November 7, 2014

Water Docket
Environment Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave. NW
Washington, DC 20460

Docket No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States under the Clean Water Act"

Dear Administer McCarthy and Lieutenant General Bostick:

Western Growers Association appreciates the opportunity to provide comments to the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) on the proposed combined joint rule on the definition of "waters of the United States under the Clean Water Act" (79 Fed Reg 35712 June 12, 2014).

Since 1926, we have represented family farmers growing fresh produce in the Western United States. Our members provide roughly half the nation's fresh fruits, vegetables and tree nuts including a third of America's fresh organic produce. In addition to our home states in the West, our growers farm throughout the United States with operations in more than 25 states, and have operations in more than a dozen foreign countries. These companies have worked for generations to ensure that consumers have year-round access to a variety of healthy choices as the first line of defense against obesity and disease. You could say: *We grow the best medicine in the world* ®.

Western Growers writes today to express our strong opposition to the promulgation of the new proposed definition of "Water of the United States" (WOTUS). We believe that this new rule as written: 1.) expands the jurisdiction of the Act beyond the limits set forth in

Rapanos v United States; 2.) ignores elements of federalism as articulated in the Act; and 3) writes new law rather than providing rules to implement existing statutes. The proposal is flawed in numerous respects and impermissibly goes beyond the boundaries of the executive branch as well as ignores critical aspects of the Administrative Procedures Act. For all these reasons we are resolutely opposed to this proposed rule and we urge both EPA and the Corps to abandon this proposal and begin anew.

If the agencies decide to ignore these objections, then Western Growers contends that, at a minimum, significant rework and clarification of terms must be provided before any proposed rule can be finalized. Specifically, the definitions of "tributary", "other waters", "significant nexus", and "adjacent waters" need clarification. Moreover the EPA and Corps must define "upland", "perennial", "ephemeral", and "intermittent" in the rule as discussion of these terms in the preamble are not satisfactory. These clarifications and definitions should be developed in direct consultation with the affected parties to ensure they will be understood and accepted by the agricultural sector.

Finally, we submit that the Interpretive Rule should be abandoned completely since most of the farming practices described within it fall within the normal farm exemption within the statute and thus do not need to be clarified. Indeed, the Interpretative Rule may be used to improperly limit normal farming practices in contravening the statute's intent.

Adding urgency to our requests, is the Small Business Administration's (SBA) call for the EPA and Corps to withdraw the rule pending a new process that would recalculate the economic impact these changes will have on small businesses. These small businesses include many family farms within our membership and throughout the United States.[1] We thus echo the SBA's request that the proposed rule be withdrawn in full. At an absolute minimum, we contend significant elements of the proposed rule must be clarified and those elements reopened for further public comment.

[1] Small Business Administration, Office of Advocacy, Regulatory Comment Letter re "Definition of 'Waters of the United States' under the Clean Water Act" October 1, 2014. Letter indicates that the agencies may have not have correctly estimated economic harm and impact upon small business.

1) The Appropriate Reach of the Clean Water Act

Western Growers' farm producers rely upon clean, readily available water in order to produce the fruits and vegetables that supply our nation and the world. As a result you will find no one more concerned about water quality than agricultural producers. We support the objectives of the Clean Water Act (CWA or Act) but contend that those objectives must be pursued within the limits of the law and precise rules governing its implementation.

A. Federal Jurisdiction Under the Clean Water Act is Not Unlimited

Prior to 1995, the Act was widely interpreted to extend to the limits of the U.S. Constitution's Interstate Commerce Clause,[2] which in turn was perceived to impose few limits on Congress's authority to regulate. As a result, courts routinely extended CWA jurisdiction to almost *any* water. In 1985, the U.S. Supreme Court issued its first major opinion defining "navigable waters" for the Act in *United States v. Riverside Bayview Homes, Inc.*[3] In this unanimous decision, the Court held that CWA jurisdiction extends to wetlands that are adjacent to waters that are 'navigable' in the traditional sense.[4]

Beginning in 1995, the U.S. Supreme Court imposed more limits on the breadth of the Act and interpretation of "waters of the United States" both constitutionally and, more importantly, as a matter of statutory interpretation. In 1995, in *United States v. Lopez*, the Court invalidated federal legislation for the first time in almost 60 years on the grounds that Congress had exceeded its authority under the Interstate Commerce Clause.[5]

Following this decision, the U.S. Supreme Court in reviewing the Seventh Circuit's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[6] began to read statutory limitations into the scope of the Act's "waters of the United States." The *SWANCC* Court acknowledged the *Riverside Bayview* decision but

