November 10, 2014

Water Docket, Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attention: Docket ID No. EPA–HQ–OW–2011–0880

Subject: Proposed rule defining the scope of waters protected under the Clean Water Act

Dear EPA Staff:

These comments regarding the proposed rule cited above are submitted by Duchesne County, Utah.

These comments address the proposed rule published in the Federal Register / Vol. 79, No. 76 / Monday, April 21, 2014, pages 22188-22274. The Environmental Protection Agency and the Department of the Army, Corps of Engineers ("Agencies") have published specific requests for information they seek. Our comments address these questions as well as additional concerns we have as elected officials. We appreciate the opportunity to submit comments and information concerning the proposed rule for a new definition of the "Waters of the United States" (WOUS) as it pertains to the Clean Water Act (CWA).

We are very concerned that the proposed rule would modify existing regulations, which have been in place for over 25 years. Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards. We have concerns with the process used to create this proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process.

County officials are elected to manage on-the-ground daily governmental activities that involve the health, safety and welfare of local citizens. Local government responsibilities include protecting our citizens from adverse impacts of federal actions. Local governments are the foundation upon which higher levels of government depend to ensure the peaceful and orderly existence of the American way of life - our customs and cultures. Local government responsibilities most definitely include developing, managing and sustaining a supply of clean water for the citizens of their communities as well as downstream users of water.

Counties are responsible for public safety. Counties own and manage public safety ditches including roads and roadside ditches and other drainage features. Counties are liable for ensuring that public safety ditches are maintained—there have been cases where counties have been sued for not maintaining their ditches and flooding occurred as a result.

Under current "Waters of the U.S." regulations, some counties are required to obtain federal permits for any type of construction or maintenance activities on these ditches, called jurisdictional ditches. Obtaining these federal permits can be very expensive, cumbersome and

time-consuming. A number of counties have waited years for federal permits at a significant cost. Counties have missed building seasons waiting for federal permits. Federal permit requirements for ditch maintenance activities also vary from area to area. NACo has documented numerous examples of problems that exist under the current "Waters of the U.S." regulation. The proposed rules will make the current problems noted above even worse as the rule does not make clear how certain perennial, intermittent and ephemeral ditches will be exempted.

Key terms used by the “waters of the U.S.” definition—tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed—are inadequately explained and raise important questions. Because the proposed definitions are vague, this will result in further legal challenges and delays.

While individuals and non-governmental organizations are always encouraged to take advantage of the opportunity to review proposed federal rules and to assess the potential beneficial and adverse impacts of these proposed rules, local governments have the additional responsibility for ensuring that the proposed rules are in compliance with the enabling legislation as it pertains to protecting the health, safety and welfare of their local citizens. As elected officials, we recognize and accept the responsibility to address the proposed changes to the definition of the WOUS that affect local citizens in a thorough and serious manner.

We submit these comments because it is important for the Agencies to recognize, honestly represent and openly disclose the adverse impacts (not just the benefits) that will result from the Agencies’ actions pursuant to changing the definition of the WOUS. While the CWA directs the Environmental Protection Agency, the Army Corps of Engineers and other federal agencies to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters, other federal laws require federal agencies to disclose information related to the effects of their actions on the American public.

We feel that the Agencies do not meet this requirement with the proposed rule and further, that the Agencies have engaged themselves in an effort to sway the public into supporting a new definition of the WOUS that the Agencies have determined is necessary but is independent of what is intended or presented in the CWA. This effort to gain support for an unnecessary new definition of the WOUS is carried out despite a recent Supreme Court decision that clearly defines the WOUS.

The proposed rule will affect every American, impacting how communities and landowners manage their public and private property using pesticide and fertilizer products. Landowners will be subject to CWA provisions for permitting and will be vulnerable to citizen lawsuits challenging their ability to manage their own property. For example, professionals making pesticide and fertilizer applications to turf and ornamental plants, golf courses, and to manage invasive and noxious terrestrial and aquatic weeds will also be impacted as will those making public health applications to control mosquitoes and ticks.

