DEPARTMENT OF AGRICULTURE
STATE OF NEW MEXICO

MSC 3189, Box 30005
Las Cruces, New Mexico 88003-8005
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Susana Martinez
Governor

Jeff M. Witte
Secretary

June 19, 2017

Ms. Donna Downing
Office of Water
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Environmental Protection Agency's Revision of "Waters of the U.S." under the Clean Water Act

Dear Ms. Downing:

New Mexico Department of Agriculture (NMDA) submits the following comments regarding the Environmental Protection Agency's (EPA) re-proposal of a Waters of the United States (WOTUS) rule to clarify jurisdiction under the Clean Water Act (CWA). NMDA submits these comments in response to Executive Order (EO) 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" and EPA's subsequent federalism consultation on April 19, 2017. NMDA has been involved in the rulemaking process for the definition of WOTUS since 2014, and we have included our agency's previous comments in the appendix of this letter. NMDA submits this letter as initial feedback on the promulgation of a new rulemaking to better define WOTUS.

Background and Summary

On April 21, 2014, EPA and U.S. Army Corps of Engineers (USACE) (collectively "Agencies") published a proposed rule to define WOTUS (79 FR 22188-22274). NMDA, other state agencies, local governments, and stakeholders submitted over one million public comments on the proposed rule. The Agencies finalized the proposed rule on June 29, 2015, (80 FR 37054-37127); and the rule became effective August 28, 2015. On October 9, 2015, a nationwide stay of the rule was put into place by the Sixth Circuit Court of Appeals, halting the implementation of the final rule. On February 28, 2017, President Trump signed an Executive Order directing the Agencies to review the final rule and "publish for notice and comment a proposed rules rescinding or revising [the WOTUS rule], as appropriate and consistent with law."

A new rule must create a consistent and clear regulatory environment that protects our water resources. However, a new rule must not impede upon states' jurisdiction over its waters or create a permitting and regulatory environment that is too cumbersome as to completely inhibit new developments. A definition of WOTUS that creates regulatory certainty and an even playing ground has been needed for

decades. Past attempts to refine or clarify the definition of WOTUS have resulted in expanded jurisdiction of the CWA that has moved the protection measures from the originally intended bodies of water to unintended water areas and land uses.

Initial Rule Development and Feedback

Please refer to NMDA's previous comments in the appendices for a more thorough review of NMDA's feedback on the rulemaking process. Below is a synopsis of some of the issues NMDA found with how the 2014-2015 WOTUS rule was originally promulgated and how this new rulemaking process can be improved upon based on important lessons learned.

State Consultation

One of NMDA's many concerns with the proposed and final WOTUS rules was the lack of consultation or coordination with states. EPA claimed they provided extensive outreach to state and local agencies before the development of the proposed rule. For instance, the *Federal Register* notice for the proposed rulemaking stated, "… EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council, and the Association of State Wetland Managers participated in various calls and meetings" (79 FR 22221). NMDA was party to conversations with multiple state and local agencies throughout the West – including the Wyoming Department of Agriculture, Utah Department of Agriculture and Food, Idaho State Department of Agriculture, Colorado Department of Agriculture, and New Mexico Environment Department – and has been unable to locate even a single one indicating outreach from EPA. State agencies must be consulted with during the rulemaking process to ensure that coordination and consistency for federal and state regulatory affairs are achieved.

Economic Analysis and Economic Impacts

As part of the proposed rulemaking process, the Agencies prepared a report entitled, "Economic Analysis of Proposed Revised Definition of Waters of the U.S. (Economic Analysis)." The Economic Analysis described the costs and benefits of the proposed rule; however, the Agencies made several economic benefit claims that were based on data that was not available to the public. The benefit claims were based on the previous WOTUS definition, which were not the same as those in the proposed rule. Further, 2009-2010 was used as the baseline economic study year for the Economic Analysis, which may have been unrepresentative of a long-term economic comparison due to the overall national economic downturn during that time. Similarly, drawing major conclusions from information in one year is not reflective of long-term implications this rulemaking could have had.

The proposed rulemaking *Federal Register* notice included a claim that under the Regulatory Flexibility Act, the proposed rule would have no effect on small businesses (79 FR 22220). However, language pulled directly from the Economic Analysis stated, "As a result of this proposed action, costs to regulated entities *will likely* increase for permit application expenses (emphasis added)." The same document says, "This proposed rule *could* result in new indirect costs on regulated entities such as the energy, agricultural, and transportation industries; land developers, municipalities, industrial operations; and on governments administering regulatory programs, at the tribal, state and federal levels (emphasis added)." The *Federal Register* notice and the Economic Analysis conclusions clearly contradict each other; and NMDA agrees with the latter, that increased permitting would come with increased costs to small businesses. An accurate and thorough economic analysis must be completed in the rulemaking process going into the future.

The promulgation of a new rule can provide an opportunity to learn from the mistakes made during the 2014-2015 rulemaking effort. Thorough, objective, and accurate economic and regulatory impact analyses are needed for any new WOTUS definitional changes.

Connectivity Research and Reporting

The EPA's Office of Research and Development's report entitled, "Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence (Connectivity Report)," the document upon which these definitional changes were based, was not complete at the time of publication of the proposed WOTUS Rule. Meanwhile, EPA's Scientific Advisory Board (SAB) was tasked with reviewing the Connectivity Report for the "clarity and technical accuracy of the report, whether it includes the most relevant peer-reviewed literature; whether the literature has been correctly summarized; and whether the findings and conclusions are supported by the available science." SAB completed their review of the Connectivity Report October 17, 2014, and had substantial recommendations for improvement and further scientific analysis.

EPA has the responsibility to provide finalized and complete documentation to the public, especially when other important federal actions hinge on the outcome of that documentation. The Connectivity Report needs to be reviewed for scientific and technical accuracy; and if it used during the promulgation of a new rule, it should be published for reference.

New Rule Promulgation

EPA indicated in their May 8, 2017, letter to your office that they intend to take action to:

> First…establish the legal status quo in the Code of Federal regulations, by re-codifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule. Second, the [Agencies] plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the [*Rapanos v. United States, 547 U.S. 715 92006)*] (*Rapanos*) plurality opinion.

NMDA has the following feedback on ways to improve upon the regulation that was in place prior to issuance of the 2014-2015 rulemaking effort. We have organized our feedback to reflect the individual components of the 1986/1988 regulatory definition of WOTUS (40 CFR 230.3(s)).[1] Please also refer to our previously submitted comments in the appendices for specific reviews on the 2014-2015 rulemaking effort.

Previous WOTUS Definition

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

[1] U.S. Environmental Protection Agency, Waters of the United States Rulemaking, "Current Implementation of 'Waters of the United States' - 1986/1988 Regulatory Definition of 'Waters of the United States,'" available at: https://www.epa.gov/wotus-rule/about-waters-united-states.

This section was not changed in the 2014-2015 rulemaking effort. This is a relatively widely accepted category and is not refuted in Justice Scalia's opinion.

(2) All interstate waters including interstate wetlands;

This section also was not changed in the 2014-2015 rulemaking effort. This is a relatively widely accepted category and is not refuted in Justice Scalia's opinion.

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

1. *Which are or could be used by interstate or foreign travelers for recreational or other purposes; or*
2. *From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or*
3. *Which are used or could be used for industrial purposes by industries in interstate commerce;*

Section 3 was removed from the 2014-2015 rulemaking effort. However, the waters as described in Section 3 were moved into other categories during the 2014-2015 rulemaking effort, thereby, creating confusion. The provision of "such as" indicates that additional waters other than those specifically listed could be included in practice by the Agencies, which warrants broad interpretation. Also, the provision of "including intermittent streams" is in direct conflict with Justice Scalia's opinion. Justice Scalia's opinion is clear in that the intention of which waters should be under the jurisdiction of the Clean Water Act (CWA) "include only relatively permanent, standing, or flowing bodies of water" (*Rapanos v. United States*, 13). This section has caused much confusion in its application in determining waters that are under CWA jurisdiction, thus needs to be closely reviewed.

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

This section also was not changed in the 2014-2015 rulemaking effort. This is a relatively widely accepted category and is not refuted in Justice Scalia's opinion.

(5) Tributaries of waters identified in paragraphs(s) (1) through (4) of this section;

There was referential change in this section in the 2014-2015 rulemaking effort to include a definition of the term "tributary." It was the definition – not the inclusion of the category – that had so many entities concerned that ditches, arroyos, small intermittent streams, etc., would now be placed into this category. Please see NMDA's comments in the appendices for our specific concerns on this section and associated definition. A definition of the term is needed to clarify this section; however, the definition should incorporate lessons learned from the 2014-2015 rulemaking effort and from Justice Scalia's opinion in drafting a new definition to ensure that unintended areas are not made jurisdictional under the CWA.

(6) The territorial sea;

This section also was not changed in the 2014-2015 rulemaking effort. This is a relatively widely accepted category and is not refuted in Justice Scalia's opinion.

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs(s) (1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

This was a major area of question in the *Rapanos* case. The question of adjacency was interpreted in the 2014-2015 rulemaking effort to be in line with the dissenting opinion of the case, which is quite broad. Justice Scalia's plurality opinion provides a much narrower reading of this section that "only those wetlands with a continuous surface connection to bodies that are 'waters of the U.S.' in their own right…are 'adjacent' to such waters and covered by the [CWA]" (*Rapanos v. United States,* 3). Clarification of this section is needed; however, the section should incorporate lessons learned from the 2014-2015 rulemaking effort and from Justice Scalia's opinion to ensure that unintended areas are not made jurisdictional under the CWA.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

The 2014-2015 rulemaking effort also excluded "prior converted cropland." The *Federal Register* notice for this proposed rule (in a footnote) states the Agencies use the Natural Resource Conservation Service (NRCS) definition of prior converted cropland for purposes of determining jurisdiction under the CWA (79 FR 22189). NRCS defines prior converted cropland as farmland that was:

- Cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as corn);
- The land was cleared, drained or otherwise manipulated to make it possible to plant a crop;
- The land has continued to be used for agricultural purposes (cropping, haying or grazing);
- And the land does not flood or pond for more than 14 days during the growing season.

NMDA is highly concerned with the exclusion of prior converted cropland, as it is currently identified, because it relies on NRCS's use of 1985 as the year that farmland must have been used for agricultural purposes. This creates a clear barrier to entry. In developing a new WOTUS rule, NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products – regardless of whether the agricultural operation was established before or after 1985 and regardless of whether the land was previously in a wetland.

Also, several NRCS programs, such as the Conservation Reserve Program (CRP), incentivizes agricultural producers to take land out of production:

> In exchange for a yearly rental payment, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant species that will improve environmental health and quality. Contracts for land enrolled in CRP are 10 - 15 years in length. The long-term goal of the program is to re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat.

NMDA is concerned that being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production.

Furthermore, this provision states "the final authority regarding Clean Water Act jurisdiction remains with EPA." The Agencies have neglected to independently define prior converted cropland, which is contrary to logic given that EPA's claims of final authority over determining exclusions. Providing a clear definition would assist in offering consistency for the regulated public in determining if their land will be considered prior converted cropland thus excluded from being jurisdictional.

Other Topics for Consideration

Commonly Disputed Terminology

NMDA had the opportunity to participate in webinars on the federalism consultation process for this new rulemaking effort (see Appendix G for the slides that were shared during these webinars). During these webinars, EPA posed the question of how states would like to see the terms "relatively permanent" for tributaries and streams and "continuous surface connection" for wetlands defined in order to be consistent with the *Rapanos* plurality opinion. The options that were discussed for better defining the term "relatively permanent" were: 1) perennial streams plus streams with "seasonal" flow, 2) perennial streams plus streams with another measure of flow, 3) perennial streams only. It is NMDA's perspective that option #3 would be most in line with the *Rapanos* plurality opinion and would reduce the regulatory uncertainty that may be associated with the other options. The options that were discussed for better defining "continuous surface connection" were: 1) surface connection even through nonjurisdictional features, 2) some degree of connectivity, 3) wetlands must directly touch jurisdictional waters. Once again, it is NMDA's perspective that option #3 would be most in line with the *Rapanos* plurality opinion and would reduce the regulatory uncertainty that may be associated with the other options.

New Mexico Authorities

According to consultation with the New Mexico Environment Department during the 2014-2015 rulemaking effort, waters within closed basins do not drain into any navigable or interstate waters and have not historically been under the jurisdiction of the CWA. Instead, these waters are under state jurisdiction. In New Mexico, closed basins are defined as "closed with respect to surface flow if its topography prevents the occurrence of visible outflow. It is closed hydrologically if neither surface nor underground outflow can occur." When promulgating a new WOTUS rule, NMDA requests the addition of waters within "closed basins" to the list of exclusions from CWA jurisdiction. It is important to keep in mind that state water quality requirements also protect waters. Just because a

water body is not jurisdictional to the Agencies does not mean it is not regulated for water quality standards.