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[2] *E.g.*, *United States v. Tull*, 769 F.2d 182, 185-86 (4th Cir. 1985) (holding that, under the Commerce Clause, extension of the Clean Water Act to the filling of wetlands that were mostly "high and dry" was proper), *rev'd on Seventh Amendment grounds*, 481 U.S. 412 (1987).
[3] 474 U.S. 121 (1985).
[4] *Id*. at 130-32.
[5] 514 U.S. 549, 557 (1995).
[6] 531 U.S. 159 (2001).

emphasized that "[i]t was the significant nexus between wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[7] In addition, it gave new import to Congress's decision to use the word "navigable" in the Clean Water Act:

> "But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[8]

Western Growers agrees with and supports the Supreme Court's line of jurisprudence that sets limits on the reach and scope of the Act. We acknowledge that the EPA's and Army Corps' proposed new "waters of the United States" strives to respond to the U.S. Supreme Court's 2006 split decision in *Rapanos v. United States*.[9] In that case, the Justices split three ways regarding the proper test to determine the limits of the Act and whether wetlands and tributaries should be considered "waters of the United States."

While we agree that the limits of the CWA need to be further defined, we do not see clear language in the proposed rule that explicitly acknowledges the limitations of the law. In fact, in the "Economic Analysis of Proposed Revised Definition of the Waters of the United States" the EPA and the Corps acknowledge that the proposed rule will <u>expand</u> the effective jurisdiction of the Act from where it extends today.[10] Western Growers disagrees with the agencies' assertion that it is only increasing its jurisdiction by 3%. While this assertion may be a literal reference to the jurisdiction it is increasing *legally,* the regulated community perceives that the agencies are increasing their effective jurisdiction immensely and increasing federal oversight on thousands of more miles of streams in each state. It thus appears that the agencies have ignored the line of Supreme Court precedent that informs any reading of the

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[7] *Id*. at 166-67.
[8] *Id*. at 172.
[9] 547 U.S. 715 (2006).
[10] Economic Analysis of Proposed Definition of Waters of United States. March 2014. EPA-HQ-OW-2011-0880-0003 (Section 6: Scope of Impact. "…proposed rule increases overall jurisdiction under the CWA by 2.7 % or roughly 3 percent, over current field practices")

CWA and instead appear to be looking to test the boundaries of, and we argue in some cases go beyond, Supreme Court precedent.

Congress passed the Clean Water Act in 1972. The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] In determining jurisdiction of what is protected under this Act for non-traditional waters, the Court uses a "significant nexus" test which defines whether a water is under the act and controlled by the EPA or Army Corp of Engineers.[12] In discussing the importance of all waters of the U.S., the Court recognizes that wetlands or waters can serve significant natural biological functions, general habitat and nesting, spawning, rearing and resting sites for aquatic species.[13] It also recognizes that wetlands and waters can serve as food chains.[14] When determining what is a "water of the U.S.", the Court in *Raponos* clearly states that a hydrological condition is the key factor to look at. Justice Scalia writing for a plurality states this requirement emphatically.[15] Moreover Justice Kennedy, writing a separate concurrence, describes the phrase "waters of the United States" more inclusively, in his argument against the pluralist view that a connection be relatively permanent flow, he still references the "scientific evidence that wetlands play a critical role in filtering runoff," and "the functions (of wetlands) such as pollution trapping, flood control and runoff storage." [16] In stating the inverse of what is <u>not</u> a "water of the U.S." Kennedy states that if a "wetlands' effects on water quality are so speculative or insubstantial they fall outside the zone fairly encompassed by the statutory term navigable waters."[17]

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[11] 86 Stat. 816, 33 U. S. C. § 1251(a).
[12] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* 531 U.S. 159, 166 (2001) citing Riverside *Bayside Homes* that "it was a significant nexus between a wetland and navigable water that informed our reading of the CWA in *Riverside Bayview Homes*"
[13] *Riverside Bayview Homes 474 U.S. 121,* 135 citing 320 .4(b) 2 (i).
[14] *Id*.
[15] *Rapanos v. United States*, 547 U.S. 715, 740 (2006). "In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.' *See* Webster's Second 2882."
[16] *Rapanos v. United States*, 547 U.S. 715, 775 (2006) referencing 33 CFR 320 4(b)
[17] *Rapanos v. United States*, 547 U.S. 715, 780 (2006)

Lastly during most of the discussion in *Rapanos* and *SWANCC* not only does the Court look at water quality aspects of the Act but they look to the Corps' own standards of volume and flow to determine a connection between waters to claim jurisdiction.[18] Therefore, in both the plurality and concurrence in *Rapanos* as well as *SWANNC* the Court shows us that in protecting or preventing pollution of waters the hydrologic connections are what primarily gives the EPA or Corps jurisdiction under the Act. The reason we emphasize this is that throughout the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, and the Proposed "Definition of 'Waters of the United States' Under the Clean Water Act", biological connections and protection of aquatic organisms is highlighted as a separate way to establish a "significant nexus" which expands the scope and extent of "waters of the U.S." beyond the primary drivers articulated by the Court.[19]

