or minimal. Because of the importance of the issue on the extent of federal jurisdiction in these headwaters, the science needs to be more substantial than currently demonstrated in the Draft Science Report....¹³²

Dr. Murphy, another SAB Panel member, found no basis for the assertion of jurisdiction over all tributaries:

As stated in my introductory comments, the inclusion by rule of all tributaries to traditional navigable waters is not scientifically justified by the published literature, the Connectivity report or the SAB review. Inclusion by rule violates the conclusion of the SAB review that connectivity exists as a gradient of causal phenomena that operate variably over flowpaths, and result in consequential disturbances in the watershed.¹³³

The agencies also cite no support for their assertion of jurisdiction over streams that disappear into the ground. According to the agencies:

The significant nexus between a tributary and a downstream water is not broken where the tributary flows underground for a portion of its length, such as in karst topography. The hydrologic connection still exists, meaning that the chemical and biological connections that are mediated by the hydrologic connection also still exist.¹³⁴

However, the agencies cite no studies to support this assertion, much less any studies to support an assertion that water that flows underground affects the quality of navigable or interstate waters or territorial seas. In fact, a study that is relied upon extensively in the Draft Connectivity Report notes that ephemeral and headwaters streams are particularly important for groundwater recharge and “once in the regional aquifer, this water may move long distances over the course of *hundreds to thousands of years* before discharging to the surface to support baseflows in downstream waters (Izbicki et al., 1995).”¹³⁵

The agencies also assert that: All “tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks *because they are directly connected to rivers via permanent surface features* (channels and associated

¹³² SAB Rule Review, at 42.

¹³³ *Id.* at 95.

¹³⁴ 79 Fed. Reg. at 22235.

¹³⁵ Nadeau, T.-L., and M. C. Rains, *supra* n. 4.

alluvial deposits).¹³⁶ The agencies make this statement even though the definition of tributary expressly includes flow paths that are not permanent and disappear underground or are dry for any length of time.

The agencies state:

The scientific literature supports this conclusion [that all tributaries have a significant nexus] for ephemeral tributaries, as well as for intermittent and perennial tributaries; for tributaries both near to and far from the downstream traditional navigable water, interstate water, or the territorial seas; and for natural tributaries or man-altered tributaries, which may include certain ditches and canals.¹³⁷

Despite this assertion, the agencies admit that the scientific literature does *not* address impacts to navigable or interstate waters or territorial seas. “Rather, the literature assesses tributaries in terms of their connections to and effects on downstream waters in a watershed.”¹³⁸ Thus, the physical, chemical and biological impacts of tributaries discussed in the scientific literature relied upon by the agencies, are in most cases *not* impacts to navigable or interstate waters or territorial seas. The agencies assert that the distinction between waters in a watershed and the actual navigable water “does not affect the conclusions of the scientific literature with respect to the effects of tributaries on downstream waters.”¹³⁹ However, they cite no support for this conclusory statement and, therefore, it does not provide support for the agencies’ determination that all tributaries are jurisdictional.

Finally, the agencies assert jurisdiction over manmade conveyances unless excluded, even though the studies in the Draft Connectivity Report focus on natural features. Dr. Josselyn points out:

The exclusion for ditches seems quite narrow. If it is meant to exclude roadside ditches, for example, the ditch must be entirely constructed in uplands and drain only uplands. This could mean that a highway drainage ditch, even though constructed mostly through wetlands [sic], but perhaps impacting wetlands or streams along 1-2% of its length would then be considered a “water of the US”.

¹³⁶ 79 Fed. Reg. at 22227 (emphasis added).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

The Draft Science Report did not address this issue as it focused on natural streams and wetlands.¹⁴⁰

ii. Adjacent waters.

With respect to adjacent waters, the agencies assert:

[T]ributaries and their adjacent waters, and the downstream traditional navigable waters, interstate waters, and territorial seas into which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into any component of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, or biological integrity of these waters.¹⁴¹

Despite this broad assertion, the agencies do not cite any studies support the conclusion that pollution discharged into water located in a floodplain affects the navigable water associated with that floodplain. The SAB Panel noted this omission:

The SAB generally finds that literature on the connectivity of waters and wetlands in floodplain settings included in the Report is limited in scope (i.e., focused largely on headwater riparian wetlands) and should consider the gradient of connectivity that is a function of the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections.¹⁴²

According to Dr. Murphy:

The definition of and inclusion by rule of adjacent waters also is inconsistent with the published literature, the Connectivity report or the SAB review. Once again, the concepts of ‘connectivity,’ ‘spatial and temporal scale,’ ‘connective flowpaths,’ ‘disturbance ecology’ and ‘ecological function’ are implicitly defined as dichotomous conditions or parameters and this violate the idea of a gradient in connectivity that is found throughout the SAB and at the heart of ecological theory and practice. The definition of significant nexus used in the Proposed Rule is scientifically flawed and does not employ modern concepts of scientific significance and statistical inference.¹⁴³

¹⁴⁰ SAB Rule Review, at 49.