Expanding the definition of "waters of the U.S." expands the scope of waters subject to NPDES permits for mosquito control applications. This makes it more difficult for professional applicators to obtain permits and treat areas at high risk for West Nile Virus and Dengue Fever, creating a great concern for public health and safety. West Nile Virus claimed some 286 lives in 2013.

This rule would make it more difficult to control harmful pests on private and public property if any water is near the area. Professional applicators and homeowners would have to obtain

permits to protect properties from pests like ticks, which carry harmful diseases like Lyme disease.

The proposed expanded jurisdiction affects vegetation management applicators' ability to keep right-of-ways safe and passable because they would need to obtain costly NPDES permits to treat near water bodies and ditches considered jurisdictional under the proposed rule. Such applications keep our roadways and power lines clear and safe.

Under the rule, EPA could compel states to place restrictions on the amount or type of fertilizer that can be used on public and private property including individual home lawns, gardens, parks and golf courses.

Expanding the definition of "waters of the U.S." also expands the scope of waters subject to NPDES permits for algae and aquatic weed control applications. Golf course water hazards and man-made lakes in residential communities or on an individual's private property could be subject to these expanded permitting requirements.

The expanded scope of the Clean Water Act could leave landowners and professionals applying fertilizers and pesticides vulnerable to nuisance lawsuits. Well-maintained lawns are important for the environment and properly-cared for lawns reduce run-off into nearby waters. One of the unintended consequences of EPA's proposed rule could be increased erosion and run-off into many connected water bodies.

Uncontrolled growth of poison ivy, poison oak, and poison sumac poses risk to children and adults alike as more than one-half of the U.S. population is allergic to these noxious weeds, which must be controlled with herbicides.

The proposed rule would have a profound and significant impact on small businesses providing pest, turf and lawn control solutions around the United States. The cost of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also have to be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services.

Most important to Duchesne County, the application of CWA regulations to “other waters” and dry washes within our boundaries could severely hamper agricultural practices and energy development in our area. Duchesne County has an unemployment rate of 2.7% according to the most recent estimates from the Utah Department of Workforce Services. Allowing federal regulators to expand jurisdiction over “other waters” and dry washes could cause our unemployment rate to rise to the higher levels being experienced nationally if doing so makes it more difficult for energy companies to develop oil and gas facilities.

The oil and gas exploration and production industry anticipates significant operational and economic impacts from this proposal. As stated in a letter from the Independent Petroleum Association, the American Exploration & Production Council and the Western Energy Alliance, these impacts are based upon tangible assessments of actual operations in several energy producing regions of the country.

We agree with the American Farm Bureau Federation in their assessment of the impacts of the proposed rule on farmers:

- Farmers and ranchers are stewards of the land and care about the environment and water quality. But this rule is confusing. Regional offices would be left to interpret and apply

the regulations to farms on an inconsistent basis. Farmers know the ground they farm and should have clear guidance about how to comply with the law.

- Third-party lawsuits have become the new norm for regulating farmers. Even if farmers protect water quality and comply with the law, they could be forced to defend themselves in court.
- Under the proposed rule, farmers, ranchers and other landowners would face a tremendous roadblock to ordinary land-use activities, from building a fence to treating for or pulling weeds to controlling insects.
- Getting a permit to plant grapes, build a fence or clear out brush is not a simple task. It could require consultation with state and federal agencies, hiring consultants and waiting for approvals. If the permit is obtained, it often includes paperwork and reporting requirements in addition to any requirements aimed at protecting water quality. Farmers just want to continue to farm and be stewards of the land, leaving it in better shape for future generations.

Overall, the proposed rule will have little to no positive impact on water quality while definitions and other aspects of the rule will be defined by the courts in anticipated citizen action lawsuits.