Additional Resource Needs
During the initial proposed rulemaking process, EPA was unable to present consistent interpretations of the changes in the definitions of WOTUS, in spite of claims that the document's purpose is to increase clarity. Because any definitional changes will rely on waters (1) through (4), NMDA suggests the maps or lists of these waters be developed. From these maps stakeholders will be given the opportunity to more easily determine waters that may be included in wasters (5) through (7) of any new rule. Providing clear and thorough maps of jurisdictional waters will assist in increasing transparency, accountability, and clarity in the promulgation of a new rule.

Conclusion
NMDA appreciates the opportunity to provide feedback on a new rulemaking to define "Waters of the U.S." under the Clean Water Act. Given that any Clean Water Act definitional change would directly impact the agricultural community, we request to be directly involved in the rulemaking process along with other state partners. Please contact Ms. Julie Maitland at (575) 646-3506 or jmaitland@nmda.nmsu.edu with any questions regarding these comments.

Sincerely,

Jeff M. Witte

JMW/ll/ya

Appendix A:
Extension of the Deadline for the Proposed Rule for Definition of "Waters of the U.S." Under the Clean Water Act

DEPARTMENT OF AGRICULTURE
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SUSANA MARTINEZ
Governor

JEFF M. WITTE
Secretary

May 7, 2014

Ms. Donna Downing, Environmental Protection Agency
Ms. Stacey Jensen, U.S. Army Corps of Engineers
Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

ATTN: Docket ID No. EPA-HQ-OW-2011-0880

RE: Proposed Rule – Definition of "Waters of the United States" Under the Clean Water Act [Docket EPA-HQ-OW-2011-0880]

Dear Ms. Downing and Ms. Jensen:

New Mexico Department of Agriculture (NMDA) submits the following initial comments in response to the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency's (EPA) (collectively "the Agencies") Proposed Rule for Definition of "Waters of the United States" Under the Clean Water Act (79 FR 22188-22274) [Docket EPA-HQ-OW-2011-0880].

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics, 2012). NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

Peer-Reviewed Literature

The proposed rule will substantially impact the agricultural community and their practices. Our preliminary concern is that the rule continually references a report (Report) that is not yet finalized, entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*"

The draft rule states: "*The Report is under review by EPA's Science Advisory Board, and the rule will not be finalized until that review and the final Report are complete.*" While we agree the rule should not be finalized until the Report is complete, we do not agree that the draft rule should reference the Report in its current iteration – especially because of the explicit warning printed on every page "DRAFT - DO NOT CITE OR QUOTE."

Our recommendation is that the peer-reviewed literature be finalized by addressing and incorporating public comments before the EPA uses it to endorse other federal actions. Any major changes to the Proposed Rule as a result of findings from the Report should be addressed in a second draft of the Proposed Rule (argued further below).

Additional Commenting Opportunity
Within the proposed rule, the agencies provide opportunity to the public to comment on options for aspects of the proposed rule – especially with regard to choosing how to address "Other Waters." NMDA requests agencies make a second draft of the Proposed Rule available to the public to comment after final regulatory decisions on "Other Waters" and any other water categories are made. With so many decisions still unclear, the public deserves the right to comment on the proposed rule once the different options are narrowed.

Extending Comment Period
NMDA recommends the EPA suspend the current comment period and reopen it when the Report is finalized, giving 90 days for input from that point. This would afford stakeholders the opportunity to review documents in their finalized forms and in chronological order of dependence.

Conclusion
Thank you for the opportunity to comment on the Proposed Rule for Definition of "Waters of the United States" Under the Clean Water Act. NMDA requests to be included in any updates or mailing lists associated with this Proposed Rule. If clarification of any comments is needed, contact Mr. Ryan Ward at (575) 646-2670 or Ms. Lacy Levine at (575) 646-8024.

Sincerely,

Jeff M. Witte

JW/rw/ya

Appendix B:
Exemption from Permitting Under Section 404(f) (1) (A) of the Clean Water Act to Certain Agricultural Conservation Practices

DEPARTMENT OF AGRICULTURE
STATE OF NEW MEXICO

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SUSANA MARTINEZ
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JEFF M. WITTE
Secretary

July 2, 2014

Ms. Damaris Christensen
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G. Street, NW
Washington, DC 20314

Mr. Chip Smith
Office of the Deputy Assistant Secretary of the Army
Department of the Army
108 Army Pentagon
Washington, DC 22310

RE: Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices [*Docket EPA-HQ-OW-2013-0820; 9908-97-OW*]

Dear Ms. Christensen, Ms. Jensen, and Mr. Smith:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the United States Army Corps of Engineers (Corps), Department of the Army (DOA), and Environmental Protection Agency's (EPA) (collectively "the Agencies") Notice of Availability (NOA) Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act (CWA) to Certain Agricultural Conservation Practices (79 FR 22276) [*Docket EPA-HQ-OW-2013-0820; 9908-97-OW*].

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics, 2012). NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

Although the interpretative rule was enacted without prior public comment, NMDA has reviewed the rule and has several concerns about its impact on the future of agriculture in the United States and New Mexico in particular. NMDA has concerns that this rule will be a detriment to agriculture when it is considered in conjunction with the expanded definition of "waters of the US" currently open for public comment.

The interpretative rule states that a farmer enacting one of the conservation practices approved under the interpretive rule does not have to have prior approval from the Corps nor the EPA, but the farmer must comply with National Resources Conservation Service (NRCS) technical standards. The rule does not make it clear which agency will ensure that farming practices are in compliance nor what would happen

if a farmer unknowingly is not in compliance. NMDA has strong concerns that farmers and ranchers would be open to citizen lawsuits under the Clean Water Act if they are unknowingly not in compliance with the NRCS standard. The interpretative rule seems to leave farmers and ranchers open to more regulatory uncertainty.

If this interpretative rule intends to make NRCS the enforcers of compliance, we fear an erosion of a strong and beneficial relationship between farmers and NRCS. Currently, NRCS provides technical guidance on a wide range of farming practices. As was stated by NRCS field personnel at a recent meeting in New Mexico, their job is to assist farmers. NRCS field personnel have not traditionally had a regulatory or policing role, rather they have helped farmers solve technical problems, improve farming practices, and access resources of the United States Department of Agriculture (USDA). All of this provides benefits to farmers, the natural resources upon which farming and the nation depend. Most importantly, the nation's food security depends on a continued supply of safe and fresh foods.

We are also concerned that NRCS will no longer be in sole control of the conservation practices they develop. The last paragraph of the interpretative rule seems to indicate that EPA and the Corps will have significant input, and perhaps veto power, over the conservation practices. NRCS has a long history of on-the-ground work with farmers and ranchers. They understand the challenges and practices of farming and ranching. The business of NRCS is helping farmers and ranchers with the implementation of on-the-ground conservation practices. We are concerned that two agencies (EPA and Corps) that do not have agronomists, horticulturists, nor range scientists on staff will be directing how farming and ranching activities are done. Development and modification of conservation practices should remain within the prevue of the experts at NRCS.

Additionally, the interpretative rule states that exempted conservation practices will be reviewed on an annual basis. The implementation of conservation practices involves multi-year projects; and NMDA is concerned that a farmer who has enacted or is in the process of enacting a practice will suddenly be left in a state of regulatory uncertainty if that practice is removed from the approved list. A process for dealing with this situation should be added to the rule. Ideally, this farmer would be grandfathered into the exemption from permitting.

Lastly, the increasing average age of farmers and ranchers in the country and the lack of recruitment of younger individuals into farming is a looming concern of both the USDA and NMDA. The interpretative rule states that only practices performed on an "established (i.e. ongoing) farming, silviculture, or ranching operation" are eligible for exemption. This is contrary to many policies of the USDA, which aim to provide incentives to young people to get involved in agriculture, and could jeopardize the future of farming.

Farming and ranching operations in New Mexico are almost entirely small, family-owned businesses. We request that EPA, Corps, and NRCS reevaluate the interpretative rule and the agricultural exemptions under the Clean Water Act to ensure that farming and ranching have a future in New Mexico and the United States. As the world population continues to grow and the number of people who face food security challenges increases in this country and elsewhere, the United States must

ensure that agriculture continues to have the ability to produce a food supply that can meet these mounting demands.

Thank you for the opportunity to comment on this NOA Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act (CWA) to Certain Agricultural Conservation Practices. NMDA requests to be included in any updates or mailing lists associated with the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act (CWA) to Certain Agricultural Conservation Practices.

If clarification of any comments is needed, please contact Ms. Angela Brannigan at (575) 646-8025 or Ms. Lacy Levine at (575) 646-8024.

Sincerely,

Jeff M. Witte

JMW/ll/ya

Works Cited

New Mexico Agricultural Statistics – 2012. Available at: http://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/bulletin12.asp

Notice of Proposed Changes to the National Handbook of Conservation Practices for the Natural Resources Conservation Service

DEPARTMENT OF AGRICULTURE
STATE OF NEW MEXICO

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SUSANA MARTINEZ
Governor

JEFF M. WITTE
Secretary

August 28, 2014

ATTN: Regulatory and Agency Policy Team
Mr. Wayne Bogovich
Strategic Planning and Accountability
Natural Resources Conservation Service
5601 Sunnyside Ave. Building 1-1112D
Beltsville, MD 20705

RE: Notice of Availability: Notice of Proposed Changes to the National Handbook of Conservation Practices for the Natural Resources Conservation Service *(Docket No. NRCS-2014-0009; 79 FR 48723-48725)*

Dear Mr. Bogovich:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the Natural Resource Conservation Service's (NRCS) Notice of Availability of Proposed Changes to the National Handbook of Conservation Practices (Handbook) *(Docket No. NRCS-2014-0009; 79 FR 48723-48725).*

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries as well as to analyze those actions by federal and state agencies that may affect its viability. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012 (New Mexico Agricultural Statistics, 2012). NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

NMDA has no comments regarding the specific proposed changes to the Handbook except that many of them are well received and appreciated. However, we have a few comments regarding any future proposed changes to the Handbook.

First, several of the Conservation Practice Standards that NRCS is proposing changes to are also Agricultural Conservation Practice Standards, which are exempt from 404(f)(1)(A) permitting under the Environmental Protection Agency's Clean Water Act (CWA) (79 FR 22276). In the future, it would be helpful to agricultural producers to include some reference to the CWA's Agricultural Conservation Practice Standards within any proposed changes to the Handbook — especially now that NRCS is heavily involved in the implementation of the CWA's Agricultural

Conservation Practice Standards. Mentioning the CWA would remind agricultural producers that the conservation practices they employ in order to avoid any violation of the CWA may need to change in accordance with the proposed changes to the Handbook.

Also, NMDA requests that a summary statement of why each change to the Handbook is being made be provided to enhance the agricultural community's understanding of the changes.

Thank you for the opportunity to comment on these proposed changes to the National Handbook of Conservation Practices. NMDA requests to be included in any updates or mailing lists associated with this rule. Please contact Lacy Levine at (575) 646-8024 with any questions regarding these comments.

Sincerely,

Jeff M. Witte

JMW/ll/ya

Works Cited

New Mexico Agricultural Statistics – 2012. Available at: http://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/bulletin12.asp

Environmental Protection Agency and U.S. Army Corps of Engineers, Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (79 FR 22276) – April 21, 2014. Available at: https://www.federalregister.gov/articles/2014/04/21/2014-07131/notice-of-availability-regarding-the-exemption-from-permitting-under-section-404f1a-of-the-clean

Freedom of Information Act Request to the U.S. Army Corps of Engineers

NM STATE UNIVERSITY

New Mexico Department of Agriculture
Office of the Director/Secretary
MSC 3189
New Mexico State University
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October 27, 2014

Humphreys Engineering Center
CEHEC-OC
7701 Telegraph Road
Alexandria, VA 22315-3860
foia@usace.army.mil

Re: Freedom of Information Act Request

To Whom It May Concern:

This is a request under the Freedom of Information Act (5 U.S.C. 552). This is in regard to the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency's Proposed Rule for the Definition of "Waters of the United States" Under the Clean Water Act (79 FR 22188-22274) published April 21, 2014, under Dockets EPA-HQ-OW- 2011-0880 and FRL-9901-47-OW.

The first sentence of Paragraph K – Environmental Documentation on 79 FR 22222 states:

> The U.S. Army Corps of Engineers has prepared a draft environmental assessment in accordance with the National Environmental Policy Act (NEPA). The Corps has made a preliminary determination that the section 404 aspects of today's proposed rule do not constitute a major Federal action significantly affecting the quality of the human environment, and thus preparation of an Environmental Impact Statement (EIS) will not be required.

The described Environmental Assessment and supporting documents cannot be found online. We request a copy of the (1) Draft Environmental Assessment, (2) Final Environmental Assessment, and (3) Finding of No Significant Impact documents identified in 79 FR 2222 be provided to New Mexico Department of Agriculture.