If the proposed rule as applied allows for only biological connections to satisfy the "significant nexus" requirement then the EPA and the Corp go well beyond the limits of the Act and the limits set by the Court in *Rapanos* and *SWANNC*. Indeed, the EPA and Corps tacitly acknowledge the *SWANCC* decision when they highlight that "non-aquatic species or species such as non-resident migratory birds that are not demonstrating a life cycle dependency on the identified aquatic resources are not evidence of biological connectivity for the purpose of this rule"[20] Despite the agencies acknowledgement of the *SWANNC* decision, it is clear in crafting the rule EPA and the Corps stretch the boundaries of significant nexus and claim jurisdiction for

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[18] *Rapanos v. United States*, 547 U.S. 715, 781 (2006)

[19] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft), 78 Fed Reg 58536; EPA-HQ-OW-2011-0880-0004. Authored Sep 1, 2013. Cites wildlife indicators as one vector showing connectivity, potentially standing alone to show connectivity: "Connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system… Similarly, aquatic food webs connect terrestrial ecosystems, streams, wetlands, and downstream waters….Numerous factors influence watershed connectivity. Climate, watershed topography, soil and aquifer permeability, the number and types of contributing waters, their spatial distribution in the watershed, interactions among aquatic organisms, and human alteration of watershed features, among other things, can act individually or in concert to influence stream and wetland connectivity to, and effects on, downstream waters." 1.3. CONCEPTUAL FRAMEWORK OVERVIEW.

[20] Proposed "Definition of 'Waters of the United States' Under the Clean Water Act"
40 CFR 230.3

waters using wildlife indicators — in this case aquatic rather than avian — to justify connectivity. Moreover, within the rules and discussion surrounding the definition of "other waters" the EPA and the Corps highlight that "evidence of a biological connectivity and the effect on waters can be found by identifying resident aquatic or semi-aquatic species present in other waters and the tributary system."[21] Establishing jurisdiction using wildlife indicators, as the EPA and Corp did when it used the Migratory Bird Rule, is beyond the Act's intent, language, and statutorily controlled jurisdictional reach. The primary purpose of the statute is pollution prevention of waters, which are inextricably linked to hydrological features, and while biological connections may serve as indicators of a significant nexus/indicators of hydrological connectivity, they cannot replace such factors. Biological connections inform rather than control.

In writing the proposed rule the agencies too often point to biological connectivity as a potential single indictor of a significant nexus rather than using biological indicators to research and document whether true hydrological connections exist which is clearly the heart of any jurisdictional finding. Given the pervasiveness of the agencies use of wildlife indicators we contend that the proposed rule should be struck down and reconsidered in full.

B. Proposed Rule has not Adequately Involved the States

Western Growers also believes that the proposed rule should be withdrawn since the EPA and Corps have failed to properly engage and consult with state and local authorities in constructing this proposal. When Congress passed the Clean Water Act in the early 1970's, they clearly envisioned an active cooperation between the states and the federal government.[22] Commenting on this aspect of the law the Supreme Court wrote: "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a

[21] *Id*.

[22] 33 U.S.C. § 1251(b). "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

shared objective: to 'restore and maintain the chemical, physical, and biological integrity of the nation's waters.'"[23]

The Clean Water Act is replete with this vision of federalism. In creating the Act, Congress made federal money available to states contingent upon the creation of a regulatory scheme that is at least as stringent as the federal minimum standards, although states may tailor water quality criteria to local needs, implement their own pollutant discharge elimination systems, and enforce their own administrative rules.[24] In section 303, the law provides states with the primary responsibility to establish, periodically review, and revise water quality standards, and the EPA only has a review function.[25] This strong federalism structure even extends into section 402 where states also may assume primary enforcement and administration of the National Pollutant Discharge Elimination System ("NPDES") program for discharges of pollutants other than dredged or fill material.[26]

It is clear from the statute, and reinforced in numerous court rulings, that Congress wrote the Clean Water Act with federalism foremost in its mind. Unfortunately, in constructing this proposed "waters of the United States" rule EPA and the Corps seem to have ignored these most basic principles of state and local government involvement. In fact, numerous states have written that they have not been involved in the formation of this rule and object to this rule moving forward without EPA and Corps reopening the rulemaking process to ensure their input is more directly heard. In testimony before the Senate Interior Appropriations Committee, the bipartisan Western Governors Association commented on this issue writing:

> WGA is concerned that states were insufficiently consulted in the development of this proposal and played no role in the creation of the rule, which has such major implications for states. Congress intended that the states and EPA would implement the CWA in partnership, delegating authority to the states to administer the law as co-regulators with EPA. Accordingly, WGA encourages congressional direction to EPA to

[23] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251).
[24] *See* 33 U.S.C. §§ 1251-1887
[25] 33 U.S.C. § 1313
[26] 33 U.S.C. §§1311(b)(2), 1342

engage the states in the creation of rulemaking, guidance, or studies that threaten to redefine the roles and jurisdiction of the states. State water managers should have a robust and meaningful voice in the development of any rule regarding the jurisdiction of the Clean Water Act or similar statutes.[27]

Western Growers agrees with this position and argues that the states cannot be effectively engaged unless this rule is abandoned and the process is re-initiated with state and local authorities engaged in the formative development of these definitions.