We see the following major issues with the proposed rule:

**Issue 1: Conflicting intent and incorrect purpose given for the proposed rule**

Reference: FR title: *Definition of "Waters of the United States" Under the Clean Water Act*

FR page 22188 column 1: [The Agencies] *are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA),*

FR page 22190, column 3: *The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying ''waters of the United States'' less complicated and more efficient.*

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

The task of establishing the parameters of the scope of responsibility for the Agencies that will enable them to carry out their missions[1] cannot be accomplished by proposing to redefine a term that already has a well-understood meaning in the English language. The Agencies, in couching the proposed rule as a request for unnecessary and inappropriate redefinitions of that and multiple additional terms, beg the question of actual intent for doing so.

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[1] The EPA mission is to protect human health and the environment. http://www2.epa.gov/aboutepa

The mission of ACE is to "Deliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters." http://www.usace.army.mil/About/MissionandVision.aspx

Summary of the Clean Water Act 33 U.S.C. §1251 et seq. (1972) The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. http://www2.epa.gov/laws-regulations/summary-clean-water-act

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

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

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

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

Any ordinary speaker of the English language understands "waters of the United States" to mean, in plain writing and common use, "all waters located within the territorial boundaries of the United States". None of the words are hard to comprehend, and the use of this type of phraseology is common to native speakers of the English language. It is a non-specific term that does not exclude any specific kinds of water to be found within the United States.

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

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

Thus when the CWA uses the term "navigable waters" to modify "waters of the United States", there should be no question that the Agencies should address waters that can be sailed on, i.e. that are passable by a vessel that floats on water. Using this clear and commonly understood meaning further leads to understanding that connected waterways and significant nexus waters will be waters that can be used for sailing on or that directly feed such waters. Limiting the Agencies' jurisdiction to the actual meaning of "navigable waters" yields to a simple test: *Can you float your boat on the water?*

It is not the business of the Agencies to reinvent language, nor is it right or proper for the Agencies to use confusing language and incorrectly stated purpose to attempt to expand a federal Agency's jurisdictional authority.

Recommendation: Withdraw the proposed rule. If the Agencies are confused about their scope of jurisdiction, they should seek Congressional and judicial guidance.

**Issue 2: Failure to provide legal justification for the proposed rule**

Reference**:** FR page 22188, column 3: *The SWANCC and Rapanos decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by Federal and State regulators.*

Discussion**:** We find this statement to be self-serving and misleading. There is no doubt that with the plurality decision in the *SWANCC* and *Rapanos* cases the Supreme Court has already provided a clear definition of "waters of the United States". *(See summary of the Supreme Court's decision in the attached "Syllabus of RAPANOS ET UX. Et AL v. UNITED STATES"[2])*

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

There can only be one reason for the Agencies' concern with having to evaluate jurisdiction of waters on a case-specific basis: The Agencies' desire to expand their scope of jurisdiction over the nation's waters. The perceived need to control land use activities across most of the nation, which has swept through the upper administrative levels of the Agencies, is not a need for states or the American public, nor is it a valid or acceptable justification for the proposed rule.

The Agencies' bid to expand their scope of jurisdiction over the nation's waters and the need to control land use activities across most of the nation is clearly evident in the fact that the EPA has taken it upon themselves to commission the development of a "Water Body Connectivity Report" and to further go to the trouble of setting up their own EPA Science Advisory Board (SAB) review of the report. It is hard to believe the outcome of this self-serving process would lead to anything but a finding that all waters are connected in one way or another, and to conclude that the Agencies must be granted jurisdiction for permitting just about every land use activity in the nation**.**

Unfortunately for the Agencies, the Constitution does not grant power to any federal agency to establish their own authorities or jurisdictional boundaries independent of Congress and the Supreme Court.

Recommendation: Withdraw the proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law. Furthermore, they must work within established constitutional process, as well as with state and local elected officials and a broad

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

cross section of the American public in developing changes to their mission and scope of authority.