Please deliver the three documents via e-mail to Mr. Ryan Ward at rward@nmda.nmsu.edu, or by physical delivery to:

> Mr. Ryan Ward
> New Mexico Department of Agriculture
> P.O. Box 30005, MSC APR
> Las Cruces, NM 88003-8005

Please contact Mr. Ryan Ward at (575) 646-2670 or Ms. Lacy Levine at (575) 646-8024 if any clarification is needed.

Sincerely,

Anthony J. Parra
Custodian of Public Records

rw/ll

Appendix E:
NMDA's Comments on the Proposed Definition of "Waters of the United States" (79 FR 22188-22274)

DEPARTMENT OF AGRICULTURE
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November 11, 2014

Ms. Donna Downing, Environmental Protection Agency
Ms. Stacey Jensen, U.S. Army Corps of Engineers
Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

ATTN: Docket ID No. EPA-HQ-OW-2011-0880

RE: Proposed Rule – Definition of "*Waters of the United States*" Under the Clean Water Act [Docket EPA-HQ-OW-2011-0880]

Dear Ms. Downing and Ms. Jensen:

New Mexico Department of Agriculture (NMDA) submits the following comments in response to the United States Army Corps of Engineers (Corps) and Environmental Protection Agency's (EPA) (collectively "Agencies") Proposed Rule for Definition of *Waters of the United States* (*Waters of the U.S.*) under the Clean Water Act (CWA) (79 FR 22188-22274) [Docket EPA-HQ-OW-2011-0880].

One part of NMDA's role is to provide proactive advocacy and promotion of New Mexico's agricultural industries. Agriculture contributed $4 billion in cash receipts to New Mexico's economy in 2012.[1] NMDA maintains a strategic goal to promote responsible and effective use and management of natural resources in support of agriculture.

NMDA requests the withdrawal of this proposed rule due to the fact that the rule will create an undue burden on small businesses – including agricultural operations, unclear and inconsistent definitional changes, inadequate provision of supporting documentation, and poor outreach and communications prior to and during this comment period with the regulated community and state agencies. NMDA has numerous comments and requests for additional information that we would like to have addressed prior to a final rulemaking.

1 U.S. Department of Agriculture, National Agricultural Statistics Service, "New Mexico 2012 Agricultural Statistics." Available at: http://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/bulletin12.asp.

NMDA has been involved in researching the proposed rule, participating in numerous webinars and hearings, and staying well-informed on other associated federal requests and actions since April of this year. NMDA has numerous comments and requests for additional information that we would like to have addressed prior to a final rulemaking. In addition to providing these extensive comments, we have also prepared a reader's guide to assist the agencies in answering our questions and concerns raised throughout the document.

NMDA's comments are organized to mirror the bright line categories of the proposed rule and our other major concerns (see Table of Contents).

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Waters of the U.S.

> "For purposes of all sections of the CWA, 33 U.S.C 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term '*Waters of the U.S.*' means":

Tributaries – (s) (5)

> "All *tributaries* of waters identified in paragraphs (s) (1) through (3) and (5) of this section";

Though the inclusion of *tributaries* is not a new jurisdictional feature of the definition of *Waters of the U.S.*, the definitional inclusion of ditches is problematic for the Southwest's agricultural community.

Ditches

The explanation in the *Federal Register* of the proposed changes to the definition of the term *tributaries* is not clear enough to systematically discern EPA's jurisdiction over ditches. The inclusion of this category is already causing confusion for the regulated public in distinguishing jurisdictional from nonjurisdictional ditches. As such, NMDA would support an additional paragraph in the definitions section clarifying EPA's intentions regarding jurisdictional determinations over ditches separate from the language pertaining to *tributaries*.

Determining the perenniality of *tributaries* and ditches is a major component of making jurisdiction determinations for this category. The vagueness of this category and its corresponding definitions are confusing to the regulated public and should be revised for clarity.

In the Southwest many agricultural ditches connect to larger water bodies due to the lack of replenishing rainfall. According to the New Mexico Environment Department, there are about 2,727 miles of ditches and canals in New Mexico, which accounts for about 2.5 percent of the total stream miles in the state.[2] Many of these ditches may be classified as *tributaries* due to the possibility of contributions of flow to a water identified in paragraphs (s) (1) through (4). However, most of these ditches in New Mexico are not perennial and are, therefore, connected only a few months out of the year, particularly during irrigation season. NMDA requests clarification on how perenniality will be determined. Specifically, we would like to know if the public will be given the opportunity to be involved in the determination process and how conflicting determinations will be mediated.

Please see our comments regarding the term ditches in the "Exclusions" section and the new definition for the term *tributary* in the "New Definitions" section below for additional concerns regarding indirect jurisdictional assertions over *tributaries* via other nonjurisdictional waters.

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2 New Mexico Environment Department. "WQCC Draft 2014-2016 State of New Mexico CWA Section 303(d)/305(b) Integrated Report." September 9, 2014. Available at: http://www.nmenv.state.nm.us/swqb/303d-305b/2014-2016/.

Adjacent Waters – (s) (6)

> "All waters, including *wetlands*, *adjacent* to a water identified in paragraphs (s) (1) through (5) of this section";

The definition of the term *adjacent* is embedded in several terms that concern NMDA. Please see our comments pertaining to the terms *adjacent*, *neighboring*, and *floodplain* within the "New Definitions" section below.

Other Waters – (s) (7)

> "On a case-specific basis, *other waters*, including *wetlands*, provided that those waters alone, or in combination with other similarly situated waters, including *wetlands*, located in the same region, have a *significant nexus* to a water identified in paragraphs (s) (1) through (3) of this section."

The inclusion of language pertaining to *other waters* has added an additional layer of complexity to this proposed rule, which goes against EPA's stated goal of increasing clarity by the publication of this proposed rule.

The case-specific basis on which EPA will assert jurisdiction over *other waters* leaves the public unsure of the jurisdiction of waters on their land. Therefore, NMDA suggests the removal of the catch-all category – *other waters*. If the Agencies maintain the *other waters* category, we request clarification on these points described below.

Jurisdictional Determinations

The *Federal Register* notice requests comment on how better to categorize the *other waters* category. EPA has already composed a list of scientifically designated ecoregions for the state of New Mexico[3] and for the rest of the United States. This list is far more comprehensive than the proposed new list on page 22215 of the *Federal Register*. Starting the process of creating a new list of ecoregions would require a duplication of effort for no scientific purpose. Therefore, NMDA recommends using the existing ecoregions as a more robust and descriptive starting point in better categorizing the *other waters* definition.

The *Federal Register* notice of this proposed rule states, "If waters are categorized as non-jurisdictional because of lack of science available today, the Agencies request comment on how to best accommodate evolving science in the future that could indicate a significant nexus for these *other waters*. Specifically the agencies request comment as to whether this should be done through subsequent rulemaking, or through some other approach, such as through a process established in this rulemaking" (79 FR 22217). NMDA has concern over this request for

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3 U.S. Environmental Protection Agency. "Ecoregions of New Mexico." Accessed September 26, 2014. http://www.epa.gov/wed/pages/ecoregions/nm_eco.htm.

information because it asks the regulated community to provide insight on ways to increase or change the jurisdictional reach of *Waters of the U.S.* in the future.

Furthermore, the "best available science" is constantly evolving. In a second draft of this rulemaking, EPA should specify areas where changes may occur in order to assist the regulated community in identifying ways this proposed rule may change in the future.

Because the catch-all category *other waters* includes case-by-case jurisdictional determinations, many stakeholders are apprehensive about the duration of these processes. Moreover, the path EPA has proposed could create substantial backlogs and force agricultural producers to postpone activities that may require a jurisdictional determination thus leading to a potential delay in agricultural production and economic losses.

In addition to the duration of the process, stakeholders are unclear of the steps involved in the jurisdictional determination and still have many questions. Will the Corps be the sole agency responsible for making determinations or will they consult with external experts? Will the process take into consideration economic activity that could be disrupted? How will stakeholders be notified if their operations occur on or near a jurisdictional water? Will stakeholders have the right to request an appeal?

To help mitigate these concerns, NMDA requests written guidance for agricultural producers that would clarify how to proactively determine if they may have jurisdictional waters on or near their owned or leased property.

The *Federal Register* notice for this proposed rule specifically states, "...To improve efficiencies, the EPA and Corps are working in partnership with states to develop new tools and resources that have the potential to improve precision of desk based jurisdictional determinations...(79 FR 22195)." As of yet, the tools mentioned in this passage are unknown to NMDA. These tools as well as those that help the regulated proactively determine jurisdiction should be made available as soon as possible. Will these tools and resources be shared with the regulated community prior to the final rule publication? Additionally, NMDA requests clarification on how these tools and resources will help stakeholders ensure their compliance.

The definition of the term *significant nexus* is of concern to NMDA. Please see our comments pertaining to the definition of this term in the "New Definitions" section below.

Exclusions from Waters of the U.S. – (t)

> "The following are not '*Waters of the U.S.*' notwithstanding whether they meet the terms in paragraphs (s) (1) through (7) of this section."

Prior Converted Cropland – (t) (2)

> "*Prior converted cropland.* Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA."

The *Federal Register* notice for this proposed rule (in a footnote) states the Agencies use the Natural Resource Conservation Service (NRCS) definition of *prior converted cropland* for purposes of determining jurisdiction under the CWA (79 FR 22189). The NRCS defines *prior converted cropland* as farmland that was:

- "Cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as corn);
- The land was cleared, drained or otherwise manipulated to make it possible to plant a crop;
- The land has continued to be used for agricultural purposes (cropping, haying or grazing);
- And the land does not flood or pond for more than 14 days during the growing season."[4]

NMDA is highly concerned with the exclusion of *prior converted cropland,* as it is currently identified, because it relies on the NRCS's use of 1985 as the year that farmland must have been used for agricultural purposes. This creates a clear barrier to entry and is further analyzed in the subsection "Barriers to Entry" in the "Economic Analysis" section below. NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products – regardless of whether the agricultural operation was established before or after 1985.

Also, several NRCS programs, such as the Conservation Reserve Program (CRP), incentivizes agricultural producers to take land out of production:

> "In exchange for a yearly rental payment, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant species that will improve environmental health and quality. Contracts for land enrolled in CRP are 10-15 years in length. The long-term goal of the program is to re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat."[5]

Will being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production"?

Furthermore, even though the *Federal Register* notice for this proposed rulemaking claims the Agencies will use the NRCS's definition, the language of the proposed rule states the Agencies have "final authority regarding Clean Water Act jurisdiction." The Agencies have neglected to independently define *prior converted cropland,* which is contrary to logic given that EPA's claims of final authority over determining exclusions. Providing a clear definition would assist in

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4 Natural Resource Conservation Service. "Wetland Fact Sheet - Prior Converted Cropland." http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517.

5 U.S. Department of Agriculture, Farm Service Agency. "Conservation Reserve Program." http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp.

offering consistency for the regulated public in determining if their land will be considered *prior converted cropland* thus excluded from being jurisdictional.

Upland Ditches – (t) (3)

> "Ditches that are excavated wholly in *uplands*, drain only *uplands*, and have less than perennial flow."

The exclusion requirements for ditches rests upon the term *uplands*, the definition of which is not found anywhere in the proposed rule. According to the proposed rule, ditches are excluded only if they "are excavated wholly in uplands, drain only uplands, and have less than perennial flow." EPA has the responsibility to adequately describe criteria that is pertinent to classification.

In addition to the ambiguity resulting from lack of a definition, this clause is arbitrarily stringent. In the context of irrigated agriculture, a ditch's relationship to *uplands* and its flow perenniality are not sufficient or even necessary conditions of a ditch.

How will agricultural producers know when ditches are excluded given the confusing nature of this exclusion? To provide consistency and clarity, NMDA requests a visual tool, perhaps in the form of a decision tree, to simplify what ditches are and are not jurisdictional.

Disconnected Ditches – (t) (4)

> "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s) (1) through (4) of this section."

The proposed exemption is so narrow that it may not exclude many ditches. Waters may pass from a ditch through nonjurisdictional waters and still be jurisdictional according to the proposed rule's language, "[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s) (1) through (4) of this section."

NMDA requests the removal of language that would allow for ephemeral ditches to be claimed as jurisdictional *Waters of the U.S.* We recommend striking the qualifier "or through another water," and leaving the wording, "Ditches that do not directly contribute flow to a water identified in paragraphs (s) (1) through (4) of this section."

Gullies, Rills and Non-Wetland Swales – (t) (5) (vii)

> "The following features… (vii) Gullies and rills and non-wetland swales."

Erosional Features

The proposed rule lacks a definition for any of the terms: *gullies, rills,* or *non-wetland swales.* However, the *Federal Register* notice for this proposed rule does indicate that gullies "are ordinarily formed on valley sides and floors where no channel previously existed," indicating the

relative impermanence thus variability that these erosional features contribute in flow into jurisdictional waters.