C. Proposed Rule Violates the Separation of Powers

The EPA and Corps have gone beyond the parameters of the Kennedy opinion in *Rapanos*, and the agencies have clearly not lived up to their statutory obligations to engage the states. We also believe the agencies have overstepped their Constitutional boundaries. It is not the executive branch's role to write the laws — it is the Administration's job to only implement them. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." This concept of the separation of powers is deeply held within the structure of our government. As described above, and throughout the comments herein, the proposed rule goes beyond the appropriate boundaries laid out by our founders. As the Supreme Court has said, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself".[28] In this instance the EPA and the Corps have gone beyond their Constitutional mandate and we urge the agencies to start this process again.

The Clean Water Act, first passed in the 1970's, has not been examined by Congress nor reauthorized since 1987. After decades in effect Congress should now as part of their Constitutional obligations, review the proper jurisdictional scope of the Act. Indeed, it is reasonable to assume that forty years after passage and decades after its last reauthorization

[27] Western Governors' Association, Testimony of James D. Ogsbury, Executive Director to U.S. Senate Comm. on Appropriations, Subcomm. on Interior, Environment, and Related Agencies May 23, 2014, page 3.

[28] *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring) ("The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend, and that it is the function of the Congress to legislate.").

the Clean Water Act is in need of review. When the Act was originally conceived there were rivers that were so polluted that famously one outside Cleveland, the Cuyahoga, ignited . Over the years, the Clean Water Act has improved our nation's water quality and these extreme conditions do not exist. The primary objectives for which the CWA was written have thus been accomplished. While water quality challenges still exist, it is high time that the law is reviewed to ensure that the balance between burden and benefit designed so many decades ago meets current conditions. It is not the role of the agencies – nor the courts – to expand the boundaries and scope of the Clean Water Act and in so doing write new law. Supreme Court Justice Jackson writing in 1952 wrote that "[t]he Executive, except for recommendation and veto, has no legislative power…With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[29] The proposed rule goes beyond the Constitution's boundaries and should be withdrawn.

D. Agencies' Process Violates the Administrative Procedure Act

Enacted in 1946, the Administrative Procedure Act (APA) governs the way in which administrative agencies of the federal government may propose and establish regulations. As the agencies well know creating the APA was a painstaking process that involved years of background work compiled in hundreds of pages of documents used to craft the statute's various provisions. A fundamental purpose of the APA is to keep the public informed and allow for "public participation in the rulemaking process".[30] Indeed as the courts have interpreted these fundamental requirements they have stated that "the Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."[31]

Critically, the scientific basis the agencies rely upon to support their proposed rule, the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the

[29] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 656 (1952) (Jackson, concurring).
[30] U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*, I. Fundamental Concepts, 1947; *see* 5 U.S.C. § 553 (b)-(c).
[31] *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994).

Scientific Evidence report was released when it was not final.[32] How can the members of the public accurately comment upon the proposed rule when the scientific analysis upon which the rule is built is not finished? This flies in the face of the requirements found under the APA which would seemingly require the public to see, and be made aware of the final scientific analysis that underlies a proposed rule. Western Growers contends that the agencies should withdraw the rule pending the final completion of the Connectivity report. Only once that report is final should the proposed rule be submitted for public comment.

2) Areas of the Rule in Need of Clarification and Improvement

As the agencies know "[i]mprecise regulations can lead regulated industries to lack the necessary knowledge of how a regulation will be interpreted or enforced. Without concrete knowledge of the meaning of a regulation, a regulated entity will not easily be able to ensure that its behavior and practices conform to the required standards."[33] This is especially true in the Clean Water Act context. As Justice Kennedy made clear in *Rapanos* the agencies must create clear standards, when they set out to create jurisdictional rules for fear that lack of clarity can lead to overly broad application of the statute.[34] Western Growers strongly contends that the definitions of "tributary", "other waters", "significant nexus", and "adjacent waters" need substantial work and clarification. The EPA and Corps must also define "upland", "perennial", "ephemeral", and "intermittent" in the rule as discussion of these terms in the preamble are not satisfactory.[35] Without clear, precise, delimiting definitions for each of these terms the proposed rule will not advance the overall objectives of the CWA. We specifically address these concerns in detail below.

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[32] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Washington, DC: U.S. Environmental Protection Agency, (2013).