**Issue 3: Failure to provide justification for expansion of authority and jurisdiction**

Reference: FR page 22189, column 1: *The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or waters in the region, is significant based on data, science, the CWA, and case law.*

*In addition, the agencies propose that ''other waters'' (those not fitting in any of the above categories) could be determined to be ''waters of the United States'' through a case-specific showing that, either alone or in combination with similarly situated ''other waters'' in the region, they have a ''significant nexus'' to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated ''other waters'' in the region should be identified.*

Discussion**:** The above statements not examples of agencies adding clarity to existing laws. Instead, these statements are additional examples of "mission creep", i.e. self-determined expansion of their mission beyond statutory authority. These statements serve to usurp the authority and jurisdiction of state and local governments. Although the powers of the federal government are vested by the U.S. Constitution, it is state government that tends to have a greater influence over most Americans' daily lives.

The Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the U.S. Constitution; thus the states, through local governments (county, municipal governments and the elected officials of soil and water conservation districts), handle the majority of issues most relevant to individuals within their respective jurisdictions.

Federal agencies are established by governments to provide specific services. The personnel of federal agencies are not elected officials, but rather civil servants. Agencies implement the actions required by laws (statutes) enacted by Congress, and may not take action that goes beyond their statutory authority or that violates the Constitution.

By virtue of the Acts of 1866, 1870, and 1877 the federal government divested itself of its authority over all non-navigable waters in the West, ceding that authority to the states. This action of Congress has only been changed in the past by the exemption of water from appropriation under state law. Thus, non-navigable waters of the West are still outside of the jurisdictional authority of the Agencies.

The proposed expansion of authority and jurisdiction over lands that may be or are covered with water for short periods of time cannot be justified. These are non-navigable waters. Clearly this expanded role is not the role the EPA and Corps were created to accomplish.

What is even more troubling with the proposed rule is the idea that because intertwined "water connectivity" and nebulous "significant nexus" to navigable waters might exist, somehow that connectivity and nexus should give the Agencies jurisdictional authority to fit their perceived needs. This is especially troublesome given the fact that what is being proposed has already resulted in multiple court cases that have gone as far as the Supreme Court of the United States, and has already resulted in the Supreme Court rendering multiple decisions that define "waters of the United States".

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

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

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

This statement alone should have been a red flag to the Agencies that the occurrence of "water connectivity" and the presence of a "significant nexus" was somehow a mandate for them to take it upon themselves to redefine what constitutes "waters of the United States" for CWA purposes.

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

Recommendation: Withdraw the current proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law, specifically incorporating the "waters of the United States" definition presented by the plurality Supreme Court opinion in the *RAPANOS ET UX. Et AL v. UNITED STATES* decision. Furthermore, the Agencies must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority.

**Issue 4: Misrepresentation of Agencies' authority in the proposed rule**

Reference: Page 22189, column 3: *This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator's authority under the CWA. CWA section 101(b).*

*This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).*

Discussion**:** The above two statements are misleading because they are presented in the proposed rule in a way that tends to create the impression the Agencies are dealing with solely Congressional policy and not requirements of the CWA. The above two statements are in fact a clearly stated objective of the CWA.

The lead-in paragraph for Section 101 of the CWA states: *The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act --- (b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to … and* (*g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act…*

When the above statements are presented in the context that they are found in the CWA it becomes much more evident that Congress did intend for Federal actions conducted under authority of the CWA to not interfere with state rights and authorities, and state responsibilities to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

We also have a concern with the statements: *"This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states …"*and *"This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State..."* When considering all of the concerns and problems that have occurred with the current implementation of the CWA it is difficult to believe that the actions called for under the proposed rule would not add an additional burden on the states as they work to carry out their rights and responsibilities to manage the water and land resources within their jurisdiction.

Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended for the Agencies to act as the primary permitting and enforcement agency for land and water use activities across the nation. Contrary to what is being presented in the proposed rule it is obvious that the Agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will have the ability to greatly influence the land and water uses in all States and across the entire nation.