Arroyos are another type of erosional feature found throughout many western states. They are dry the vast majority of the year and are wet only immediately following a strong precipitation event. The topography in the arid West, with low-density vegetative cover and highly erodible soils, causes arroyos to form in much the same way as gullies.

Arroyos are similar to gullies in their hydrological significance. However, one main difference between the two features is that arroyos are typically wide and shallow, whereas gullies are relatively deep channels. This difference is inconsequential regarding the volume of water either can carry or contribute to a system, especially when considering the arid landscapes in which arroyos exist. In these regions, arid top soils are more prone to erosion hence erosional features tend to be wider.

NMDA requests that *arroyos* be added to this exclusion category.

Aside from *gullies, rills, and non-wetland swales*, how do the Agencies plan on differentiating other erosional features not specifically excluded from the definition of *Waters of the U.S.*?

Closed Basins

According to consultation with the New Mexico Environment Department, waters within closed basins do not drain into any navigable or interstate waters and have not historically been under the jurisdiction of the CWA. Instead, these waters are under state jurisdiction. In New Mexico closed basins are defined as "closed with respect to surface flow if its topography prevents the occurrence of visible outflow. It is closed hydrologically if neither surface nor underground outflow can occur."[6] Therefore, NMDA requests the addition of waters within "closed basins" to the list of exclusions presented in this proposed rule, as they cannot satisfy any criteria required for a water to be jurisdictional.

Also, the former definition of *Waters of the U.S.* includes in part (c), "All other waters such as... playa lakes." Will playa lakes be excluded due to their hydrologic disconnect from major waterways or are they assumed to be included under one of the new *Waters of the U.S.* categories?

New Definitions

The "Definitions" section of the proposed rule attempts to clarify several terms used in the definition of *Waters of the U.S.* However, NMDA would like the clarification and addition of several terms.

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6 "Glossary of Water Terms." New Mexico Office of the State Engineer. http://www.ose.state.nm.us/water_info_glossary.html#C.

Adjacent – (u) (1)

> "*Adjacent.* The term *adjacent* means bordering, contiguous or *neighboring*. Waters, including *wetlands*, separated from other *Waters of the U.S.* by man-made dikes or barriers, natural river berms, beach dunes and the like are '*adjacent waters.*'"

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

The definition of *adjacent* relies heavily on the definitions of several other key terms. Please see our comments regarding the terms *neighboring*, *riparian area*, and *floodplain* below for further concerns regarding the use of the term *adjacent*.

Neighboring – (u) (2)

> "*Neighboring.* The term *neighboring*, for the purposes of the term '*adjacent*' in this section, includes waters located within the *riparian area* or *floodplain* of a water identified in paragraphs (s) (1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."

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

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

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

This new definition of *neighboring* waters relies on the definitions of the terms *riparian area* and *floodplain,* both of which have confusing definitions that in-turn make the definition of *neighboring* waters confusing. Please see our comments regarding these terms below.

Riparian Area – (u) (3)

> "*Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal

community structure in that area. *Riparian areas* are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."

Again, although the CWA does not grant EPA jurisdiction over groundwater, this definition refers to groundwater using the term "subsurface hydrology." The first sentence of the paragraph states it is problematic because nonjurisdictional and, therefore, irrelevant considerations would be allowed to influence jurisdictional determinations.

We recommend striking the qualifier "or subsurface" and leaving the wording, "The term *riparian area* means an area bordering a water where surface hydrology directly influences the ecological processes and plant and animal community structure in that area."

Floodplain – (u) (4)

"*Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."

The U.S. Geological Survey defines the term *floodplain* as "a strip of relatively flat and normally dry land alongside a stream, river, or lake that is covered by water during a flood."[7] *Floodplains* are hydrologically defined by flood intervals. Flood intervals can range from 10 to 500 years yet the proposed definition does not include information about which flood interval the Agencies plan to use. This means *floodplains* defined by the longest interval can be several times larger than the smallest; therefore, NMDA requests clarification on which interval the Agencies intend to use.

Similarly, if the designated boundaries of *floodplains* or flood zones change for any reason, the public should be notified by the Agencies how the changes will impact the jurisdictional status of waters on or near their property.

Tributary – (u) (5)

"*Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3 (e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s) (1) through (4) of this section. In addition, *wetlands*, lakes, and ponds are *tributaries* (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s) (1) through (3) of this section. A water that otherwise qualifies as a *tributary* under this definition does not lose its status as a *tributary* if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as *wetlands* at the head of or along the run of a stream,

7 United States Geological Survey. "Water Science Glossary of Terms." April 3, 2014. http://water.usgs.gov/edu/dictionary.html.

debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A *tributary*, including *wetlands*, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (t) (3) or (4) of this section."

Previously, paragraph (s) (5) states that EPA will assert jurisdiction over "tributaries of waters identified in paragraphs (s) (1) through (4)." However, this paragraph depicts a much broader jurisdictional reach because of the definition of the term *tributary* in (u) (5).

Due to the qualifier "or through another water," NMDA notes that waters may pass through nonjurisdictional waters and still be classified as *tributaries*. This is because the term *another water* is not defined hence may refer to nonjurisdictional water. This is true especially when *another water* is contrasted with a "water that contributes flow directly" to a jurisdictional water.

We recommend striking the qualifier "or through another water," and leaving the wording, "The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3 (e), which contributes flow directly to a water identified in paragraphs (s) (1) through (4) of this section."

Significant Nexus – (u) (7)

> "*Significant nexus.* The term *significant nexus* means that water, including *wetlands*, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s) (1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s) (1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. *Other waters*, including *wetlands*, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard do their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s) (1) through (3) of this section."

The rule states that, "For an effect to be significant, it must be more than speculative or insubstantial." This broad definition leaves much to interpretation and should be clarified. As written, there is virtually no limit to the number of waters that could be deemed jurisdictional via *significant nexus*.

The definition of the term *significant nexus* includes a broad criterion that would allow the Agencies to claim jurisdiction over *similarly situated waters*. A *similarly situated water* "perform[s] similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s) (1) through (3) of this section." NMDA requests the removal of language allowing for the use of *significant nexus* determinations based on proxy data like "similarly situated waters." Thus we

recommend striking the qualifier "either alone or in combination with other similarly situated waters in the region" and leaving the wording, "The term *significant nexus* means that a water, including *wetlands*, that alone significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s) (1) through (3) of this section."

Clarity and Consistency

Other Waters

The Agencies have not been consistent in the predicted changes of jurisdiction as a result of this proposed rule. The Agencies have variously said that jurisdiction will increase,[8] [9] decrease [10] and will not change.[11] NMDA cites this inconsistency as proof of the ambiguity created by the creation of the *other waters* category among other problems with the wording of this proposed rule.

The source of this confusion is that this category would require a prescribed action for every jurisdictional determination (i.e., the definition requires determinations to be made on "a case-specific basis.") Currently, there is no such category that requires as extensive attention for every determination. This change would clearly result in less consistency and less clarity for waters that would belong in the new *other waters* category. One way to reduce uncertainty and increase clarity would be to provide a decision tree tool that demonstrates to the regulated public how jurisdictional determinations are made so that landowners and businesses can proactively become involved in the process.

Executive Order (E.O.) 13563, signed by President Obama in 2011, requires the regulatory system to "promote predictability and reduce uncertainty" and "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."[12] Therefore, it is important to increase clarity in actions taken by the Agencies. Currently, EPA conducts jurisdictional determinations based on the CWA itself, alongside three key Supreme Court precedents, which is confusing to the regulated public. The intention of the new definition of *Waters of the U.S.* was to increase clarity by combining the previous definition of *Waters of the U.S.* with these interpretations from the Supreme Court.

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

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

10 Stoner, Nancy. "Setting the Record Straight on Waters of the US." EPA Connect, July 7, 2014. http://blog.epa.gov/epaconnect/author/nancystoner/.

11 U.S. Environmental Protection Agency. "Clean Water Act Exclusions and Exemptions Continue for Agriculture," http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf.

12 Executive Order 13563: Improving Regulation and Regulatory Review. Signed January 18, 2011. http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

However, the language in the proposed definition, for reasons listed in sections above, may, in fact, reduce clarity and cause confusion and frustration among regulated stakeholders.

Comprehensive List of Waters

EPA has been unable to present consistent interpretations of the changes in the definitions of *Waters of the U.S.*, in spite of claims that the document's purpose is to increase clarity. To this point, the U.S. House of Representatives Committee on Science, Space, and Technology recently requested maps that show jurisdictional waters under the CWA.[13] In a response letter from EPA, Administrator Gina McCarthy states, "I wish to be clear that EPA is not aware of maps prepared by any agency, including the EPA, of waters that are currently jurisdictional under the CWA or that would be jurisdictional under the proposed rule."[14]

Because many newly proposed definitional changes rely on waters (s) (1) through (4), NMDA requests maps of these waters. From these maps stakeholders will be given the opportunity to more easily determine waters that may be included in wasters (s) (5) through (7) of the proposed rule. Providing clear and thorough maps of jurisdictional waters will assist in increasing transparency, accountability, and clarity in this rulemaking.

Interpretive Rule and Other Guidance Documents

The Interpretive Rule Regarding Applicability of the Exemption from Permitting Under Section 404 (f) (1) (A) of the CWA to Certain Agricultural Conservation Practices (Interpretive Rule) attempts to define what activities are normal agricultural activities by deferring to NRCS guidance. The interpretive rule is just the newest of a multitude of guidance documents for permitting under Section 404 of the CWA. It is difficult, if not impossible, for interested public parties to know of the existence of these documents. Therefore, it would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rules in one place.

NRCS guidelines are subject to review, and parties with an interest in the CWA may not be aware of these changes or their potential impacts on their agricultural operations. NMDA requests the Agencies publish a *Federal Register* notice when NRCS guidelines are up for review. This notice should indicate that changes in NRCS guidelines will impact agricultural producers due to the applicability of permitting under the CWA, which would not have been

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13 Chairman Lamar Smith, U.S. House of Representatives Committee on Science, Space, and Technology. Letter to U.S. Environmental Protection Agency Administrator Gina McCarthy. Dated August 27, 2014. Available at http://science.house.gov/epa-maps-state-2013.

14 Administrator Gina McCarthy, U.S. Environmental Protection Agency. Letter to Chairman Lamar Smith, U.S. House of Representatives Committee on Science, Space, and Technology. Dated July 28, 2014. Available at: http://science.house.gov/epa-maps-state-2013.

necessary prior to changes in NRCS guidelines. We have requested the same of the NRCS when they make changes to their National Handbook of Conservation Practices.[15]

Please see our previously submitted comments on the Agricultural Interpretive Rule and the NRCS National Handbook of Conservation Practices in Appendix B for further concerns regarding this document.

Land Use

Though the Agencies have assured the public on numerous occasions that this rule does not impact land use, it does impact activities that can be done near ephemeral water bodies that may not have been jurisdictional prior to this rulemaking. This rule will have an impact on land use, particularly in areas in the arid West. According to the New Mexico Environment Department and the New Mexico Water Quality Control Commission, there are 108,649 miles of streams of which 99,332 miles are intermittent or ephemeral. That means that over 91 percent of all streams in New Mexico have the potential to be determined *Waters of the U.S.* despite the fact that they are dry most of the year.[16] Therefore, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of *Waters of the U.S.*

Public Involvement

Outreach

EPA has claimed extensive outreach to state and local agencies before the development of the proposed rule.[17] For instance, the *Federal Register* states, "… EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council, and the Association of State Wetland Managers participated in various calls and meetings" (79 FR 22221). NMDA has been party to conversations with multiple state and local agencies throughout the West – including the Wyoming Department of Agriculture, Utah Department of Agriculture and Food, Idaho State Department of Agriculture, Colorado Department of Agriculture, and New Mexico Environment Department – and has been unable to locate even a single one indicating outreach from EPA. If public records of this outreach exist, NMDA requests this information be published.

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15 Natural Resources Conservation Service. "Conservation Practices." http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/references/?cid=nrcs143_026849.

16 New Mexico Environment Department. "WQCC Draft 2014-2016 State of New Mexico CWA Section 303(d)/305(b) Integrated Report." September 9, 2014. Available at: http://www.nmenv.state.nm.us/swqb/303d-305b/2014-2016/.

17 U.S. Environmental Protection Agency. "EPA Summary of the Discretional Small Entity Outreach for Planned Proposed Revised Definition of '*Waters of the U.S.*'" Available at: http://www2.epa.gov/uswaters/epa-summary-discretionary-small-entity-outreach-planned-proposed-revised-definition-waters.

During telephone conversations and webinars EPA and the Corps hosted after the publication of the proposed rule, EPA has maintained a defensive tone.[18] [19] Rather than either address concerns raised by the public or state that comments would be taken seriously in the revision of the proposed rule, the Agencies merely restated that the intent of the rule is to increase clarity. NMDA maintains that stakeholders with concerns do, in fact, understand the implications of this rule and implores that EPA consider the concerns brought up by this and other state and local agencies and revise the proposed rule accordingly.