¹⁴¹ 79 Fed. Reg. at 22261.

¹⁴² SAB Report Review, at 39.

¹⁴³ SAB Rule Review, at 95.

iii. Other waters.

Similarly, the Draft Connectivity Report does not support the agencies’ analysis for isolated waters. According to the agencies, “[a]vailable literature indicates that “other waters” have important hydrologic, water quality, and habitat functions that have the ability to affect downstream waters if and when a connection exists between the ‘other water’ and downstream waters.¹⁴⁴ However, there is no support for that assumption and, as noted above, the ecological studies cited do not address water quality impacts on navigable or interstate waters. As noted by Dr. Ali, one of the SAB Panel members, extending jurisdiction over “other waters” requires a showing that materials are actually transferred from those waters to downstream navigable waters:

The draft rule goes on to say that “the [EPA science] Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule” but there again, it is unclear to me whether that very qualitative terminology (“very strong”) is a synonym for “significant”. Having other groups or types of waters being determined jurisdictional by rule or category would only be possible if we could rank them according to the frequency and/or magnitude and/or duration with which they actively transfer materials (or prevent the transfer of materials) to downstream waters (see coarse schematic in Figure 1).¹⁴⁵

As a result, even if “connectivity” was an appropriate test for asserting jurisdiction, the record developed by the agencies does not support the proposed rule. And, as discussed above, connectivity alone is not sufficient to demonstrate jurisdiction.

3. The SAB Panel Reviews Demonstrate that the Proposed Rule Fails To Articulate A Coherent Theory To Support Including or Excluding Water From Jurisdiction.

“Connectivity” is the agencies’ rationale for asserting jurisdiction under the proposed rule.¹⁴⁶ However, as noted by the SAB Panel, all water is connected. Taking the rationale to its logical conclusion, all water, even groundwater, could be a water of the U.S. But this would run afoul of the specific constitutional, statutory, and judicial constraints on CWA jurisdiction described above. Furthermore, the lack of a coherent approach consistent with these constraints has led the

¹⁴⁴ 79 Fed. Reg. at 22248.

¹⁴⁵ SAB Rule Review, at 12.

SAB Panel to press for an even more inclusive rule, which would stray even further from the constraints.

Thus, the SAB Panel questions why the Draft Connectivity Report did not include deep aquifer connections.¹⁴⁷

The Report focuses primarily on the site and subregional scales, perhaps due to cost of and access to data and model results. This tends to either ignore or at least downplay the potential significance of regional-scale hydrologic connectivity, especially as it relates to groundwater. This is a problem because regional groundwater flows commonly interact with the surface environment at sinks and springs. For example, the Floridan aquifer underlies all of Florida as well as portions of Mississippi, Alabama, Georgia, and South Carolina and commonly interacts with the surface environment through sinks, springs, and outcrops (see Sun et al. 1997 and references therein).¹⁴⁸

In fact, if the agencies' rationale for the proposed rule were a valid basis for federal jurisdiction, all water in Florida, as well as the parts of Mississippi, Alabama, Georgia and South Carolina that overlay the Floridan aquifer would be regulated waters of the U.S.

Similarly, applying the agencies' "connectivity" rationale to biological connectivity, there are no waters that would be unconnected. The SAB Panel notes that "organismal movement can connect waters and wetlands across uplands and between watersheds."¹⁴⁹ Thus, if the agencies' rationale for the proposed rule was valid, waters could be located in completely different watersheds but still be considered connected.

In addition, the Panel recommends including a discussion of manmade connections "via roads, agricultural tiles, dams, pumping groundwater, irrigation, channelization, and other manmade infrastructure (piped streams, stormwater pipes)."¹⁵⁰

The SAB recommends that the Report authors consider including examples from at least some of the following human alterations affecting the connectivity of streams: agricultural ditches and tile drains, urban lined channels and buried streams, removal of riparian trees, cattle grazing, gravel mining, channel diversions, low-head dams,

¹⁴⁶ As discussed above, the agencies assume all connections, in the aggregate, meet their "significant nexus" standard.

¹⁴⁷ SAB Report Review, at 19.