For over one hundred years the nation's state and local governments have dealt with the planning, development and use of land and water resources, including water pollution within their jurisdictions. These tasks have been carried out faithfully at the local level without having to take extremely punitive measures, which seems to be the norm when federal agencies have intervened in the recent past. This heavy-handed approach to gain compliance is now a common practice in the way the Agencies conducts their permitting activities. This constant fear of harsh fines and threats of being imprisoned by federal agencies has greatly affected the states' responsibilities and rights when dealing with local efforts to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. We can only foresee this situation becoming much worse if the proposed rule is implemented.

Congress has over the years been very careful to encourage state and local government responsibility for and involvement in the planning, permitting and proper implementation of land and water use activities. Only in the last twenty or thirty years has the role of the states and local governments been usurped by the mission creep of federal agencies. This proposed rule is another example of a mission creep that is being fueled and driven by a few select elite

environmental organizations that will stop at nothing to impose their will on the American public.

Recommendation: Withdraw the current proposed rule.

Additionally, the Agencies must:

- End actions that allow mission creep within the federal governmental agencies.
- Discontinue unconstitutional self-serving efforts to increase the Agencies' boundaries of jurisdiction over land use activities across the nation.
- Work diligently to divest themselves of all permitting authority and rather put their efforts towards helping the states and local governments coordinate and jointly plan for permitting and implementing sound land and water use practices across the entire United States, which is the clear intent of the CWA.
- Connect with the American public and not give in to the desires of a select group of environmental organizations that hope to gain control of the nation's land and water resources through the manipulation of the Federal land and resource management agencies.

**Issue 5: Failure to comply with Executive Orders 12866, 13132 and 13563**

References: FR page 22188, column 1. *This proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of ''waters of the United States'' protected under the Act.*

FR page 22189, column 1. *…the agencies request comment on alternate approaches to determining whether ''other waters'' are similarly situated and have a ''significant nexus'' to a traditional navigable water, interstate water, or the territorial seas.*

FR page 22189, column 1. *In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify which ''other waters'' should be considered similarly situated for purposes of a case-specific significant nexus determination.*

FR page 22189, column 2. *The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.*

FR page 22189, column 2. *…the agencies also request comment on determining which waters should be determined non-jurisdictional.*

FR page 22189, column 2. *The agencies seek comment on how inconclusiveness of the science relates to the use of case specific determinations. As the science develops, the agencies could determine that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule or that as a class they do not have such a significant nexus and might not be jurisdictional.*

FR page 22189, column 2. *The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.*

FR page 22190, column 1. *This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource, implementation, and economic implications of a definition of "waters of the United States" as*

*described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment*

Discussion: Executive Orders 12866 Regulatory Planning and Review (1993) and 13563 Improving Regulation and Regulatory Review (2011) require that the federal regulatory system ensure, among other things, regulations that are consistent, written in plain language, and easy to understand. The proposed rule fails on all counts.

The stated purpose of this proposed rule, as evidenced by its title, is to define the "Waters of the United States" under the Clean Water Act, and as stated elsewhere (see above references), to increase clarity as to the scope of "waters of the United States". As has already been addressed, above, that term does not need to be defined. The CWA and the Supreme Court have already very adequately provided a definition. However, the proposed rule goes on to request comments that address so many other issues, and in such a self-referential and circular manner, that the proposed rule becomes nearly impossible to understand.

The Agencies have not published a proposed rule, but rather a request for the public to do the Agencies' own work. Rather than publish a proposed rule that presents definitions of terms and alternatives to those definitions in a consistent and easy to understand manner for the public to analyze and evaluate, the Agencies have created a rule that goes back and forth between confusing definitions scattered throughout the document and soliciting additional comments about definitions of terms that are not found anywhere near the request for comments. (*See Issue 1 above, "bait and switch" discussion*).