Concerns from Congress

The fact that several United States legislative bills (including S. 2496: "Protecting Water and Property Rights Act of 2014,"[20] S. 2613: "Secret Science Reform Act of 2014,"[21] H.R. 5071: "Agricultural Conservation Flexibility Act of 2014,"[22] and H.R. 5078: "*Waters of the U.S.* Regulatory Overreach Protection Act of 2014"[23]) have been filed at the federal legislative level that requests the withdrawal or revision of the proposed rule indicates there are major problems with this proposed rulemaking as presented. Several bipartisan letters from United States senators and representatives have also been submitted requesting clarification of the proposed rule. This includes a letter signed by 13 senators who have specific concerns about the proposed rule's impact on the agricultural community.[24]

Document Availability

Draft Environmental Assessment (DEA)

Despite reference to a DEA prepared by the Corps for Section 404 aspects of the proposed rule on page 22222 in the *Federal Register* notice, NMDA has not been able to locate this National Environmental Policy Act documentation.

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18 University of Nebraska Livestock and Poultry Environmental Learning Center. "Waters of the U.S. Proposed Rule Webinar." Hosted6/20/14. Archived at: http://www.extension.org/pages/71028/epas-proposed-waters-of-the-us-regulations#.VC8F7xYa5F8.

19 U.S. Environmental Protection Agency. "Waters of the U.S.: Clarifying Misconceptions." Hosted 7/16/14. http://www2.epa.gov/uswaters/waters-united-states-webinar-clarifying-misconceptions.

20 Protecting Water and Property Rights Act of 2014, S. 2496, 113 Cong. Sponsored by Sen. John Barrasso (WY). Introduced June 19, 2014. Available at: https://www.congress.gov/bill/113th-congress/senate-bill/2496/text.

21 Secret Science Reform Act of 2014, S. 2613, 113 Cong. Sponsored by Sen. John Barrasso (WY). Introduced July 16, 2014. Available at: https://www.congress.gov/bill/113th-congress/senate-bill/2613.

22 Agricultural Conservation Flexibility Act of 2014, H.R. 5071, 113 Cong. Sponsored by Rep. Reid Ribble (WI). Introduced July 10, 2014. Available at: https://www.congress.gov/bill/113th-congress/house-bill/5071.

23 Waters of the U.S. Regulatory Overreach Protection Act of 2014, H.R. 5078, 113 Cong. Sponsored by Rep. Steve Southerland (FL). Introduced July 11, 2014. Available at: https://www.congress.gov/bill/113th-congress/house-bill/5078.

24 United States Senate. Letter to U.S. Environmental Protection Agency Administrator Gina McCarthy, U.S. Department of the Army Secretary John McHugh, and U.S. Department of Agriculture Secretary Thomas Vilsack. Dated July 31, 2014. Available at: http://sustainableagriculture.net/blog/senate-wotus-letter/.

Such an important document should have been made publicly available on the EPA's *Waters of the U.S.* website. NMDA submitted a Freedom of Information Act (FOIA) request on October 27, 2014, for these documents. This FOIA request can be found in Appendix B.

Connectivity Report

The EPA's Office of Research and Development's report entitled, "Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence (Connectivity Report)," the document, upon which all of these definitional changes are based, was not complete at the time of publication of the proposed definitional changes. The Agencies state throughout the *Federal Register* notice for this proposed rule that the final rule for the definition of *Waters of the U.S.* will not be finalized until the Connectivity Report is finalized (79 FR 22188-22274).

Meanwhile, the EPA's Scientific Advisory Board (SAB) was tasked with reviewing the Connectivity Report for the "clarity and technical accuracy of the report, whether it includes the most relevant peer-reviewed literature; whether the literature has been correctly summarized; and whether the findings and conclusions are supported by the available science."[25] The SAB completed their review of the Connectivity Report on October 17, 2014, and had substantial recommendations for improvement and further scientific analysis.

For instance, the SAB report notes technical inaccuracies in the underlying science upon which this proposed rule is based:

- "The Report often refers to connectivity as though it is a binary property rather than as a gradient. In order to make the Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach..."
- "The SAB recommends that the EPA consider expanding the brief overview of approaches to measuring connectivity."
- "The SAB recommends that the Report more explicitly address the scientific literature on cumulative and aggregate effects of streams, groundwater systems, and wetlands on downstream waters."

These technical limitations affect the final outcome of jurisdictional determinations for all of the categories of *Waters of the U.S.*

EPA has the responsibility to provide finalized and complete documentation to the public, especially when other important federal actions hinge on the outcome of that documentation. Any changes in the Connectivity Report, which is still not finalized, could seriously hamper and even invalidate the language proposed in this rule by effectively barring public participation. Further, the scientific reasoning for the definitional changes to *Waters of the U.S.* needs

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25 U.S. Environmental Protection Agency Office of the Administrator Scientific Advisory Board. "SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." October 17, 2014. Available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershedpercent20Connectivitypercent20Report!OpenDocument&TablcRow=2.3#2.

improvement. NMDA requests the agencies withdraw this proposed rule and reinitiate a comment period at the time the Connectivity Report is finalized.

Stakeholders and the public in general have the right to understand the full implications that regulatory changes will have on their operations before federal regulations are proposed. Please see our previously submitted comments on this rule pertaining to deadline incongruence resulting from the Connectivity Report still being in draft form. These comments can be found in Appendix B for further concerns regarding this document.

Second Draft of the Proposed Rule

Because of the sheer quantity of requests for public input in the *Federal Register* notice for this proposed rule, a single draft for this proposed rule will not be sufficient. The Agencies have requested too much information from the public, and the potential for unintended consequences is high when taking into consideration every potential change to the rule resulting from public comments.

If the proposed rule is not withdrawn entirely, NMDA supports the publication of a second draft, listing the comments received and detailing EPA's responses to them. This will greatly increase transparency of the rulemaking process.

Economic Analysis

Analytical Errors

The Agencies prepared a report entitled, "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.* (Economic Analysis)." The Economic Analysis describes the costs and benefits of the proposed rule; however, the Agencies make several economic benefit claims that are based on data that is not available to the public. The benefit claims are based on the previous *Waters of the U.S.* definition, which are not the same as those in the proposed rule.

Also, using 2009-2010 as the baseline, economic study year could be unrepresentative of a long-term economic comparison due to the overall national economic downturn during that time.[26] Similarly, drawing major conclusions from information in one year is not reflective of long-term implications this rulemaking may have. The Agencies have claimed the proposed rule does not affect areas that were previously excluded from jurisdiction, that the proposed rule does

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

not regulate new types of waters.[27] If this is the case, why are there several new definitions and an Agency estimated 2.7 percent increase in acreage?[28]

The Brattle Group, an independent economic, regulatory, and financial consulting firm, prepared a report for the Waters Advocacy Coalition entitled, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.* (Brattle Group Report)."[29] The Waters Advocacy Coalition "is an inter-industry coalition representing the nation's construction, real estate, mining, agriculture, forestry, manufacturing, energy sectors, and wildlife conservation interests."[30] The Brattle Group Report is a very detailed analysis of the Agencies' Economic Analysis and identifies numerous errors including "flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definition changes…"[31] The report suggests that the Agencies "should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA."[32]

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

Benefits

EPA's claims that benefits resulting from this proposed rule outweigh the costs are not entirely relevant. Agriculture and industry bear the huge majority of costs, whereas the benefits listed by EPA are mostly nonhuman and environmental.[33] These environmental benefits, termed *ecosystem services*, are purported to improve water quantity even though the primary concern of the CWA is water quality. One of NMDA's concerns is that the conflation between water quality and quantity in this regard has led to an overestimation of the benefits and that costs to the agricultural community have been minimized.

The *ecosystem services* taken from the Economic Analysis include: "flood storage & conveyance, support for commercial fisheries, water input and land productivity for agriculture and commercial & industrial production, municipal and water supply, recreation & aesthetics,

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

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

29 The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" May 15, 2014. Available at: http://www.brattle.com/news-and-knowledge/publications/archive/2014.

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

31 The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 2. May 15, 2014. Available at: http://www.brattle.com/news-and-knowledge/publications/archive/2014.

32 The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 2. May 15, 2014. Available at: http://www.brattle.com/news-and-knowledge/publications/archive/2014.

33 U.S. Environmental Protection Agency. "Ditch the Myth." September 26, 2014. http://www2.epa.gov/uswaters/ditch-myth.

sediment and contaminant filtering, nutrient cycling, groundwater recharge, shoreline stabilization and erosion prevention, biodiversity, wildlife habitat (emphasis added)." NMDA requests an explanation of the benefits listed above, especially those related to water quantity benefits.

Costs

EPA does not take into consideration the costs on agricultural sectors that do not qualify for the Agricultural 404 (f) (1) (A) Exemption. An increase in jurisdiction would likely entail an increase in requirements for National Pollutant Discharge Elimination System (NPDES) permitting. Agriculture-related permits primarily affected by this potential permitting increase would be Concentrated Animal Feeding Operations (such as dairies) and Pesticide General Permits.[34] Again, NMDA requests a thorough analysis on the costs this rule will have on various regulated industries.

Barriers to Entry

As previously detailed, the NRCS defines prior converted cropland as farmland that was "cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as corn); the land was cleared, drained, or otherwise manipulated to make it possible to plant a crop; the land has continued to be used for agricultural purposes (cropping, haying, or grazing); and the land does not flood or pond for more than 14 days during the growing season."[35]

The explicit exclusion for "prior converted croplands" will create a barrier to entry for agricultural producers due to the NRCS cutoff date of 1985. Younger agriculturalists wanting to start their own operations will not be afforded the same opportunities as older, more established farmers or ranchers. The average age of agricultural producers in the United States is 58 years old; [36] implementing arbitrary requirements may prevent new farmers from entering the market. This barrier could have profound impacts on rural economies in addition to the nation's ability to provide enough agricultural goods for a growing population.

It is also contrary to many policies of the United States Department of Agriculture, which aim to provide incentives to young people to get involved in agriculture and could jeopardize the future of farming.

Similarly, in reference to the "continuous operation" provision, NMDA requests clarification on whether land use restrictions near a newly designated *Waters of the U.S.* will change when agricultural lands are either sold or passed from one generation to the next when the use for the

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34 New Mexico Environment Department, Surface Water Quality Bureau. "NPDES Permits in New Mexico." http://www.nmenv.state.nm.us/swqb/Permits/.

35 Natural Resource Conservation Service. "Wetland Fact Sheet - Prior Converted Cropland." http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517.

36 U.S. Department of Agriculture. "2012 Census of Agriculture." http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/.

land is maintained as agricultural. If restrictions are put into place or if major permitting would be required with new ownership, it would create a barrier to entry for new agricultural producers, especially since it is not uncommon for agriculture operations to be passed on from one generation to the next.

Federalism (E.O. 13132) and Costs to State and Local Agencies

> "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. Thus, Executive Order 13132 does not apply to this action and local agencies should have been done at that level as well (79 FR 22220)."

Since "[t]he main responsibility for water quality management resides with the States in the implementation of water quality standards, the administration of the NPDES… and the management of nonpoint sources of pollution,"[37] any change in jurisdiction will necessarily have an impact on the states. E.O. 13132 states that, "To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on state and local governments, and that is not required by statute…"[38] NMDA concludes that the Agencies' analysis regarding E.O. 13132 was done incorrectly.

The Economic Analysis states there should be no substantial increase in costs to state agencies, in spite of a probable increase in jurisdiction. Under the section entitled "CWA Section 303 and 305," the document states, "EPA's position on these costs is that an expanded assertion of jurisdiction would not have an effect on annual expenditures… for state agencies, including those responsible for state water quality standards, monitoring and assessment of water quality, and development of total maximum daily loads (TMDLs) for impaired waters."

NMDA does not agree that states will necessarily have capability in a form robust enough to comply with the expanded federal jurisdiction as proposed in this rule. Moreover, monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs.

Environmental Justice (E.O. 12898), the Regulatory Flexibility Act (RFA), and Impacts to Small Businesses

In the *Federal Register* notice of this proposed rulemaking, EPA claims that under the RFA the proposed rule will have no effect on small business using the language, "After considering the economic impacts of this proposed rule on small entities, I certify that this proposed rule will not

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37 U.S. Environmental Protection Agency. "Overview of Impaired Waters and Total Maximum Daily Loads Program." http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm#section303.

38 Exec. Order No. 13132 – "Federalism." Signed August 4, 1999. Available at: https://www.federalregister.gov/articles/1999/08/10/99-20729/federalism.

have a significant economic impact on a substantial number of small entities" (79 FR 22220). However, language pulled directly from the Economic Analysis states, "As a result of this proposed action, costs to regulated entities will likely increase for permit application expenses."[39] The same document says, "This proposed rule could result in new indirect costs on regulated entities such as the energy, agricultural, and transportation industries; land developers, municipalities, industrial operations; and on governments administering regulatory programs, at the tribal, state and federal levels."[40] The *Federal Register* notice and the Economic Analysis conclusions clearly contradict each other; and NMDA agrees with the latter, that increased permitting will come with increased costs to small businesses.

