November 10, 2014

Ms. Donna M. Downing  
Office of Water (4502-T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Ms. Stacey Jensen  
Regulatory Community of Practice (CECW-CO-R)  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314

Re: Definition of “Waters of the United States” Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:


NWC joins a clear, bipartisan majority of the members of both Houses of Congress in opposing the Proposed Rule in its current form. The agencies’ proposal misconstrues the “significant nexus” test articulated in Justice Kennedy’s concurring opinion in *Rapanos* in a manner that impermissibly expands CWA jurisdiction. The Proposed Rule contains sweeping and vague definitions of “adjacent,” “tributary,” and other terms. In these and other ways, the proposal creates new, overbroad categories of jurisdictional areas that lack a significant nexus to traditionally navigable waters. In so doing, the proposal violates the law as established by *Rapanos*. The agencies also have greatly underestimated the costs that will be associated with their Proposed Rule. Finally, the process by which EPA proposed the rule has denied a reasonable opportunity for the public to review and comment on important scientific information.

About NWC

NWC, established in 1960, is dedicated to a greater understanding of the widespread public benefits of our nation’s water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation’s water resources and their contribution to public safety,
competitive economy, national security, environmental quality and energy conservation. Conference membership includes the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments.

Background

Under CWA section 404(a), any person engaging in activities that result in the "discharge of dredged or fill material into the navigable waters" must obtain a permit from the Corps.1 The term "navigable waters" is defined broadly by statute to mean all "waters of the United States, including the territorial seas."2 EPA and the Corps further defined that term by regulation to include: (1) waters currently used or used in the past for interstate of foreign commerce, including waters subject to the ebb and flow of the tide (i.e., traditional navigable waters); (2) interstate waters and wetlands; and (3) "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ."3 The definition also includes "tributaries" of these waters, impoundments of these waters, and "wetlands adjacent to [these] waters."4

The agencies state that they issue the Proposed Rule "in light of" the U.S. Supreme Court’s decisions in three noteworthy cases that address the scope of waters protected by the CWA: United States v. Riverside Bayview Homes (Riverside Bayview), Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs (SWANCC), and Rapanos v. United States (Rapanos). In Riverside Bayview, the Court upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States."5 However, in SWANCC, the Court rejected the agencies’ attempt to include an isolated wetland with no connection to traditionally navigable waters and no connection to interstate commerce other than usage by migratory birds.6 The SWANCC court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could apply to wetlands and other waters that were not themselves navigable.7 However, as the Court observed, “it is one thing to give a word limited effect and quite

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1 33 U.S.C. § 1344(a) (emphasis added).
2 Id. § 1362(7).
3 See 33 C.F.R. § 328.3(a).
4 Id. § 328.3(a)(5)–(7).
7 Id. at 172.
another to give it no effect whatever.” In that case, the water in question was too remote to fall within the regulatory authority provided by Congress under the CWA.

In the *Rapanos* case, the Supreme Court addressed the question of whether CWA jurisdiction extends to wetlands not “adjacent” to a navigable water. The opinions offered in this case included a four-member plurality opinion issued by Justice Scalia, a concurrence by Justice Kennedy, and a four-member dissent written by Justice Stevens, which may be summarized as follows:

- The Scalia plurality opinion found that “navigable waters” must be “relatively permanent, standing or continuously flowing bodies of water,” which does not include intermittent streams and tributaries that empty into navigable waters. In addition, wetlands must have a “continuous surface connection” to jurisdictional waters to be covered by the CWA.

- The Kennedy concurrence established a “significant nexus” test. Under this test, for a water or wetland to constitute “navigable waters,” it must possess a “significant nexus” to waters that are or were navigable in fact (i.e., traditional navigable waters) or that reasonably could be so made. “[W]etlands possess the requisite nexus if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.” In contrast, when “wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone of fairly encompassed by the statutory term ‘navigable waters.’”

- The Stevens dissent would have deferred to the Corps’ exercise of regulatory jurisdiction as applied in that case.

The meaning and intent of *Rapanos* have been the subject of extensive debate, but one aspect of the case is certain: it limits the agencies’ jurisdiction. The case vacated Sixth Circuit opinions that had upheld CWA jurisdiction in specific cases. The multiple opinions in the case lead to some complexity, but one aspect of the outcome is clear:

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8 *Id.*
9 *See id.*
11 *Id.* at 742.
12 *Id.* at 759.
13 *Id.* at 780 (emphasis added).
14 *Id.*
Rapanos did not invite the agencies to expand jurisdiction compared to the law prior to that case.