In the midst of all the confusion, it is difficult to understand precisely how the alleged purpose of clarification of scope actually would be achieved by complying with the proposed rules requests for comments. In fact, these many requests (only some of which are cited, above) are actually extremely loaded questions based on undisclosed presumptions meant to limit direct replies to only those that serve the Agencies' agenda.

Nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the Agencies. As has been mentioned in several comments prior to this one, this amounts to "mission creep", which is enabled by not complying with the Executive Order's directives on regulatory planning.

The Proposed rule raises federalism concerns and could impose direct and indirect costs. Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of "waters of the U.S." imposes only "indirect" costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations. However, the agencies' cost-benefits analysis—Economic Analysis of Proposed Revised Definition of Waters of the U.S. (March 2014)—contradicts the notion that there are no federalism concerns. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed (page 2). Since states, local governments and their agencies implement and enforce CWA programs, we believe the "waters of the U.S." definitional change does have a substantial direct effect on these entities. The economic analysis agrees, stating that CWA "programs may subsequently impose direct or indirect costs as a result of implementation..." (Page 2).

Recommendation: Withdraw the proposed rule. It is inappropriate and in violation of Executive Orders on regulatory planning and federalism.

**Issue 6: Failure to list all supporting documents.**

Reference: FR page 22188, column 2. All documents in the docket are listed in the http:// www.regulations.gov index.

Discussion: FR page 22188, column 1 states that the proposed rule is published "in light of" court cases. Column 3 of the same page refers to the SWANCC and Rapanos court cases.

The SWANCC and Rapanos decisions are crucially important to understanding the whole reason the Agencies contend that the proposed rule is necessary, yet the Agencies have not made them available in the docket under "Supporting & Related Material. This is not only unfair to the public, but it is also a false statement made in the proposed rule.

The proposed rule should follow, not precede, the draft science report. We are concerned with the sequence and timing of the draft science report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, and how it fits into the proposed "waters of the U.S." rulemaking process, especially since the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

Recommendation: Provide links to the SWANCC and Rapanos court cases as well as any other caselaw "in light of" their important connection to the proposed rule. Allow the public sufficient time to respond to the proposed rule after the science report is made available.

**Issue 7: Violation of Fifth Amendment "regulatory taking"**

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

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

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

Recommendations: Withdraw the proposed rule.

**Issue 8: Improper dismissal of negative impact (small business)**

Reference: FR page 22220, columns 1-2: *The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions….*

*Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations*

Discussion: The above statement in the rule is patently self-contradictory. Expansion of the scope of the Agencies' jurisdictional authority to include practically any and all surface waters of the territorial United States will obviously impact many more small businesses than are already impacted, not fewer. The impact of regulatory overreach of the Agencies on small businesses cannot simply be dismissed by pretending that more is less through twisting language and doublespeak.

Apparently the Agencies expect the public (particularly farmers, ranchers and the no doubt millions of other small business owners that would be impacted by this propose rule) to believe that increasing the scope of jurisdiction, i.e. defining all waters as "waters of the United States", somehow means that fewer individual waters would be involved. This would be like saying that a bushel of apples is a smaller amount of apples than the 125 apples in the bushel basket, just because a bushel is one unit whereas the second description includes many units.

The Agencies' bid for increased jurisdictional authority would have exponentially expanding impacts on small businesses, and these impacts will have significant adverse economic impacts on the general public, including but not limited to reduced land value and, increased costs of doing business due to regulatory burdens (e.g. having to hire consultants to prepare permits, cost of permits, project delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation and failure of projects to make a profit).

Property owners, particularly farmers and ranchers and citizens in rural areas, count their land as their principal asset. Land is often used as collateral for loans and other capital purchases needed for business operations or capital improvements.

The tremendous direct and indirect adverse impacts and cumulative impacts of this proposed rule on small businesses cannot simply be dismissed as the Agencies have decided to do. It is no surprise that the Small Business Administration's Office of Advocacy has recently called for the withdrawal of the proposed rule, stating that the proposed rule will result in a "direct and potentially costly impact on small businesses" and that the limited economic analysis submitted with the rule "provides ample evidence of the potentially significant economic impact."