¹⁴⁸ *Id.*, at 20.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 11.

grade control structures, roads, stream restoration, accelerated erosion, sediment transport and storage, stream restoration, and effluent dominated streams.¹⁵¹

Based on their understanding of connectivity, some members of the Panel who reviewed the proposed rule recommended against the exclusions for groundwater, ditches, rills, gullies, non-wetland swales, and artificial lakes and ponds.¹⁵²

Others Panel members observed that the agencies did not provide a rationale for the exclusions, creating confusion:

Panel members commented that the manner in which decisions would be made about excluding other manmade features was not clearly explained in the preamble of the proposed rule. Members noted, for example, that it was not clear whether the proposed rule would exclude: artificial lakes and ponds that have connections to downstream waters, underground stormwater drainage, natural versus artificial swales, roadside ditches, stormwater quality basins, bioswales, detention basins, industrial water processing and/or treatment facilities, desalination brine storage basins, cooling systems, oil and gas tank basins, fish farms, and rice paddies.¹⁵³

However, one SAB Panel member, Dr. Josselyn, points out that, as currently drafted, the Draft Connectivity Report does not support including manmade features in the waters of the U.S.:

The tributary definition in the Proposed Rule also includes other features such as flood control channels, some ditches, underground stormwater drainage works that are not part of, nor discussed in, the Draft Science Report. Presumably such man-made features may alter the functions associated with the tributary or alter the water quality considerably—either beneficially (sediment deposition in reservoirs) or adversely (addition of urban storm water). The Draft Science Report focused on research from natural systems and therefore does not provide sufficient information on which to discuss the role of these man-made features. The Panel recommended that more information be provided in the Science Report on the effect of man-made features on connectivity—either elimination or enhancement of connectivity. In urban environments where water flows are largely in man-made structures, this information will be necessary to support the conclusion that impacts to upstream features not part of the urban infrastructure would have a significant impact on navigable waters, when in fact the urban infrastructure itself is the cause of the impact to water quality.¹⁵⁴

Dr. Josselyn further recommended that:

¹⁵¹ *Id.* at 31-32.

¹⁵² Rodewald Memorandum, at 6-8.

¹⁵³ cite

¹⁵⁴ *Id.* at 43.

[T]he Science Report might also discuss how some man-made features are designed to avoid connectivity in order to protect the environment from toxic or polluted water sources that are present in some of these features. The construction of any facility designed to retain, store, pond, treat, or process water used in industrial processes and to assure that such liquids do not enter the environment should be excluded from jurisdiction as a matter of rule.¹⁵⁵

These comments all point to a failure by the agencies to articulate a coherent rationale for asserting federal jurisdiction that is consistent with constitutional, statutory, and judicial limits.

V. The Proposed Rule Lacks Clarity.

A. The Broad Legal Rationale For the Proposed Rule Agencies Has Caused Confusion.

The legal rationale for the proposed rule is the assertion that almost all water is connected and therefore jurisdictional. This rationale is so broad that it would justify federal jurisdiction over water that the agencies may never have considered or evaluated when developing the rule. As a result, not only are the SAB Panel members confused, as noted above, but EPA and the Corps of Engineers have not been able to explain how their proposal applies to many waters. This has led to confusion about both what is covered and what is not covered by the proposed rule.

For example, as noted by the SAB Panel, most, if not all of the focus of the Draft Connectivity Report has been on natural waterbodies. This focus has left EPA and the Corps unprepared to answer questions about manmade features.

In a June 30 blog, Acting Assistant Administrator Stoner said that “Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters.” However, the proposed rule says ditches that provide flow year-round during periods of normal rainfall are waters of the U.S. whether or not they previously were natural streams.

Ms. Stoner’s posting also reveals that EPA did not focus on ditches and conveyances that have year-round flow, not because of rainfall, but because these ditches are designed to move water around a facility, or from a storage basin to a town, farm, or industrial facility. The proposed rule does not provide clear exclusions for these types of conveyances.

¹⁵⁵ *Id.* at 48.

On June 11, 2014, Deputy Administrator Bob Perciasepe told the House Transportation and Infrastructure Committee that backyards, wet spots, and puddles are excluded.¹⁵⁶ In her blog, Acting Assistant Administrator Stoner says that: “The Clean Water Act applies only to surface waters, not to land, rain gutters, wet lawns, ground water, or a host of other kinds of waters.” However, while it may not be the agencies’ intent, under the plain language of the proposed rule, absent exclusion, any water in a floodplain would be *per se* jurisdictional under the terms of the rule, even if located in someone’s backyard.

The agencies also do not appear to have focused on how the proposed rule will affect permit programs. In her June 30, 2014 blog, Acting Assistant Administrator Stoner said that “permits will NOT be applied for the application of fertilizer to fields or surrounding ditches or seasonal streams.”¹⁵⁷ This statement is not accurate. The proposed rule makes all water in a flood plain and all seasonal streams federally regulated waters of the U.S. The application of fertilizer or pesticides to a water of the U.S. can require a permit.¹⁵⁸ The blog also says that “The pesticide general permit only requires a NPDES permit where pesticides are applied directly to a water of the U.S.” This statement also is incorrect. The pesticide general permit expressly applies to pesticide applications that take place near water, such as along the bank of a stream, because EPA takes the position that this pesticide will end up in a water of the U.S.¹⁵⁹ EPA’s pesticide permit also says “Delineated Waters of the United States may or may not be wet at the time of discharge; however, discharges to such are still considered discharges to Waters of the United States.”¹⁶⁰ Administrator Stoner’s blog also says that “Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields.” That would be true only if the field, or any other area of land, does not have erosional features that EPA or the Corps might consider an ephemeral stream. A permit could be needed to spray pesticide on any land that is crisscrossed with erosion features that are considered ephemeral streams, even if there is no water present.