[33] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612 (1996).

[34] *Rapanos v. United States*, 547 U.S. 715, 781-782 (2006). *See* additional discussion below in Section 2.D.

[35] These definitions and clarifications are especially critical in light of the Sixth Circuit decision in *National Cotton Council v. EPA*, in which the Circuit Court indicated that pesticide spraying is required to get a NPDES permit if spraying near or accidently on waters of the US, and thus must meet all of the elements of the Clean Water Act even if these activities fall under normal farming exemption. Slip Op. No. 06-4630 (6th Cir. Jan. 7, 2009).

A. Confusion Surrounding the Definition of "Tributary"

The proposed rule creates a category of jurisdictional water by newly defining "tributaries". While the EPA's and Corps' prior regulations reached tributaries and adjacent wetlands, the proposed new rule establishes, defines, and attempts to justify these new category on the basis of Justice Kennedy's "significant nexus" test from *Rapanos*. In examining the proposed new definition of "tributaries" it is clear straight away that the definition is complex and has multiple exemptions and creates several ambiguities regarding whether farmers will be regulated. As we unpack these complexities, Western Growers asks that the Corps and EPA clarify several aspects of "tributaries".

First, the proposed regulation makes it clear that to identify a tributary one must determine 'flow' from the waterbody in question into a traditional jurisdictional water.[36] Moreover the agencies assert in premable—but not in the regulation itself—that tributaries can include perennial, intermittent, or ephemeral streams and other waterways.[37] Western Growers would ask the agencies to clarify with precision the following, before any rule is finalized:

1. **The proposed definition does not define what amount of flow needs to be contributed to create a connection.** In commenting on *Riverside Bayview Homes* as it applies to the Corps standards in place at the time, Justice Kennedy in *Rapanos* noted that the agencies in writing their regulations should discuss concepts of flow in terms of regularity and volume. Further, in *Rapanos* Kennedy indicated the Corps standards in place at the time were not specific enough to those concepts to pass jurisdictional muster—despite many pages of explanation the agencies again appear to ignore this requirement.

2. **Ephemeral and intermittent streams are discussed in the preamble but are not part of the definition of tributary.** The agencies must define the relevant hydrological features of ephemeral or intermittent streams that will trigger jurisdiction; e.g. what amount of "flow" needs to be present? While Justice Kennedy in *Rapanos* discusses the possibility that at least some intermittent and ephemeral waterways would be covered by the Act that does not abrogate the agencies responsibility to delineate which types of

[36] U.S. Army Corps of Engineers & U.S. EPA, *Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule*, 79 Fed. Reg. 22,188, 22,201 (April 21, 2014). Proposed "Definition of 'Waters of the United States' Under the Clean Water Act" 40 CFR 230.3(c)5

[37] *Id.* at 22,202.

intermittent or ephemeral waterways would qualify jurisdictionally and which would not, based on some description of hydrological conditions.

Clarification surrounding ephemeral or intermittent streams is absolutely critical in the arid West where these features are common place. While regulated entities may not fully have all the technical capabilities at their disposal that the Corps or EPA have, without more precise definition members of the regulated community are left with no way to even approximate which waters fall under the Act's jurisdiction pursuant to the definition of tributary. Given the uncertainty in the proposed rule we ask EPA and the Corps to answer these questions and open a comment period on these clarifications. The rule cannot be finalized without further clarification.

Secondly, the proposed regulation also appears to create two kinds of tributaries: 1) smaller waterways that have a bed, banks, and ordinary high water mark; and 2) waters like lakes, wetlands, and ponds that lack these features but nevertheless contribute flow to traditional jurisdictional waters.[38] The division between these two types of "tributaries" is unclear, particularly because many lakes can have a bed, banks, and high water mark. It is our belief that the categorization of lakes and ponds as "tributaries" requires additional clarification. As one example of the potential ambiguity, is a lake with a bed, banks, and high water mark a "water of the United States" if it flows into a non-navigable stream that flows into an impoundment of a navigable-in-fact waterway?

B. What is a Ditch?

Our members agree with the agencies "that there have been inconsistencies in practice implementing agency policy with respect to ditches." This underscores the need for the agencies to improve clarity predictability, and consistency to accomplish the stated objectives of the rule."[39] One of the more complicated aspects of the EPA's and Army Corps' proposed new definition of "waters of the United States" is its treatment of ditches. The rule's definition