NMDA requests that additional analysis be completed to determine the true impacts of increased permitting to small businesses – particularly for the agriculture industries. In the meantime, USDA's 2012 Census of Agriculture provides economic analyses that show a significant amount of agricultural producers can be categorized as small businesses thus likely to experience the impact of regulatory burden. The 2012 Census of Agriculture classifies approximately 75 percent of agricultural operations nationwide as being less than $50,000 in the "classification of farms by the sum of market value of agricultural products sold and federal farm program payments."[41] In New Mexico the percentage of less than $50,000 producers is significantly higher, at nearly 88 percent; therefore, producers in New Mexico could be more economically vulnerable to market fluctuations caused by regulatory burden. NPDES and other permitting costs may have a negative economic impact on small businesses. Therefore, EPA's findings under RFA are not only incorrect but they also conflict with supporting documents.

To this same point, the United States Small Business Administration recently wrote a comment letter to the Agencies requesting them to "withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[42]

Conclusion

For reasons stated throughout our comments, NMDA requests the withdrawal of this proposed rule since the rule will create an undue burden on small businesses – including agricultural operations, unclear and inconsistent definitional changes, inadequate provision of supporting documentation, and poor outreach and communications prior to and during this comment period with the regulated community and state agencies.

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39 U.S. Environmental Protection Agency & U.S. Amy Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 32. March 2014. Available at: http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act.

40 U.S. Environmental Protection Agency & U.S. Amy Corps of Engineers. "Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" Page 5. March 2014. Available at: http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act.

41 U.S. Department of Agriculture – National Agricultural Statistics Service, "2012 Census of Agriculture." 2014. http://www.agcensus.usda.gov/Publications/2012/.

42 U.S. Small Business Administration, Comments on the Definition of "*Waters of the U.S.*" Under the Clean Water Act. Submitted 10/1/14. http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act.

Thank you for the opportunity to comment on the Proposed Rule for Definition of *Waters of the U.S.* Under the Clean Water Act. We request the opportunity to be involved in any revisions of the proposed rule and other involvement opportunities. NMDA also requests to be included in any updates or mailing lists associated with this Proposed Rule.

If clarification of any comments is needed, please contact Mr. Ryan Ward at (575) 646-2670 or Ms. Lacy Levine at (575) 646-8024.

Sincerely,

Jeff M. Witte

JMW/rw/ll

Appendix A: NMDA Comments – Reader's Guide

Throughout this document, NMDA has requested information from the Agencies to either provide additional clarity or documentation on certain issues. The following is a list of the questions and requests for information excerpted from our comments. This list does not reflect the full scope of our comments, rather it is meant to serve as a reference for addressing specific questions and concerns. We request the Agencies review the entirety of our comments and use the following highlights from our comments as a guide.

Tributaries (s) (5), Ditches (Page 4)

- NMDA would support an additional paragraph in the definitions section clarifying EPA's intentions regarding jurisdictional determinations over ditches separate from the language pertaining to *tributaries*.
- NMDA requests clarification on how perenniality will be determined. Specifically, we would like to know if the public will be given the opportunity to be involved in the determination process and how conflicting determinations will be mediated.

Other Waters (s) (7) (Pages 5-6)

NMDA suggests the removal of the catch-all category – *other waters*. If the Agencies retain the *other waters* category, we request clarification on the points described below.

- NMDA recommends using the existing ecoregions as a more robust and descriptive starting point in better categorizing the *other waters* definition.
- In a second draft of this rulemaking, EPA should specify areas where changes may occur in order to assist the regulated community in identifying ways this proposed rule may change in the future.
- In addition to the duration of the process, stakeholders are unclear of the steps involved in the jurisdictional determination and still have many questions. Will the Corps be the sole agency responsible for making determinations or will they consult with external experts? Will the process take into consideration economic activity that could be disrupted? How will stakeholders be notified if their operations occur on or near a jurisdictional water? Will stakeholders have the right to request an appeal?
- NMDA requests written guidance for agricultural producers that would clarify how to proactively determine if they may have jurisdictional waters on or near their owned or leased property.
- "New tools and resources that have the potential to improve precision of desk based jurisdictional determinations" should be provided to the regulated community to assist in independently assessing if water bodies on their land will be jurisdictional and to begin taking appropriate action to maintain compliance with Agency standards.

Exclusions from Waters of the U.S. (t) (Pages 6-9)

Prior Converted Cropland (t) (2) (Pages 6 – 8)

- NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products – regardless of whether the agricultural operation was established before or after 1985.
- Will being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production"?
- Providing a clear, Agency-endorsed definition of prior converted cropland would assist in offering consistency for the regulated public in determining if their land will be considered prior converted cropland thus excluded from being jurisdictional.

Upland Ditches (t) (3) (Page 8)

- NMDA requests the term uplands be defined in the *Waters of the U.S.* rule.
- How will agricultural producers know when ditches are excluded given the confusing nature of this exclusion? To provide consistency and clarity, NMDA requests a visual tool, perhaps in the form of a decision tree, to simplify what ditches are and are not jurisdictional.

Disconnected Ditches (t) (4) (Page 8)

- Waters may pass from a ditch through nonjurisdictional waters and still be jurisdictional according to the proposed rule's language. NMDA requests the removal of language that would allow for ephemeral ditches to be claimed as jurisdictional and striking the qualifier "or through another water."

Gullies, Rills, and Non-Wetland Swales (t) (5) (vii) (Pages 8-9)

- NMDA requests that arroyos be added to this exclusion category.
- Aside from gullies, rills, and nonwetland swales, how do the Agencies plan on differentiating other erosional features not specifically excluded from the definition of *Waters of the U.S.*?

Closed Basins (Page 9)

- NMDA requests the addition of waters within "closed basins" to the list of exclusions presented in this proposed rule, as they cannot satisfy any criteria required for a water to be jurisdictional.
- Will playa lakes be excluded due to their hydrologic disconnect from major waterways or are they assumed to be included under one of the new *Waters of the U.S.* categories?

New Definitions (Pages 9 -13)

Adjacent (u) (1) (Page 10)

- The qualifying separations between *Waters of the U.S.* and adjacent waters, including "man-made dikes or barriers, natural river berms, beach dunes, and the like," are clear.

However, without guidance on the size and extent of the separations, the term adjacent is still unclear.

Neighboring (u) (2) (Page 10)

- EPA has no jurisdiction over groundwater thus no jurisdiction over "shallow subsurface" water. We request striking the second half of the sentence, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Further, the term shallow in this definition is subjective and undefined by the Agencies.
- If the floodplain is larger than a water's riparian area, will the floodplain be used as the guiding jurisdiction criteria?

Riparian Area (u) (3) (Page 10 -11)

- We recommend striking the qualifier "or subsurface" due to the fact that groundwater is not jurisdictional.

Floodplain (u) (4) (Page 11)

- Flood intervals can range from 10 to 500 years yet the proposed definition does not include information about which flood interval the Agencies plan to use.

Tributary (u) (5) (Page 11 – 12)

- Due to the qualifier "or through another water," NMDA notes that waters may pass through nonjurisdictional waters and still be classified as tributaries. This qualifier should be removed from the definition.

Significant Nexus (u) (7) (Page 12 – 13)

- The rule states that, "For an effect to be significant, it must be more than speculative or insubstantial." This broad definition leaves much to interpretation and should be clarified.
- NMDA requests the removal of language allowing for the use of significant nexus determinations based on proxy data like "similarly situated waters." Please remove the phrase "similarly situated waters" from the definition.

Clarity and Consistency (Pages 13 – 15)

Other Waters (Pages 13 – 14)

- Including the category "Other Waters" does not increase clarity for the regulated public. One way to reduce uncertainty and increase clarity would be to provide a decision tree tool that demonstrates to the regulated public how jurisdictional determinations are made so that landowners and businesses can proactively become involved in the process.

Comprehensive List of Waters (Page 14)

- Because many newly proposed definitional changes rely on waters (s) (1) through (4), NMDA requests maps of these waters. From these maps stakeholders will be given the opportunity to more easily determine waters that may be included in wasters (s) (5) through (7) of the proposed rule.

Interpretive Rule and Other Guidance Documents (Pages 14 – 15)

- It would greatly reduce confusion if all guidance documents were consolidated into one document or place. This would allow for agricultural producers and other stakeholders to access all relevant information about the implementation of this and related rules in one place.
- NMDA requests the Agencies publish a *Federal Register* notice when NRCS guidelines are up for review due to the fact that changes in the NRCS guidelines will affect compliance with the Clean Water Act for certain agricultural practices.

Land Use (Page 15)

- Due to the fact that over 91 percent of all streams in New Mexico have the potential to be determined *Waters of the U.S.* despite the fact that they are dry most of the year, NMDA requests analysis of the effects this proposed rule could have on land use compared to the previous definition of *Waters of the U.S.*

Public Involvement (Pages 15 – 18)

Outreach (Pages 15 – 16)

- NMDA requests that a thorough description of the claimed outreach activities to stakeholders be published.

Document Availability (Pages 16 – 17)

- The DEA prepared by the Corps for Section 404 aspects of the proposed rule should be published on the EPA's website due to its importance in the rulemaking process.
- The SAB completed their review of the Connectivity Report on October 17, 2014, and had substantial recommendations for improvement and further scientific analysis. These recommendations should be incorporated into the Connectivity Report and resulting changes to the definition of *Waters of the U.S.* should be made available for public comment in the form of a second draft of the proposed rule.
- If the proposed rule is not withdrawn entirely, NMDA requests the publication of a second draft listing the comments received and detailing EPA's responses to them.

Economic Analysis (Page 18 – 22)

Analytical Errors (Pages 18 – 19)

- NMDA requests a more accurate and complete analysis of the economic implications of this proposed rulemaking for the following reasons: the Agencies make several economic benefit claims that are based on data that is not available to the public; the benefit claims are based on the previous *Waters of the U.S.* definition, which are not the same as those in the proposed rule; and using 2009-2010 as the baseline economic study year could be unrepresentative of a long-term economic comparison.

Benefits (Pages 19 -20)

- NMDA requests an explanation of the economic benefits, especially those related to the improvement of water quantity even though the primary concern of the CWA is water quality.

Costs (Page 20)

- NMDA requests a thorough analysis on the costs this rule will have on various regulated industries, especially those related to agricultural sectors that do not qualify for the Agricultural 404 (f) (1) (A) Exemption.

Barriers to Entry (Pages 20 – 21)

- The explicit exclusion for "prior converted croplands" will create a barrier to entry for agricultural producers due to the NRCS cutoff date of 1985. Younger agriculturalists wanting to start their own operations will not be afforded the same opportunities as older, more established farmers or ranchers.
- In reference to the "continuous operation" provision, NMDA requests clarification on whether land use restrictions near a newly designated *Waters of the U.S.* will change when agricultural lands are either sold or passed from one generation to the next when the use for the land is maintained as agricultural.

Federalism (E.O. 13132) and Costs to State and Local Agencies (Page 21)

- NMDA does not agree that states will necessarily have capability in a form robust enough to comply with the expanded federal jurisdiction as proposed in this rule. Moreover, monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs.

Environmental Justice (E.O. 12898), the Regulatory Flexibility Act (RFA), and Impacts to Small Businesses (Pages 21 – 22)

- The *Federal Register* notice and the Economic Analysis conclusions clearly contradict each other; and NMDA agrees with the latter, that increased permitting will come with increased costs to small businesses. NMDA requests that additional analysis be completed to determine the true impacts of increased permitting to small businesses – particularly for the agriculture industries.

Appendix F:

Testimony of
Jeff M. Witte, Secretary of Agriculture, State of New Mexico
On behalf of the National Association of State Departments of Agriculture

As submitted to the
House Committee on Agriculture, Subcommittee on Conservation and Forestry
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March 17, 2015
2:00 p.m.
1300 Longworth House Office Building

Introduction

Chairman Thompson, Ranking Member Lujan Grisham, and members of the Subcommittee, good afternoon and thank you for inviting me to join you this afternoon. My name is Jeff Witte, and I am here to represent the National Association of State Departments of Agriculture - NASDA. Everyone agrees that clean water is an important part of our nation's health. I know this because I grew up on a beef cattle ranch in my native state of New Mexico. I proudly serve as my state's Secretary of Agriculture, President of the Western Association of State Departments of Agriculture, and Chairman of NASDA's Natural Resources, Pesticide Management, and Environment Committee.

In my various roles, I promote agriculture and protect consumers and producers through a host of regulatory programs — including regulatory programs to ensure the protection of my state's natural resources. I sit before you today to express my concerns with the significant negative impacts of the proposed Waters of the United States (WOTUS) Rule on farmers, ranchers, and people in other agricultural industries.