¹⁵⁶Hearing on Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule, June 11, 2014. (attached).

¹⁵⁷ <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/> This blog is periodically updated. A screen shot from November 13, 2014 is attached.

¹⁵⁸ *Nat’ Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009).

¹⁵⁹ U.S. EPA, Pesticide General Permit for Discharges From the Application of Pesticides, Authorization to Discharge under the National Pollutant Discharge Elimination System (2011), at 1-1, 9-21 (permit applies at water’s edge as well as in water).

¹⁶⁰ *Id.* at A-8 (defining waters of the U.S. to include areas that are not wet at the time of discharge).

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.

B. The Failure To Define or Limit Essential Terms Renders the Proposed Rule Impermissibly Vague.

Under the proposed rule, the extent of federal control has been 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.”).

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.¹⁶¹ 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 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.¹⁶²

B. Increased Burden.

1. *Burden on Landowners.*

The general response to concern over expanded regulation from EPA and the Corps of Engineers has been: “don’t worry; just get a permit. This answer ignores the time, money, and effort required to secure a permit and will impose an economic burden that has not been quantified in the regulatory impact analysis accompanying the rule.

2. *Burden on State and Local Governments.*

The agencies have failed to quantify the burden on state and local governments (and the federal government) from the expansion of jurisdiction. The proposed rule will affect state and county highway departments, flood control agencies, local governments with municipal separate storm sewer systems, and economic development agencies. For example, the Tennessee Department of Economic and Community Development recently was told by the Corps that a field that they had designated as an industrial development site was a water of the U.S., after the Tennessee regulatory personnel had evaluated the property and determined that the erosion features in the field were not streams or tributaries, but instead were “wet weather conveyances,” an approved

¹⁶¹ 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).

¹⁶² 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).

designation under the state's water quality standards program.¹⁶³ This regulatory determination applies the proposed rule's definition of "tributary" and belies agency assertions that farmers' fields will not be regulated. As a result, state agencies seeking to develop such property will have to incur significant permitting and mitigation costs to develop this property.

3. *Burden on Regulators.*

The agencies also have failed to quantify the burden on regulators from increased jurisdiction. EPA's ATTAINS database that tracks TMDL development reports a total of 3,533,205 river and stream miles in the United States based on data reported by states using the National Hydrography Dataset (NHD). The NHD is a database that interconnects and uniquely identifies the millions of stream segments or reaches that comprise the Nation's surface water drainage system and is based on the USGS 1988 1:100,000-scale Digital Line Graph (DLG) hydrography dataset integrated with reach-related information from the USEPA Reach File Version 3.0-Alpha release (RF3-Alpha).

According to EPA's report on "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest" (EPA/600/R-08/134) (Nov. 2008), even the high resolution NHD "may grossly underestimate the number and length of drainage networks," *i.e.*, ephemeral streams. "Heine et al. (2004) reported that USGS 1:24,000-scale maps under-represented drainage networks by 64.6 percent in a study in Kansas."

EPA's ATTAINS database that tracks TMDL development reports a total of 107,700,000 wetlands acres. Again, the agencies have not reasonably estimated the increase in potential wetland acreage under the proposed rule. Their estimate of only a 2.7 percent increase in jurisdictional wetlands is based on applications for jurisdictional determinations, when in fact landowners would not have applied for JDs for most of the ditches, ephemeral features, isolated wetlands in floodplains and riparian areas, and "other water" wetlands that would be considered jurisdictional under the proposed rule.

EPA's currently approved ICR (EPA ICR No. 1560.10, Nov. 2011) for both water quality reporting and TMDL development activities estimate the cost to States for those programs at

¹⁶³ See *supra* pp. 6-8. A photograph of the field is attached as Appendix A.

\$193,568,080 a year. Of that amount, \$21,390,991 is for assessment activities. The remaining costs of \$172,267,089 are for TMDL development and EPA assumes 4,000 TMDLs a year, averaging \$43,000 per TMDL.

The agencies have failed to include the cost to states of increased regulation under the proposed rule. What would be the total increase in stream miles if ephemeral streams that show up in the NHD at a high resolution become waters of the United States? What is the increase in acres of waters and wetlands regulated if all broadly-interpreted adjacent waters and wetlands become jurisdictional? What would be the total cost to States to assess those additional miles and acres? What will it cost to develop new water quality criteria, designated uses, and TMDLs for waters not currently regulated?