[38] "II.F.1 What is a Tributary for the purposes of the proposed regulation?" 79 Fed. Reg. 22,188, 22,201-04 (April 21, 2014).
[39] I. Waters that are not "Waters of the United States" 79 Fed. Reg. 22,188, 22,217 (April 21, 2014)

of "tributary" clearly includes ditches as potential tributaries and hence as potential "waters of the United States." Indeed, in their commentary on the proposed rule, the agencies provide several examples of what they would consider "jurisdictional ditches." These include "[n]atural streams that have been altered (e.g., channelized, straightened, or relocated)"; "ditches that have been excavated in 'waters of the United States,' including jurisdictional wetlands"; "ditches that have perennial flow"; and "ditches that connect two or more 'waters of the United States.'"[40] Including ditches as tributaries is odd since ditches generally are not thought of as having a bed, banks, and ordinary high water mark- e.g. ditches are not normally thought to have the required characteristics of 'tributaries' so it is not clear why the agencies have chosen to categorize them that way. The EPA's and Army Corps' handling of 'ditches' is thus troublesome and confusing. Rather than wait for court challenges, the EPA and Corps should—with industry guidance—clarify this section of the rule. Again, prior to any rule being finalized these terms and sections must be clarified by the agencies and then reopened for public comment.

The proposed new regulation also creates two new exemptions for ditches that are not completely clear. Of the two one is potentially significant and it provides that**:** "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" to not be "waters of the United States." [41] This exemption suggests, for example, that many ditches draining farmlands would never be considered "waters of the United States" for purposes of the Clean Water Act. However critical questions are left unanswered:

1. **How are the EPA and the Army Corps defining "upland"? For example, do prior converted croplands qualify as "uplands" for purposes of this exclusion?** Suppose that a field qualifies as prior converted cropland because farmers converted a wetland or an ephemeral drainage area into a field over a century ago. Does a non-perennial ditch or swale draining this field into a navigable-in-fact waterway qualify for the exclusion, or is it a tributary? The proposed rule makes clear that prior converted cropland is not itself a "water of the United States," but it does not make clear whether prior converted cropland thus becomes "upland" for purposes of this exclusion. Clearly if the field abuts a river or stream with a bed, banks, and ordinary high water mark, *that* river or stream will be a tributary if it flows, directly or indirectly, perennially or not, into a traditional jurisdictional

[40] *Id.* at 22,203.
[41] *Id*. at 22,218

water, and Clean Water Act jurisdiction will ordinarily begin at the river's or stream's ordinary high water mark. In addition, the agencies note that artificially irrigated areas that would revert to uplands should irrigation cease are also not jurisdictional.[42] But additional clarity around and an explanation of the term "upland" remains necessary.[43]

2. **How will the agencies define "perennial flow"?** The proposed regulation itself does not provide a definition of "perennial flow." In the commentary, the EPA and the Army Corps state that "[t]he scientific concept of perennial flow is a widely accepted and well-understood hydrologic characteristic of tributaries. *Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal*."[44] The agencies further assert that identifying upland ditches with perennial flow "is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year."[45] Despite these assurances and because of the "inconstancies"[46] of the agencies' past, we submit that the definition of 'perennial flow' must also be in the rule and not left for potential guidance documents in the future. Furthermore, the agencies ask the public to comment upon the amount of flow necessary for a ditch to be exempt.[47] Western Growers contends that any ditch having flow that is 'less than perennial' should be exempt. As the agencies note, perennial flow is easy to determine, and thus that should be the benchmark; having a standard other than this would be unclear and confusing. Establishing a standard different than 'less than perennial' flow, such as 'less than intermittent flow' as alternatively suggested, would be confusing and much more subjective. In addition, an intermittent standard would seemingly capture a universe of ditches that are more than intermittent but less than perennial- such an interpretation would defeat the intent of the exemption itself.

3. **How do these regulatory exclusions for ditches interact with the Clean Water Act's definition of "point source," which also clearly includes ditches?** The statutory definition of "point source," another element of Clean Water Act jurisdiction, explicitly lists "ditch" as a point source.[48] Moreover, in *Rapanos*, the plurality Justices lead by Justice Scalia preferred to think of ditches and channels as point sources rather than as "waters of the United States," at least so far as the NPDES permit program is concerned. It is therefore entirely possible that a non-perennial upland ditch discharging into another water might qualify as the relevant point source even if it cannot be considered a "water of the United

[42] *Id*.
[43] SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: *A Review and Synthesis of the Scientific Evidence*, Oct. 17, 2014, Section 3.6.2. Urges additional clarity around term upland.
[44] *Id*. at 22,202 (emphasis added).
[45] *Id*.
[46] *Id*. at 22,217
[47] *Id* at 22,203 and 22219.
[48] 33 U.S.C. § 1362(14) (2012).