The stated intent of the proposed rule was to increase clarity and consistency. In fact, it has done the opposite: creating confusion and uncertainty for agricultural producers, rural communities, and state governments. The impacts of the rule are so potentially harmful, it should be withdrawn. We request that federal water regulators take a more collaborative approach in working with state and local stakeholders to draft a rule that works for everyone.

Impacts in New Mexico and Across the Country

In New Mexico, agriculture contributes approximately $4 billion to the economy every year[1] and is the backbone of rural communities. New Mexico products our country treasures — such as cheese, pecans, and chile peppers — and the hardworking families that bring them to us, would be directly impacted by the proposed rule.

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[1] National Agricultural Statistics Service. (2012). *2012 Census of Agriculture* - 2012 Census Volume 1, Chapter 1: State Level Data: New Mexico. Retrieved from USDA: http://agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/New_Mexico/

New Mexico is an arid state with diverse landscapes; and, overall, we get much less precipitation than other states. This means irrigated farms are reliant upon ditches fed by spring runoff, which only flow ephemerally. The proposed definition of ditches has been a point of confusion since the publication of the proposed rule. It is unclear if the many ditches that feed from rivers will be considered "tributaries" under Section (s) (5) or will be excluded as "ditches" under Section (t) (3) or (t) (4).

Similarly, ranchers are often dependent on catching rainwater for livestock and to control erosion, which may be regulated under this rule. Of special concern in the southwest is the potential inclusion of ephemeral erosional features such as arroyos, which are similar to gullies. Again, it is unclear from the rule if arroyos will be jurisdictional as small "tributaries" under Section (s) (5) or excluded because of their status as an "erosional feature" as gullies are in Section (t) (vii).

Waters that have traditionally been available for agriculture without the need for permits will now be subject to permitting under the proposed rule — adding time and costs to the production of food on the 2.1 million farms throughout our country. The time sensitive nature of agricultural production may be at risk due to addition scrutiny and potential legal challenges associated with determining jurisdictional waters.

Among the many terms that are left undefined in the proposed rule, "prior converted croplands" is of specific concern to the agricultural community. This is not just an issue in arid states; across the nation agricultural producers and regulators have expressed concern for how the Clean Water Act (CWA) will apply this term. Although, the Environmental Protection Agency (EPA) does not define "prior converted croplands," other agencies such as the Natural Resources Conservation Service only afford this status to wetlands that were cropped before 1985. This barrier could have profound impacts on rural economies in addition to the nation's ability to provide enough food for a growing population.

Farmers and ranchers throughout the country — including those in wetter states — have also expressed concern with the rule. For instance, Florida Commissioner Adam Putnam recently testified on the consequences that this proposal would have for lands located near isolated wetlands with the expansion of federal jurisdiction.

Another example is in Iowa. My colleagues have estimated that wetland mitigation costs associated with upgrading that state's century-old tile drainage system could increase under the proposed rule from $1.8 billion to more than $57 billion in coming decades.[2]

Further, we have significant concerns that farmers and ranchers will face uncertain permitting requirements and legal liabilities under Section 402 of the CWA, which requires National Pollutant Discharge Elimination System permits for point source discharges near a jurisdictional water.

Jurisdictional Issues

My team has worked with our own environmental permitting agency, Soil and Water Conservation Districts, and other stakeholders. We have concluded this rulemaking represents a federal overreach into state affairs, specifically states' authority to manage and allocate water.

[2] Personal Communication between NASDA staff and staff of Division of Soil Conservation, Iowa Department of Agriculture and Land Stewardship

States have been provided with the authority to manage water quality under the CWA. The New Mexico Environment Department specifically stated in their comments that they are "most significantly concerned that the proposed rule's definition of 'tributary' will unconstitutionally increase federal authority over traditionally held intrastate intermittent and ephemeral waters…"[3] These concerns, which have yet to be addressed, make managing water quality and conservation practices at the state level burdensome.

Since the proposed rule was published in April 2014, EPA and the Army Corps have not been consistent. The agencies have variously said that jurisdiction will increase,[4] [5] decrease, [6] and will not change.[7] There is a significant lack of clarity in the proposed definitions. Furthermore, interpretation of the rule would be left to the discretion of the district offices of the Army Corps across the nation, which adds ambiguity and inconsistency to the process. The "other waters" category in Section (s) (7) leaves many waters in question to the discretion of individuals — creating an unreliable and uncertain business environment.

These issues create both regulatory uncertainty and untold economic consequences for farmers and ranchers. Farmers and ranchers who have historically utilized waters that were not jurisdictional will have to commit valuable time and resources in learning the permitting process and pursuing a permit if needed, causing delays in production.

Additionally, the industries that support our nation's food system—and public health—would be affected by this rule. Pesticide labeling, which informs users and regulators of where pesticides are allowed and appropriate, will change due to expanded jurisdictional areas in which they are prohibited. For example, a pesticide that is labeled inappropriate for use near water may no longer be allowed for use on arroyos or dry ditches to control noxious weeds and invasive species. Pesticides are not only used for crops but are also used for vector control to reduce infectious diseases and algae control to reduce harmful toxins in drinking water downstream. The expanded jurisdiction this rule calls for could negatively impact public health.

Effect on Business

The Small Business Administration (SBA) has expressed concern that EPA and Army Corps inappropriately used a nearly thirty-year-old baseline to certify small business impacts. Further, the SBA said the rule does indeed impose costs directly on small businesses. [8] The bottom line is the rule would

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[3] New Mexico Environment Department. (2014, November 14). New Mexico Environment Department's Comments Regarding Proposed Regulatory Changes to the Definition of "Waters of the United States" Under the Clean Water Act.

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

[5] The Brattle Group. "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*" May 15, 2014. Available at: http://www.brattle.com/news-and-knowledge/publications/archive/2014.

[6] Stoner, Nancy. "Setting the Record Straight on Waters of the U.S." EPA Connect, July 7, 2014. http://blog.epa.gov/epaconnect/author/nancystoner/.

[7] U.S. Environmental Protection Agency. "Clean Water Act Exclusions and Exemptions Continue for Agriculture," http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf.

[8] The Office of Advocacy. (2014, October 21). *Definition of "Waters of the United States" Under the Clean Water Act.* Retrieved from U.S. Small Business Administration: https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act

have significant economic consequences on small businesses including farmers and ranchers because they would have to pay for permits when they have not been required to in the past.

Restoration Initiatives

The changes and uncertainty resulting from this rule not only affect agriculture but can also hamper environmental restoration conducted by several federal agencies and soil and water conservation districts in my state.

In 2005 the Bureau of Land Management began the Restore New Mexico initiative. This program brings together federal, state, and private partners — including farmers and ranchers — to restore landscapes across the state. So far, these partners have successfully restored more than 3 million acres by thinning overgrown forests, restoring native grasses, removing thirsty nonnative species, reclaiming abandoned oil fields, and more.[9] Over the last ten years, at least $100 million — 40 percent from farmers and ranchers — has been used for on-the-ground conservation programs.[10]

There are still 4 million acres identified for restoration and conservation. This rule puts that work in jeopardy due to increases in time and money required for permitting, which would otherwise be spent on important conservation projects and on maintaining the important work that has already been completed.

Watershed restoration and conservation projects also address wildfire concerns. The rule could impede land management agencies from conducting timely restoration projects. Preventative watershed conservation projects are much less costly than the mitigation and rehabilitation activities that must occur after catastrophic fires — which are becoming more common in western states. It is our hope that these imperative, preventative measures do not face increased costs or delays from permitting now that jurisdictional waters would increase.

Over $19 million was spent on fighting the Little Bear fire in southern New Mexico in 2012.[11] This does not include the restoration work that continues in this region. We are concerned that fire suppression and rehabilitation activities may be delayed or impeded by additional permitting requirements. It is unclear where the funds to complete permitting will come from — from the private entities that are severely affected or from the state and federal agencies that are working so hard to suppress fires and restore these landscapes.

[9] BLM. (2014, October 7). *Accomplishments: Restore New Mexico.* Retrieved from U.S. Department of the Interior: http://www.blm.gov/nm/st/en/prog/restore_new_mexico/restore_new_mexico.html
[10] Mr. Ken Leiting, New Mexico Association of Conservation Districts.
[11] Kalvelage, Jim. (July 26, 2012). "Cost of Little Bear Fire suppression tops $19 million." *Ruidoso News*. http://www.ruidosonews.com/ci_21163264/cost-little-bear-fire-suppression-tops-19-million.

Conclusion

Our nation's food security rests on the shoulders of our farmers and ranchers. The confusion and uncertainty from this proposed rule may adversely affect them. The rule would cause negative consequences without any clear benefit beyond existing CWA regulations.

Farming and ranching is already a risky business, and adding this level of uncertainty would make many young farmers and ranchers think twice about entering the profession. Since the average age of agricultural producers in the United States is 58 years old,[12] implementing unclear regulations may prevent future innovation in the agricultural economy. Without the opportunity for these young agriculturalists to succeed, our reliable and superior food supply could be undermined.

EPA has stated that we can expect extensive revisions in the final rule. We do hope for extensive revisions, but we are concerned that the revisions may not catch all issues that have caused individuals, organizations, and local and state governments to submit over 1 million comments on this rule. In addition, the EPA and the Army Corps have not posted all public comments or responded to them, yet the agencies have indicated they intend to send the rule to be finalized to the Office of Management and Budget in the very near future. Given the magnitude of comments received and the clear requirement to respond prior to finalization, the agencies are neglecting their duty to provide good faith effort to address public concerns.

If finalized in its current form, the federal agencies may not have the resources to implement the rule. Monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs — potentially creating an unfunded mandate to states.

My request of the committee is that you support and encourage the complete withdrawal of this rule. Late last year in the "Consolidated and Further Continuing Appropriations Act of 2015," Congress directed the agencies to withdraw the flawed Agricultural Interpretive Rule. Our hope is that the same can be done for the proposed rule itself. State and local governments have expressed dissatisfaction with the very low level of collaboration in this process. We request more robust involvement opportunities to help revise this rule to benefit all interested parties.

I appreciate the opportunity to testify before you today, and I welcome any questions you may have.

[12] U.S. Department of Agriculture. "2012 Census of Agriculture."
http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/

Appendix G:
NMDA's Review of the Final "Waters of the U.S." Rule

Final "Waters of the U.S." Rule
New Mexico Department of Agriculture
Intra-Agency Review
July 14, 2015

United States Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (collectively "Agencies") proposed a revised definition of Waters of the United States under the Clean Water Act in April 2014 (79 FR 22188-22274) and finalized the rule in June 2015 (80 FR 37054-37127). New Mexico Department of Agriculture (NMDA) submitted two comment letters on the proposed rule (dated May 7, 2014, and November 11, 2014), one comment letter on the Agricultural Interpretive Rule (79 FR 22276) before it was withdrawn (dated July 2, 2014), one Freedom of Information Act (FOIA) request for several support documents for the rule (dated October 27, 2014), prepared and provided one testimony for NMDA Secretary Jeff Witte to the U.S. House of Representatives Agriculture Committee's Subcommittee on Conservation and Forestry (March 17, 2015), and participated and listened into several conference calls and webinars on the proposed rule throughout 2014 and 2015.

Our overall message to the Agencies was that the rule should be withdrawn and reinitiated through the rulemaking process to be more inclusive of the public and other governmental agencies' input. Obviously the rule was not withdrawn. At this point in time, the final rule will go into effect August 28, 2015.

Overall Feedback

The Agencies did a decent job of collating all the comments they received and the responses they provided. The Agencies published several PDF documents to address categorical issues identified in the more than one million comments they received. The Agencies did a good job in providing essay responses and specific responses in many cases. In other cases, however, the responses were not helpful and only provided blanket statements that did not answer specific questions or points made by commenters. In a couple cases, the Agencies refer readers to a response essay to respond to comments that do not answer the comment.

Feedback on Background Questions That We Posed and Documents We Requested

The National Environmental Policy Act (NEPA) process was poorly utilized and the Notice of intent and Draft Environmental Assessment (EA) should have been more clearly and widely available. The Final EA and Finding of No Significant Impact only provide two substantive alternatives – use the rule or don't. While the Agencies make the argument that the public comment process was part of the NEPA process and the comments utilized therein were applied to the EA, it is not fair to present black and white options. Further, the documents that supported and led to the final EA were not and are still not available to the public – even though we submitted a FOIA request for them.

The "Connectivity of Streams and Wetlands: A Review and Synthesis of the Scientific Evidence (Connectivity Report)" had the same issue – the final document was not published until well after the draft rule was provided to the public. There are a couple of instances in the Agencies' responses where they say that a transparent scientific review process will be utilized if additional

changes are made to the rule. Our experience from this rulemaking process makes NMDA skeptical of the open nature in which rules are changed or created by the Agencies.

Again, to the point of the documentation and analysis used in the rulemaking process, we requested a more thorough analysis be done on the impacts the rule will have on small businesses. While the economic analysis was redone, a small business analysis was not. The Agencies still maintain that there will not be a significant impact to small businesses, but analyses have yet to be seen to substantiate this conclusion.