While the agencies have failed to include these costs in the regulatory impact analysis of the proposed rule, some states have provided cost estimates. According to the State of Missouri, if it had to regulate all stream miles discernable at the 1:24,000 scale of the National Hydrology Dataset, it would add an additional 158,565 miles of stream (183,591 miles total) to its existing classified waters network and would more than double the state's monitoring costs from about \$11.2 million to \$24.2 million.¹⁶⁴ The state also would incur additional costs for use designations and total maximum daily load development.

The agencies must calculate these increased costs for every state and include them in the regulatory impact analysis for the rule.

VII. The Agencies' Procedural Errors Render the Proposed Rule Invalid.

A. The Proposed Rule Fails to Meet the Requirements of the Administrative Procedure Act.

The Administrative Procedure Act (APA) requires agencies to provide the public with the opportunity to comment on their actions. 5 U.S.C. 553(c). In order to provide for meaningful public comment under the APA, agencies must disclose the data or other material that the agency relies on to make a final decision. Participation is not meaningful if an agency bases its action

¹⁶⁴ See MO Regulatory Impact Report, *supra* n. 11 at 25, 35.

on information that is not available to the public. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d. Cir. 1977).

As discussed above, the entire basis for the agencies' determination that categories of waters are *per se* waters of the U.S. is the Draft Connectivity Report. The SAB Panel charged with reviewing that report released their comments on October 17, 2014, and recommended extensive changes, including a recommendation to evaluate connectivity along a gradient that recognizes that connectivity is a function of frequency, duration, magnitude, predictability, and consequences.¹⁶⁵

The proposed rule that is out for public comment does not reflect these recommendations. As noted by Dr. Fennessy, one of the SAB Panel members who reviewed the proposed rule:

[] I was surprised about the release date of the draft rule, and to see that it does not reflect the many suggestions made by the SAB panel to strengthen the EPA Connectivity Report. While I understand the timing of the release is typical, it possibly weakens the value of the SAB process, which is designed to strengthen the scientific basis upon which the draft rule is based. I hope the draft rule can be modified to reflect the work of the SAB panel. A second, related issue is that the report does not use the connectivity gradient framework that was suggested by the SAB panel. Establishing the framework early in the draft rule would aid in the discussions about what constitutes a significant degree of connectivity, which could help define jurisdictional waters.¹⁶⁶

The agencies have promised to issue a revised Connectivity Report before they issue a final rule.¹⁶⁷ If the final report addresses the comments of the SAB Panel (including comments noting that connectivity is not a binary function) it will be significantly different from the draft report. Further, if the final rule is amended based on a revised final report, then material that the agencies will rely on to make a final decision will not be available during the public comment period. This means that the public will not have a meaningful opportunity to comment on the rule, violating the APA.

¹⁶⁵ This recommendation, as well as the limitations discussed above of the studies cited in the Draft Connectivity Report, undermines the agencies' conclusion that all "tributaries" (as defined in the proposal) and all "adjacent waters" (as defined in the proposal) have sufficient connection to navigable water to be considered "waters of the U.S."

¹⁶⁶ SAB Rule Review, at 29.

¹⁶⁷ 79 Fed. Reg. at 22197 ("At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and make any adjustments to the final rule that are appropriate based on this record.").

The agencies' plan to rely on guidance relating to the definition of OHWM, floodplain, and other terms used in the proposed rule also would violate the APA because the agencies would be changing federal jurisdiction without notice and comment.¹⁶⁸

B. The Proposed Rule Fails To Comply With the Regulatory Flexibility Act.

On October 1, 2014, Dr. Winslow Sargeant, Small Business Administration, Chief Counsel for Advocacy, filed comments on the proposed rule asserting that the agencies failed to comply with the Regulatory Flexibility Act, which requires consideration of small business impacts.¹⁶⁹ In the proposed rule, the agencies certified that the rule would not have a significant impact on small businesses.¹⁷⁰ The SBA Office of Advocacy disagrees, saying: "Advocacy believes that the agencies have improperly certified this rule," noting significant direct impacts on small businesses. Accordingly, the SBA Office of Advocacy urges EPA to withdraw the proposed rule and comply with the Regulatory Flexibility Act. We agree.

C. The Proposed Rule Fails to Comply with the Unfunded Mandates Control Act.

The agencies also certified that: "This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector."¹⁷¹ According to the agencies, the proposed rule does not directly regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA.

As noted above, the proposed rule will require state, local, and tribal governments to take actions due to the expansion of jurisdiction, just as it will require small businesses, landowners, and the entire regulated community to take actions. The failure to consider local government impacts is another reason the agencies must withdraw the rule and issue a reproposal.

¹⁶⁸ See, e.g., *General Electric v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (guidance that creates legal obligations is a legislative rule).

¹⁶⁹ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

¹⁷⁰ 79 Fed. Reg. at 22220.

¹⁷¹ *Id.*

D. The Proposed Rule Fails to Comply with Executive Order 13121.

In the proposed rule, the agencies also certified that: “This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.”¹⁷² As these comments have demonstrated, the proposed rule would have a significant effect on states’ ability to regulate use of their lands and waters.