States." Neither the proposed new regulation nor the agencies' commentary deals with this potential dual legal status of ditches as the agencies should.[49]

4. **When is a ditch actually a waterway with a bed, banks, and ordinary high water mark, and are those elements always necessary for it to be a "tributary"?** The proposed new regulation provides no specific definition of "ditch." Logically, any ditch must meet the other requirements of a tributary—namely, a bed, banks, and ordinary high water mark—to be included as a "water of the United States." However, the second sentence of the "tributary" definition leaves open the possibility that any ditch that contributes flow to a traditional jurisdictional water is potentially a "water of the United States," like the wetlands and ponds that do not have to have a bed, banks, and high water mark. The agencies state in their commentary that "ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries. . . . Such farm field features are not tributaries even though they may contribute flow during some rain events or snowmelt."[50] This statement in the preamble is helpful for our producers, however additional clarification of when ditches can generally qualify as tributaries would be helpful.

C. The Confusion Around "Adjacent Wetlands"

Like tributaries, the new definitions for "adjacent waters" raise potential ambiguities and uncertainties, some of which must be resolved in any proposed regulation. Clarification should be provided to the public and additional comments sought to provide greater clarity on floodplains and riparian areas before finalizing the rule.[51] Our concerns are as follows:

1. **Where are the borders of a floodplain?** The proposed new rule does not specify exactly how to determine the extent of a floodplain, and the agencies do not specify what kind of floodplain (e.g., 20 –year flood, 100-year flood, 500-year flood) they have in mind. A floodplain in Louisiana is much different than a floodplain in Arizona both hydrologically and physically. In fairness to the regulatory community, and for the ease of the regulators, Western Growers submits a standard floodplain throughout the United States should govern the adjacency requirement. The agencies should propose such a standard and provide the public an opportunity to comment upon it.

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[49] U.S. Army Corps of Engineers & U.S. EPA, *Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule*, 79 Fed. Reg. 22,188, 22,219 (April 21, 2014). Noting the potential jurisdiction as a point source but not discussing the issue at length.
[50] *Id*. at 22,204.
[51] *Id*. at 22,209; *see also*, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: *A Review and Synthesis of the Scientific Evidence*, Oct. 17, 2014, Section 3.6.2 (urges consistent definitions in order to enhance clarity of these two terms).

2. **Where are the borders of a riparian area?** Even more troublesome, the proposed new rule does not specify how to determine the extent of a riparian area. While a clarification of the floodplain considered would be helpful and appropriate, floodplains are nevertheless likely easier to delineate than "riparian areas." The definition of "floodplain" emphasizes physical features and a number of entities already have mapped and delineate floodplains for a variety of other purposes. In contrast, because the EPA and Corps define "riparian areas" in terms of ecological function, additional clarification of this issue to the regulated community is even more critical in order for us to fully understand the proposed rule before it is finalized. Western Growers suggests that all association to "riparian areas" for the purposes of determining "adjacent waters" should be removed and a "floodplain" of standard size throughout the U.S., an easily determinable term and physical feature, should be the only factor determinable. In absence of deleting riparian from the proposed rule altogether, then the agencies must at least propose a more determinable, clearer definition of "riparian area", add it to the proposed rule and submit it for public comment.

D. 'Significant' Nexus Needs further Clarification

In Justice Kennedy's concurring opinion in *Rapanos,* he submits that that the agencies could through regulation "identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters."[52] Yet in the *Rapano*s case, Kennedy notes that the Corps' "existing standard for tributaries, however, provides no such assurance."[53] Indeed, Justice Kennedy goes on to say with regard to the Corps' existing standard that "the breadth of this standard — which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it — precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[54] Justice Kennedy then briefly discusses an issue not before the Court, the issue of how the Corps might regulate wetlands that are not adjacent to navigable waters; he writes: "[a]bsent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case

[52] *Rapanos v. United States*, 547 U.S. 715, 781 (2006).
[53] *Id.*
[54] *Id.*

basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute."[55] Taken together, Justice Kennedy's explanation is critical to understanding the framework into which the agencies define "significant nexus" as well as what level of specificity is required in applying that test. The agencies must clearly explain their claims of jurisdiction- whether wetlands adjacent to traditional navigable in fact waters OR wetlands adjacent to non-navigable waters constitutes a "significant nexus". In either case, Kennedy is clear that the standards created by the agencies cannot be overly broad. In applying Kennedy's admonition to the proposed application of significant nexus to the agencies' proposed analysis of how they would determine jurisdiction for cases under the 'other waters' category it appears that the agencies have gone beyond the Supreme Court's limits.