NMDA requested the rule be withdrawn on several occasions. NMDA then suggested the rule be placed for a second round of comments as an alternative. Neither request was granted. Instead, the rule was finalized; and although several major changes and improvements were made, it still would have been helpful to policy analysts and entities that are impacted by the rule to have a second round of a comment period.

Feedback on the Final Rule Language

The proposed rule and final rule were both organized by 1) categorical inclusions for waters of the U.S., 2) exclusions of waters of the U.S., and 3) definitions of terms used in the other two portions. Major changes were made between the proposed and final rule and changes were a direct result of comments like ours. However, there are still some items of concern. Below is a review of the changes made between the draft and the final rule.

Categorical Inclusions for Waters of the U.S.

The final rule has eight categories of waters that are much more detailed than the draft rule.

> *(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*

This did not change from either the preceding rule or from the proposed rule – no feedback. This is a relatively widely accepted category.

> *(ii) All interstate waters, including interstate wetlands;*

Though the intent of the language did not change, the specificity of the category seems better. It clarifies that all interstate waters, regardless of if they are navigable, are included.

> *(iii) The territorial seas;*

This did not change from either the preceding rule or from the proposed rule – no feedback. This is a relatively widely accepted category.

> *(iv) All impoundments of waters otherwise identified as waters of the United States under this section;*

No substantive change from the preceding rule or draft rule – no feedback. This is a relatively widely accepted category.

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

Slight change in this category to more specifically reference the definition of a tributary, which is provided in the definitions of terms below. It is the definition – not the inclusion of the category – that has so many people concerned about ditches, arroyos, small intermittent streams, etc.

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

The intent of this category didn't change, but more specific language about various specific waters that are included in the category are provided. Of concern is the term "and similar waters," which may be interpreted as a catchall for many unintended waters types. The terms used in this category are now much better defined in the definitions of terms below.

(vii) Case Specific Waters

This category was previously the "other waters" category. The category now is far more specific on how waters can be determined jurisdictional individually or in combination with other waters on a case-by-case basis. The new language also provides some regional specific waters that were brought up a great deal by commenters. This category is still a little troublesome at this point because of the extent of case-by-case determinations that may have to be made. The Agencies assure readers that it is a straight forward and stakeholder inclusive process, but many are skeptical of the process. Because of the unknowns of this category at this time, this could remain a troublesome category.

(viii) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (A) through (E) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required. (refer to rule for (vi)(A)-(E))

This is a new category entirely. The category covers waters that are located within a 100-year floodplain of (i) through (iii) waters and waters located within 4,000 feet of the OHWM (ordinary high watermark) of (i) through (v) waters. The language states that a water is jurisdictional if any portion of the water is within these boundaries. While the logic of this

category is understandable, the category grants a lot of leeway to the Agencies in determining jurisdiction. There are some major unknowns with this category even though the Agencies have said they have used these general guidelines in determining jurisdictions for a long time. The Agencies' responses state that although waters will be considered jurisdictional if they fall within the delineations, additional waters can still be determined to be jurisdictional (even if they are outside the delineation) if there is a significant nexus.

Exclusions of Waters of the U.S.

The final rule has seven exclusions and has some major improvements compared to the proposed rule, largely as a response to the comments that were received. The normal agricultural activities exemption is not specifically written in the final rule; however, it still applies as a part of the Clean Water Act and has not changed.

> *(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.*

There was no change between the draft and final rule for this exclusion – no feedback.

> *(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.*

There was no change between the draft and final rule – which means that concerns remain the same. The *Federal Register* notice for this proposed rule (in a footnote) states the Agencies use the Natural Resource Conservation Service (NRCS) definition of *prior converted cropland* for purposes of determining jurisdiction under the CWA (79 FR 22189). The NRCS defines *prior converted cropland* as farmland that was:

- Cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as corn);
- The land was cleared, drained or otherwise manipulated to make it possible to plant a crop;
- The land has continued to be used for agricultural purposes (cropping, haying or grazing);
- And the land does not flood or pond for more than 14 days during the growing season."[1]

NMDA is highly concerned with the exclusion of *prior converted cropland*, as it is currently identified, because it relies on the NRCS's use of 1985 as the year that farmland must have been used for agricultural purposes. This creates a clear barrier to entry and is further analyzed in the subsection "Barriers to Entry" in the "Economic Analysis" section below. NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products – regardless of whether the agricultural operation was established before or after 1985.

[1] Natural Resource Conservation Service. "Wetland Fact Sheet - Prior Converted Cropland." http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517.

Also, several NRCS programs, such as the Conservation Reserve Program (CRP), incentivizes agricultural producers to take land out of production:

> In exchange for a yearly rental payment, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant species that will improve environmental health and quality. Contracts for land enrolled in CRP are 10-15 years in length. The long-term goal of the program is to re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat.[2]

Will being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production"?

Furthermore, even though the *Federal Register* notice for this proposed rulemaking claims the Agencies will use the NRCS's definition, the language of the proposed rule states the Agencies have "final authority regarding Clean Water Act jurisdiction." The Agencies have neglected to independently define *prior converted cropland*, which is contrary to logic given that EPA's claims of final authority over determining exclusions. Providing a clear definition would assist in offering consistency for the regulated public in determining if their land will be considered *prior converted cropland* thus excluded from being jurisdictional.

(iii) The following ditches:
(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

This category combined two exclusions and added clarity to the draft rule language. There are three categories of ditches that are specifically excluded. The types of ditches address several of the concerns we raised; however, there has been feedback from congressional members and other entities that the exclusions are still not wide enough.

A term that was used in the draft rule that was removed from the final rule was "upland." The final rule provides much better wording to determine which ditches are and are not jurisdictional.

(iv) The following features:
(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
(C) Artificial reflecting pools or swimming pools created in dry land;

[2] U.S. Department of Agriculture, Farm Service Agency. "Conservation Reserve Program." http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp.

(D) Small ornamental waters created in dry land;
(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

This category adds to the language suggested in the proposed rule and includes, in addition to the previous exclusions, erosional features and puddles. The Agencies responded to our concerns about arroyos and stated that arroyos are included in the erosional features exclusion. However, the staff from Bureau of Land Management have stated concerns about several projects that involve areas with arroyos and think they will have to obtain permits for these features. Time will tell how this exclusion is upheld, but on paper the exclusions are much clearer.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

This is a new exclusion that is a direct result of the comments people made about subsurface connections between waters. It is now specifically excluded, which is a welcome addition to the list of exclusions.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

This is a new exclusion, but NMDA has no feedback other than it is likely that local governments would be pleased by the addition.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

This is a new exclusion, but NMDA has no feedback other than it is likely that local governments would be pleased by the addition.

<u>Definitions of Terms Used in the Other Two Portions</u>
There are seven term definitions provided in the final rule and several improvements were made between the draft and final rule.

A term that was not defined that should have been is "similarly situated." The *Federal Register* notice and the Agencies' responses provide good explanations; but it is not included in the actual rule, which is unfortunate because not everyone will necessarily have time to check back and reference between documents.

Two other terms that would have been helpful to define in the rule is ephemeral and intermittent. A definition is provided for these terms in the *Federal Register* notice but not in the final rule.

(i) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this section, including waters separated

by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

Though much of the language for this definition changed and expanded, the overall intent and reach of the definition really didn't. One welcome clarification was made about the specific exclusion of waters used for normal agricultural activities. The term "neighboring" is further defined in the second term definition below.

(ii) Neighboring. The term neighboring means:
(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

This definition is much more specific now and identifies boundaries of being in and out of the neighboring classification. This is a direct response to comments like ours that requested delineations be made because, otherwise, there was no limit to the number of waters that could be considered jurisdictional. Two terms that were used in the draft definition – riparian area and floodplain –were removed, which is a welcome change. Riparian area and floodplain both had some major issues with them and the new definition for neighboring is much better overall.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under

paragraph (2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i1) through (iii) of this section.

This definition had NMDA and many stakeholders concerned about its inclusion of essentially all contributing waters. This is where many concerns about the inclusion of ditches, arroyos, etc., were placed. The final definition is clearer, but time will tell how the ditch exclusion is upheld.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

No change was made between the draft and final rule – NMDA didn't have any comments on this definition.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:
(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,

(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

The definition in the final rule provides more clarity on how significant nexus determinations will be made and provides a list of functions that a water performs in order to be considered to have a significant nexus to a water of the U.S. The agencies have stated that the number of cases where a significant nexus may be determined positively will likely not increase. Similar to many other definitions and categories, time will tell how this definition is implemented.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

This is a new definition and was needed to add clarity to many parts of the rule as it is currently written.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

This is a new definition and was very much needed to add clarity to many parts of the rule as currently written.

Appendix H:
EPA's Federalism Consultation Meeting Slides

EPA United States Environmental Protection Agency

The Definition of “Waters of the U.S.”

E.O. 13132 Federalism Consultation Meeting

April 19, 2017

Purpose & Agenda

Purpose:

- Initiate Federalism consultation to obtain state and local government officials' perspectives
- Provide an overview of potential changes under consideration for the definition of "Waters of the U.S."

Agenda:

- Federalism overview
- "Waters of the U.S." over time
- The Executive Order
- Proposed two-step process
  - Step 1
  - Step 2
- Discussion of Potential Approaches
- Next steps

E.O. 13132, Federalism

The Order requires that Federal agencies consult with elected state and local government officials, or their representative national organizations, when developing regulations that have federalism implications.

The agencies are consulting due to strong interest on the part of state and local governments on this issue over the years and potential effects associated with a change in the definition of "waters of the U.S."

“Waters of the U.S.” Over Time

From the 1970s through the 1990s, the majority offederal courts, as well as the agencies, consistently interpreted a broad scope of Clean Water Act jurisdiction.

Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of waters used in navigation. The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.

The agencies have been working since these Supreme Court decisions to provide clarification and predictability in the procedures used to identify waters that are – and are not – covered by the Clean Water Act.

The 2015 Clean Water Rule was an effort to provide that needed clarification and predictability. Many stakeholders, including many states, expressed concerns with the 2015 Rule.

The agencies are now embarking on another effort to provide clarity and predictability to members of the public.

The Executive Order

On February 28, 2017, the President signed the "Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule and "publish for notice and comment a proposed rule rescinding or revising the rule…."

The E.O. directs that EPA and theArmy "shall consider interpreting the term 'navigable waters'" in a manner "consistent with Justice Scalia's opinion" in *Rapanos*. Justice Scalia's opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic

Two-Step Process

The agencies are implementing the Executive Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.

1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The agencies are aware that the scope of CWA jurisdiction is of intense interest to many stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.

In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.

Step 1: Withdraw 2015 Clean Water Rule

While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.

To provide greater certainty, the agencies will move to reinstate the preexisting regulations and guidance and to withdraw the 2015 Rule.

In the Step 1 proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.

The Step 1 proposed rule would maintain the approach in place for decadesuntil a revised rule with a new definition can be promulgated.

Step 2: Develop New Rule Consistent with the Executive Order

The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The agencies are consulting with state and local government officials as we begin to develop the new definition.

Potential Approaches to "Relatively Permanent" Waters

Perennial plus streams with "seasonal" flow	Perennial plus streams with another measure of flow	Perennial streams only	Other
Current practice: seasonal flow = about 3 months (varies regionally)	Use appropriate, implementable metrics, e.g., frequency of flow, intersecting water table	Streams that carry flow throughout the year except in extreme drought	Thoughts?

Potential Approaches to Wetlands with a "Continuous Surface Connection"

Surface connection even through non-jurisdictional feature	Some degree of connectivity	Wetland must directly touch jurisdictional waters	Other
Current practice considers directly abutting wetlands and those with a continuous surface connection, regardless of distance, to be jurisdictional	Use appropriate, implementable metrics, e.g., distance	Only wetlands that directly touch a jurisdictional water	Thoughts?

Discussion:

The change in jurisdictional waters will vary across states and localities and with the options suggested above. Given that:

1. How would you like to see the concepts of "relatively permanent" and "continuous surface connection" defined and implemented? How would you like to see the agencies interpret "consistent with" Scalia? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

2. What opportunities and challenges exist for your state or locality with taking a Scalia approach?

3. Do you anticipate any changes to the scope of your state or local programs (e.g., regulations, statutes or emergency response scope) regarding CWA jurisdiction? In addition, how would a Scalia approach potentially affect the implementation of state programs under the CWA (e.g., 303, 311, 401, 402 and 404)? If so, what types of actions do you anticipate would be needed?

4. The agencies' economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your region, state or locality that could be affected but would not be captured in such an economic analysis?

Next Steps

Do you have any additional information that the EPA should be aware of?

- If so, please provide.

Do you have any other approaches that you would like the agencies to consider?

Comments will be due to the EPA in approximately 8 weeks, June 19, 2017.

Please send written comments to: CWAwotus@epa.gov and copy Hanson.Andrew@epa.gov

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