Under the Executive Order, federalism implications include “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

As a result, the agencies must fully comply with the “Fundamental Federalism Principles” of section 2 of the Order, which requires the agencies to “act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.” Many states have identified these uncertainties in the proposed rule.¹⁷³ The agencies also must comply with the “Federalism Policymaking Criteria” of section 3, which requires agencies to strictly adhere to constitutional principles and statutory authority, to provide states with maximum administrative discretion, and to rely on state policies to the maximum extent practicable. Finally, before issuing a proposal, the agencies must develop and provide “a federalism summary impact statement, which consists of a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.”

To meet these requirements, the agencies must withdraw the rule and develop a new proposal.

¹⁷² 79 Fed. Reg. at 22,220.

¹⁷³ See, e.g., October 23, 2014 comments filed by Kansas Governor Sam Brownback; October 8, 2014 comments filed by Pennsylvania’s Department of Environmental Protection, Deputy Secretary for Water Management, Kelly Heffner; October 8, 2014 comments filed by the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina.

VIII. Recommendations.

As demonstrated above, the proposed rule lacks statutory, judicial, and record support and the agencies' have failed to meet the requirements of the APA, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders. We therefore urge the agencies to withdraw the proposed rule and develop a new proposal that articulates legitimate 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 should develop this replacement proposal in dialogue with states and the regulated community, in a search for focused, reasonable positions on what is and is not jurisdictional. One or more workshops for this purpose could be helpful. The agencies must then make the revised proposal and improved rationales available for public comment.

A reproposal must meet the following principles. First, it must focus on water quality impacts to navigable waters. Second, it must focus on natural water bodies, not water that is in municipal, agricultural or industrial use. Third, it must apply the combined constraints of the agencies' constitutional authority, Congress' expression of limits in the CWA, and the Supreme Court's opinions including the plurality and Justice Kennedy opinions take together in *Rapanos*. Fourth, it must focus on water bodies where a federal presence is truly warranted, allowing states to retain primary jurisdiction over other waters. Fifth, the agencies must follow proper administrative procedures in issuing the proposal and taking public comment, including accurate cost-benefit analysis, consultation with affected stakeholders, and a focus on minimizing regulatory burden. By following these principles, the agencies would be able to promulgate a rule that is both lawful and clear.

A. Focus on Water Quality Impacts to Navigable Waters.

As discussed above, the CWA addresses only the quality of navigable waters. Consistent with Supreme Court case law interpreting the Act, to protect the quality of navigable waters the agencies may exert jurisdiction over a limited set of waters that are not navigable. The

identification of those waters must be based on a showing that federal jurisdiction over those non-navigable waters is necessary for the protection of the quality of navigable waters.

1. *Tributaries.*

Under the *Rapanos* case, a showing that regulation of a tributary is necessary to protect navigable water must be based whether the flow in the tributary is “relatively permanent” and whether that flow could affect water quality. The plurality decision determined that flow must be relatively permanent to have any impact on downstream navigable water. Justice Kennedy added a requirement that not just any impact was sufficient; it must be a significant impact. As discussed above, Supreme Court precedent requires that both tests be met for a non-navigable water to be jurisdictional under the CWA.

Applying that test to “tributaries,” tributaries would be defined as waters of the U.S. based on whether a natural channel of water that maintains flow even when it is not raining such that it is “relatively permanent.” In addition, the tributary must be capable of transporting pollution to a navigable water such that it could have a significant impact on the navigable water. This legal basis for this recommendation is the fact that the purpose of the CWA is to protect navigable waters from pollution. The technical basis would be an evaluation of the permanence of the flow and whether that flow could carry pollutants to a navigable water in a particular geographic area.¹⁷⁴

This definition would not extend to water that goes underground, so the agencies would not need to make arbitrary decisions about the distance groundwater can travel, or how many years can elapse before groundwater is recharged to surface water, and remain a “tributary.” The CWA does not apply to groundwater, shallow or not. Water that becomes groundwater loses its status as a water of the U.S. Thus, non-navigable water that flows on the surface before it becomes groundwater cannot be considered a water of the U.S. These distinctions will do much to increase the clarity of a proposed rule.

¹⁷⁴ The agencies’ subjective determination that an OHWM can be discerned is not an appropriate surrogate. In 2003, Robert Pierce reviewed the reliability of the use of the term “OHWM” and other terms that the Corps uses to determine the limits of its jurisdiction in inland landscapes and identified technically-based alternative concepts that would be more appropriate and defensible. He concluded that: “The COE needs to assess what a reasonable level of flow is necessary to have an effect on a navigable waterbody before it concludes that any particular landscape feature that exhibits an OHWM is jurisdictional.” *See Pierce, supra* n. 126, at 22.