Recommendation: Withdraw the proposed rule. Should the Agencies put forth another proposed rule, the true impacts of expansion of waters under the CWA on small businesses must be fully disclosed for the public to analyze and evaluate.

**Issue 9: Failure to address economic impact**

Reference: FR page 22220, column 1: [The Agencies] *prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in ''Economic Analysis of Proposed Revised Definition of Waters of the United States.''*

Discussion:

The Agencies' estimate of the costs and benefits associated with the regulatory redefinition of "waters of the United States" has not been adequately addressed in the proposed rule or in the associated document cited above. The inclusion of categories of non-navigable waters that were previously never regulated by the Agencies under CWA, such as waters in floodplains, riparian areas, and certain ditches, will broaden the jurisdictional authority of the Agencies and will significantly increase the costs associated with each program; however the above cited document severely underestimates the impact of the definitional changes, excludes important costs, and uses a flawed benefits transfer methodology to estimate the benefits of expanding jurisdiction.

According to a May 15, 2014 report by David Sunding, Ph.D. of the Waters Advocacy Coalition[3], the numerous errors, omissions, and lack of transparency render the analysis virtually meaningless. Estimates of economic impacts to other programs rely on an incremental jurisdiction determination that is deeply flawed. The systematic exclusion of various costs and benefits ignores important impacts to permit applicants and permitting agencies. The analysis suffers from a lack of transparency. Explanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided; the entire report is based on records from the Corps' internal ORM2 database, which is unavailable to the public, and thus the validity of the underlying data cannot be determined due to lack of requisite transparency.

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

Recommendation: Withdraw the proposed rule. Withdraw the economic analysis. If the Agencies wish to resubmit a proposed rule, it must be based on an adequate economic analysis.

**CONCLUSION**

Many more examples of the misguided direction and misleading information found in the proposed rule could be cited and addressed in these comments, but doing so would be a waste of time and resources since the comments presented have brought forward key and fatal flaws of the current proposed rule. While the entire proposed rule is lacking integrity and is obviously loaded with bias toward the federal takeover of land and water use activities across the nation, we can only hope that the actions of the Agencies to expand their jurisdictional boundaries and increase their authority over land and water use activities will be recognized for what they are: gross incompetence and blatant mission creep.

The mission of the Agencies is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters for the continuing benefit of the American people. This mission

[3] http://www.nam.org/~/media/9CE236BA1E11491982C77E72B2D5AFD8/WOTUS_Economic_Report_FINAL.pdf Accessed 07/24/14

will work much better when done with the support of and interaction with state and local governments, and the citizens of the United States. The proposed rule would impose tremendous burdens on the taxpaying public and on small businesses, making it more difficult to farm and ranch, build homes, develop energy resources (a major economic sector in our County), engage in conservation activities and otherwise use the land. In fact, the Agencies have obscured rather than promoted their own missions and the purpose of the Clean Water Act.

We agree with the 24 members of the United States Senate who, in their October 23, 2014 letter concluded that "the proposed rule would provide EPA and Corps (as well as litigious environmental groups) with the power to dictate the land use decisions of homeowners, small businesses and local communities throughout the United States. With few exceptions, it would give the agencies virtually unlimited regulatory authority over all state and local waters, no matter how remote or isolated such waters may be from truly navigable waters. The proposed rule thus usurps legislative authority and Congress's decision to predicate Clean Water Act jurisdiction on the law's foundational term, ***navigable waters***."

Thank you for your attention to our comments and we hope our harsh criticism will lead to actions that restore the faith of the American public in the ability of the Agencies to honestly and transparently work with States and local governments in caring for and managing the WOUS.

We, the undersigned, appreciate your attention to and serious consideration of our comments and recommendations on the proposed rule.

Sincerely,

DUCHESNE COUNTY COMMISSIONERS

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