In an effort to “implement” the Supreme Court’s decisions in SWANCC and Rapanos, EPA and the Corps drafted guidance clarifying how they would identify waters protected by the CWA in the wake of those decisions. The Draft Guidance was to supersede guidance issued in 2003 after SWANCC and in 2008 after Rapanos. However, facing widespread criticism regarding their decision to issue guidance instead of immediately undertaking a formal rulemaking, the agencies withdrew the Draft Guidance in September 2013.

At that time, the agencies sent the Proposed Rule to the Office of Management and Budget (“OMB”) for review, and EPA released its draft scientific report on the connections of streams and wetlands to large water bodies like rivers, lakes, and oceans. The agencies stated that the rule would not be finalized until the completion of the final connectivity report, which would inform the final rule. However, the draft report was under review by the EPA’s Scientific Advisory Board (“SAB’s”) during most of the comment period. EPA did not release the SAB’s final review of the connectivity report until October 17, 2014. The agencies provided four additional weeks after the close of the public comment period on the rule to allow stakeholders to consider the SAB’s final review.

A Majority of Both Houses of Congress, along with State Officials, Object to the Proposed Rule

Majorities of the U.S. House of Representatives and Senate, including members from both parties, are on record as opposing the agencies’ current efforts to expand CWA jurisdiction. On May 1, 2014, a bipartisan group of 231 Members of Congress wrote EPA and the Department of the Army to request “that this rule be withdrawn and returned to your agencies.” On May 14, 2013, after the agencies had issued the draft guidance but before publishing the Proposed Rule, 52 Senators voted in favor of a Barrasso Amendment to prohibit the agencies from implementing the guidance and using it “or any substantially similar guidance, as the basis for any rule.” More recently, by a letter dated October 24, 2014, a group of 24 Senators wrote EPA and the Corps to urge them to withdraw the proposed rule. On September 9, 2014, the House passed (262–152) H.R.

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15 Draft Guidance on Identifying Waters Protected by the Clean Water Act (May 2, 2011).


5078, the Waters of the United States Regulatory Overreach Protection Act of 2014, a bipartisan bill to prohibit the Corps and EPA from finalizing the Proposed Rule. Widespread, bipartisan opposition exists at the State level as well. The agencies should refrain from acting in a manner so clearly contrary to the will of so many of our nation’s elected lawmakers.

The Proposed Rule Impermissibly Broadens CWA Jurisdiction

The agencies claim that “the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations.”\(^1\) We agree that *Rapanos* requires that to be so, but the statement is not accurate.

The agencies misconstrue the “significant nexus” test.

Justice Kennedy’s concurring opinion in *Rapanos* establishes a “significant nexus” test for jurisdiction. However, the agencies’ interpretation of the Kennedy test in the Proposed Rule, like in the Draft Guidance, effectively reads the word “significant” out of the text. The adjective “significant” is essentially comparative in nature. For any one thing to be significant, there must be other things that are insignificant by comparison. However, the agencies have offered no example of a hydrologic connection that is insignificant. As explained below, the agencies would find jurisdiction even in some instances where there is no hydrologic connection at all. In other words, any connection is sufficient to establish jurisdiction. That result violates the “significant nexus” test. If the agencies deem all connections to be significant, none truly is.

No fair reading of the Kennedy opinion leads to the result reached by the agencies. Justice Kennedy clearly stated that a “mere hydrological connection should not suffice in all cases,” because “the connection may be too insubstantial for the hydrologic linkage to establish the required nexus.” He also stated that mere adjacency to a ditch described in the case was not sufficient to establish jurisdiction, because “a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flows towards it.”

The Proposed Rule states that agencies should consider a water to have a significant nexus to jurisdictional waters if it—

either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to [traditional navigable waters, interstate waters, or the territorial seas]), significantly affects the chemical, physical, or biological integrity of [traditional navigable waters, interstate

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\(^1\) 79 Fed. Reg. at 22,189.
waters, or the territorial seas] ... [that is] more than speculative or insubstantial.\(^{20}\)

So the agencies will assert jurisdiction over waters that are remote, small in volume, and individually insignificant by amassing them with other waters the agencies may deem to be “similarly situated” in a watershed.