Under this definition, identification of a tributary would not be based on U.S. Geological Survey maps, aerial photography, or remote sensing information, as proposed by the agencies. Instead, it would be based on quantitative information about flows, adding certainty and clarity and greatly reducing arbitrary differences among jurisdictional determination,

2. *Adjacent and other waters.*

Under *Riverside Bayview*, “adjacent waters” must be limited to wetlands that are part of a continuum that establishes the point at which the water ends and land begins. The legal basis for this recommendation also is protection of navigable waters from pollution. The technical basis would be a determination of the point at which water ends and land begins. Consistent with *Riverside Bayview*, wetlands would meet this definition only if they are not separated from the jurisdictional water by dry land, including berms and levees, so “other waters” would not be a separate category.¹⁷⁵ Any determination that dry land between jurisdictional water and a wetland or other water is somehow part of that continuum would not be legally or technically justified, so wetlands or water beyond that separation cannot be part of the jurisdictional water.

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

The agencies also would not have to define “shallow subsurface hydrologic connection” or “confined surface connection” because these too would not be used to establish jurisdiction. Abandoning these new bases for jurisdiction will mean that the agencies do not have to justify how water regains its status as a “water of the U.S.” after it recharges from groundwater to surface water or after it flows over land. It will also alleviate concerns that the agencies will try to argue that all water is connected every time it rains.

¹⁷⁵ The *Carabell* case that was consolidated with *Rapanos* addressed a man-made drainage ditch that ran along one side of the wetland, separated from it by a 4-foot-wide man-made berm. 547 U.S. at 729. By remanding the case, both the plurality and Justice Kennedy determined that separation by a berm could not be ignored.

These changes will also alleviate concerns that many stormwater ponds, spreading basins, reservoirs, irrigation canals, and cooling ponds or lagoons, and even puddles or other standing water could become jurisdictional waters of the U.S. under the proposed definition of “adjacent waters.”

Finally, these changes will replace the term “significant nexus” with a quantifiable impact on navigable water, removing the concern expressed by some members of the SAB Panel that: “The definition of significant nexus used in the Proposed Rule is scientifically flawed and does not employ modern concepts of scientific significance and statistical inference.”¹⁷⁶ Removing the term “significant nexus” from the regulatory language also addresses the concerns expressed above that the agencies are attempting to read “water quality” out of the CWA and regulate based on the life cycle of species. Under these changes, movement of a beaver between a stream to a farm pond or the movement of an alligator from a river to a golf course water trap will not make the farm pond or water trap a water of the U.S.

3. *Clarity for drainage ditches.*

The recommendations above for defining tributaries and identifying what wetlands are jurisdictional will also clarify the regulatory status of drainage ditches. A manmade ditch would not be a tributary, obviating the need to define what it means to contribute flow and what is “perennial” flow. A manmade ditch could be excavated through a wetland that is not jurisdictional, obviating the need to define the term “uplands.” A manmade ditch that develops wetland characteristics would remain outside federal jurisdiction. A manmade ditch that allows water to percolate into the ground would not be a water of the U.S. Only a ditch that replaces a natural stream, consistent with that Acting Assistant Administrator Stoner’s explanation, would be jurisdictional. These changes would eliminate significant confusion engendered by the proposed rule.

B. Focus on Water Bodies, Not Overland Flow, Point Source Conveyances, or Water Used for Municipal, Industrial, or Commercial Purposes.

The agencies claim the authority to identify what waters are “the focus of the CWA.” 79 Fed. Reg. at 22218. However, they do not explain what that focus is. We urge the agencies to

¹⁷⁶ SAB Rule Review, at 95.

recognize that the CWA is focused on the protection of the quality of navigable waters and is not focused on the use of land or water. Further, not all water is a water of the United States even if it can convey pollutants to navigable water. To facilitate future decision-making and promote certainty regarding when the CWA does and does not apply, the agencies should articulate the legal and policy rationales for identifying water that is not a “water of the U.S.”

1. *Overland flow.*

First, the agencies should clearly explain that the CWA does not regulate the overland flow of rain and snow melt. All overland runoff may eventually flow to a channel, but this water is considered a nonpoint source.¹⁷⁷ It would not become part of the waters of the U.S. until it flows into a water of the U.S.

Applying this clarification, water that flows only in response to rain or snow melt would not be a water of the U.S. Thus, a reproposal would not need to define gullies and rills or distinguish them from an “ephemeral stream.” None of these features would be subject to federal jurisdiction.

2. *Point source conveyances.*

Water in a point source conveyance is not a water of the U.S. Rather, such water may be discharged *to* a water of the U.S. *from* the conveyance. That discharge may carry pollutants that are regulated under section 404 or 402 (or may be exempt by statute). However, the water itself is not regulated until it is discharged and enters a channel that is a water of the U.S.¹⁷⁸

For example, EPA has long recognized that collected stormwater is not a water of the U.S. Thus, 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,” which is specifically designated by EPA’s regulations as a “point source” because it is “the point where a

¹⁷⁷ *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir.1984) (“[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance.”).