In writing the proposed rule the agencies adopt a concept of significant nexus in order to inform the how they will make jurisdictional determinations for land that falls outside any other category and thus falls into a catch-all "other waters" category.[56] More specifically, the agencies propose that in making a determination that in part it will require "an evaluation of either a single water or group of waters (i.e., a single landscape unit) in the region that can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas….In determining whether groups of other waters perform ''similar functions'' the agencies would also consider functions such as habitat, water storage, sediment retention, and pollution sequestration. These and other relevant considerations would be used by the agencies to document the hydrologic, geomorphic and ecological characteristics and circumstances of the waters."[57] These factors would allow the agencies to examine not only a single specific unit but allow them to infinitely aggregate other "similarly situated" units in

[55] *Id*. at 782.
[56] U.S. Army Corps of Engineers & U.S. EPA, *Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule*, 79 Fed. Reg. 22,188, 22,211-14 (April 21, 2014).
[57] *Id*. at 22,213.

order to evaluate jurisdiction under the catch all "other waters" category.[58] The agencies proposed description of how they will make evaluations provides absolutely no clarity to the regulated community and covers so many variables that nearly *any* body of water could be found jurisdictional. For practical purposes no limits would exist to a jurisdictional finding which would seem to directly contradict Justice Kennedy's aforementioned language in *Rapanos*.

As is made clear in *Rapanos* (both in the Scalia plurality and Kennedy opinions) a hydrological connection is the critical factor to consider in establishing a 'significant nexus'—that concept should be used consistently throughout the proposed rule. In fact the agencies seem to understand the importance of this concept because in examining "adjacent waters" the agencies note that "[f]or waters outside of the riparian area or floodplain, confined surface hydrologic connections are the only types of surface hydrologic connections that satisfy the requirements for adjacency."[59] Hydrological factors should likewise be the critical factor to point to in making any 'significant nexus' determination and an overly broad proposed standard for a nexus in "other waters" determinations should be withdrawn and modified.

3) Interpretative Rule as Constructed is Not Helpful and Should be Withdrawn

Although we commend the EPA and Corps for attempting to be inclusive with the exemptions for agriculture in the Interpretative Rule, Western Growers is troubled by a number of aspects of the rule and recommend it be withdrawn.

First, as a practical matter it sets up a potential procedural requirement for the NRCS to determine what practice meets a NRCS standard or what is not if the EPA or Corp has a concern. By creating the Interpretative Rule USDA, EPA and the Corps may be unintentionally reducing conservation program participation. The USDA and NRCS have built a long tradition of serving farmers through a voluntary process and this creates a new oversight and regulatory enforcement structure which would not be welcome. Linking standards for voluntary NRCS conservation practices to compliance with mandatory regulatory requirements undermines the

[58] *Id.*
[59] *Id* at 22,208.

paradigm of utilizing voluntary, incentive-based conservation practices to improve environmental quality resulting in less on the ground conservation.

Second, as a matter of law all "normal farming" practices are exempt from the Act, as noted in section 404 of the law. As such it is unclear why a list of "conservation practices" almost all of which would fall under "normal farming practices" is even necessary. Whether building a fence, clearing brush, or utilizing conservation cover, producers utilize these practices as necessary tools for the management of their operations—regardless of whether those practices are implemented in conjunction with an NRCS conservation program or not. Indeed, Western Growers is concerned that by creating a list of what constitutes "normal farming" activities under the Section 404 "normal farming" exemption, courts could begin to interpret that list as an exhaustive list, rather than a descriptive one, which would narrow the Section 404 "normal farming" exemption.

If the EPA and Corps have a rationale for the Interpretative Rule it has not yet been adequately explained and thus this rule should be withdrawn. What would be helpful to the regulated community is for the agencies to explain what agricultural activities they believe are *not* exempt.

4) Conclusion

The EPA's and Army Corps' proposed new definition of "waters of the United States" does not clarify but creates new ambiguities for agricultural operations, particularly with respect to missing definitions and a lack of clarity around "tributaries", "ditches", "adjacent waters". Western Growers contends this proposed rule impermissibly ignores federalism and overreaches the *Rapanos* decision. The proposed rule also ignores critical aspects of the Administrative Procedure Act. We strongly urge the agencies to withdraw this proposed rule. Western Growers members value our nation's water. Our livelihood depends on clean, abundantly available water. There are no bigger champions of water quality than our producers. However the Clean Water Act is not without boundaries. By withdrawing the rule and then engaging state, local governments and the regulated community the agencies should

better be able to craft a rule that fits within the boundaries the Supreme Court has placed on the Clean Water Act while also preserving and protecting our nation's water health.

If the EPA and Army Corps ignore these objections and move forward then, at minimum, the definitional ambiguities in the rule must be clarified by the agencies and shared with the public before this proposed rule is finalized. In fact, once clarified the agencies should reopen those select sections of the rule to public comment. Finally, Western Growers also suggests that the agencies not go forward with the Interpretive Rule at all for its negative impact of conservation being put in place on the landscape as well as the potential to narrow the understanding of exempt "normal farming" practices.

We thank you for the opportunity to provide comments to the Environmental Protection Agency and Army Corps of Engineers on the proposed combined joint rule on the definition of "waters of the United States under the Clean Water Act". Western Growers commits to actively participating in any efforts the agencies may undertake to redraft the proposed rule, in whole or part.

Sincerely,

Tom Nassif
President and CEO of Western Growers