¹⁷⁸ See, e.g., *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (water in a lagoon is not regulated under the CWA until it is discharged); *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997) (“The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a “point source”; it is not authorized to regulate the pollutant levels in a facility’s internal waste stream.”).

municipal separate storm sewer discharges to [WOTUS].”¹⁷⁹ Industrial stormwater, including runoff from many construction sites, also is collected and discharged through an outfall.¹⁸⁰ If stormwater collection systems themselves were considered waters of the U.S., then EPA would have no authority to regulate the discharge from the collection system to a river or stream.¹⁸¹ Runoff into municipal and industrial stormwater collection systems would be unregulated nonpoint sources, and the collection systems themselves would be waters of the U.S. that merely transfer water to another water of the U.S. The result would leave stormwater unregulated, undermining the objectives of Congress in section 402(p) of the CWA and reducing the protection of the environment.

A reproposal that limits tributaries to natural streams, as suggested above, would add certainty by making make it clear that conveyances, such as MS4 systems, are not waters of the U.S. As noted by one of the SAB Panel members, the agencies must distinguish between infrastructure and waters of the U.S.¹⁸²

3. Water Used for Municipal, Industrial, or Commercial Purposes.

Another example of non-jurisdictional water is water that is used or managed for municipal, industrial, or commercial purposes. Courts have held that water that is in use is not regulated.¹⁸³ EPA also has long recognized the distinction between water that is in use and water that is part of the waters of the U.S.¹⁸⁴ This policy is embedded in EPA’s water transfer rule, which draws the line between waters of the U.S. and water that is subject to a municipal, industrial or commercial

¹⁷⁹ 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). For a further discussion of the distinction between MS4s and waters of the U.S. see the August 8, 2014 comments of the Coalition of Real Estate (“CORE”) Associations.

¹⁸⁰ 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).

¹⁸¹ See 40 C.F.R § 122.3(i) (the transfer of water from one water of the U.S. to another does not require a permit even if the water carries pollutants).

¹⁸² See *supra* p. 49-50.

¹⁸³ *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997) (“The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a “point source”; it is not authorized to regulate the pollutant levels in a facility’s internal waste stream.”).

¹⁸⁴ See August 5, 2005, Memorandum From Anne Klee and Benjamin Grumbles to Regional Administrators, “Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers,” at 18.

use. “For example, if the water is withdrawn to be used *as cooling water, drinking water, irrigation, or any other use such that it is no longer a water of the U.S.* before being returned to a water of the U.S., the water has been subjected to an intervening use.”¹⁸⁵ As EPA explains:

[A water transfer] differs from a situation in which, for example, an industrial facility takes in water for the purpose of cooling some part of the facility itself. In such cases, the water used for cooling *loses its status as a water of the United States when subjected to an intervening industrial use*¹⁸⁶

If water that is being used were somehow a water of the U.S, then EPA could subject that *use* to permitting, gaining complete control of water supply and water use, contrary to the stated purpose of the CWA, discussed above.

Based on longstanding policy and on the language and structure of the statute, the agencies should specify that water that is subject to a municipal, industrial, commercial, or agricultural use is not a water of the U.S, and that such use includes water that is being collected, stored, managed, used, or treated prior to discharge to a water of the U.S. or without discharge. This is the legal rationale for the waste treatment system exemption. It is the legal rationale that would clarify a number of areas of confusion. This clarification also would address concerns raised by some of the SAB Panel members.¹⁸⁷

For example, clarifying that water that is in use is not jurisdictional makes it clear that a ditch that moves cooling water or process water or waste water around an industrial facility every month of the year is not a water of the U.S. Similarly, a canal used by an irrigation district to move water or hold water every month of the year would not be a water of the U.S.

This recommendation clarifies that all systems that hold, manage, or move water for collection, reuse, treatment, evaporation, infiltration or injection to groundwater, and aquifer storage, would be outside the definition of waters of the U.S. This exclusion would continue to apply even if a storage pond began to grow cattails or if an aquifer storage and recovery system recharges to surface water. Water that is being used by municipalities, industries, and farmers and ranchers are not federal waters.

¹⁸⁵ 73 Fed. Reg. 33697, 33704 (June 13, 2008) (emphasis added).

¹⁸⁶ *Id.* at 33705 n.10 (emphasis added).

¹⁸⁷ *See supra* pp. 49-50.

IX. Conclusion

For all the reasons cited in above, we urge the agencies to withdraw the proposed rule and work with States and stakeholders to develop a proposed a much more refined, clear, reasonable, and workable definition of waters of the U.S. that is consistent with the CWA and Supreme Court caselaw, as recommended above.

Appendix A. Tennessee Department of Economic and Community Development proposed industrial development site.