The Kennedy opinion refers to “similarly situated” wetlands in the context of discussing one possible component of the process of determining jurisdiction in some instances. However, that is different than applying jurisdiction over a water that has only an insignificant nexus on the grounds that it is similar to one or more other waters in the watershed which, collectively, have a more substantial connection to downstream waters. To the contrary, according to Justice Kennedy, “the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency.”\(^{21}\)

Justice Kennedy emphasized that individualized analysis because of, in his words, “the potential overbreadth of the Corps’ regulations” and a need “to avoid unreasonable interpretations of the statute.”\(^{22}\)

The Kennedy concurrence clearly envisions that there are some waters with a hydrologic connection that nevertheless are not jurisdictional.\(^{23}\) By contrast, virtually any nexus beyond “speculative” or “insubstantial” would result in a finding of jurisdiction under the agencies’ interpretation in the Proposed Rule. Even areas that lack a hydrologic connection to a traditional navigable water can be deemed jurisdictional under the Proposed Rule’s expansive test.\(^{24}\) Virtually any discernible downstream effect—such as the retention of any amount of upstream drainage, or a function resulting in the addition of any substance that the agencies may deem to be a nutrient, sediment, or pollutant—is sufficient to confer jurisdictional status.\(^{25}\) That is not a plausible interpretation of Justice Kennedy’s opinion.

Furthermore, the Proposed Rule robs the term “navigable” in “navigable waters” of any meaning, an outcome the Kennedy opinion explicitly forbids.\(^{26}\) The proposed


\(^{21}\) Rapanos, 547 U.S. at 782 (emphasis added).

\(^{22}\) Id.

\(^{23}\) Id. at 784–85 (“Mere hydrologic connection should not suffice in all cases . . . .”).

\(^{24}\) 79 Fed. Reg. at 22,213 (“A hydrologic connection is not necessary to establish a significant nexus . . . .”).

\(^{25}\) Id.

\(^{26}\) Rapanos, 547 U.S. at 778–79 (“[T]he word ‘navigable’ in ‘navigable waters’ [must] be given some importance [and] some effect.”).
language for concepts including “adjacent,” “neighboring,” and “tributary” expand the CWA’s reach to ditches, ephemeral drainages, ponds, and other waters that are too small, too far removed, with too speculative and insubstantial an effect on traditionally navigable waters, to allow any meaningful connection to navigability.

The agencies’ departure from the Kennedy concurrence is most clearly apparent when comparing the Proposed Rule to Justice Kennedy’s instructions to identify impacts to the “chemical, physical, and biological integrity” of traditional navigable waters. Where Justice Kennedy uses the conjunction “and” to refer to all kinds of impacts collectively, the agencies substitute “or,” allowing the identification of any one. The result of the agencies’ wordplay is an undeniably and unequivocally broader test than that articulated by Justice Kennedy.

The agencies assert jurisdiction too broadly over “adjacent” waters.

The Proposed Rule includes within the scope of CWA jurisdiction “all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment.”27 By declaring all adjacent waters—not simply adjacent wetlands, as the current rule and past guidance do—categorically jurisdictional, the Proposed Rule sweeps in many waters not previously subject to federal regulation, which is contrary to the agencies’ assertion that the proposal does not expand jurisdiction. Furthermore, the definition of “adjacent” is overly broad, impermissibly relying on groundwater connections to capture “neighboring” waters that are not actually adjacent and otherwise would not fall within CWA jurisdiction.

The agencies propose to consider adjacent waters jurisdictional because the agencies find that they, categorically, have a significant nexus to jurisdictional waters. However, the agencies’ scientific support for this finding is not yet final, and the agencies wrote the language without waiting for the outcome of the SAB review.28 Thus the flawed bases of the Proposed Rule’s impermissible expansion of CWA jurisdiction include not only the agencies’ faulty construction of the significant nexus text, but also incomplete science and analysis.

Further, the Proposed Rule broadens the definition of “adjacent” to include waters that are not actually adjacent within the customary meaning of the word but rather are merely “neighboring,” as defined. The result is not only overbroad, it is also unclear. The agencies propose to define “adjacent” as “bordering, contiguous or neighboring,” and to cover “[w]aters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like” as “adjacent waters.”29 The term “neighboring” is defined for purposes of the term “adjacent” and

29 Id. at 22,263.
with respect to “riparian area” and “floodplain,” each of which would also be a defined term itself: “Neighboring” includes “waters located within the riparian area or floodplain of a [jurisdictional water], or waters with a shallow subsurface hydrologic connection to such a jurisdictional water.”

The terms “riparian area” and “floodplain” further define “neighboring” for purposes of the term “adjacent.” “Floodplain” would be defined as “an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows. The definition of “riparian area” is especially troublesome for its breadth and ambiguity:

The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

The concept of “influenc[ing]” the ecosystem in the “area” bordering a water—by “surface or subsurface hydrology,” no less—is an amorphous and potentially far-reaching standard. It is also an unworkable one likely to make case-specific determinations complicated, prolonged, and burdensome.

The Proposed Rule impermissibly relies on groundwater to establish jurisdiction, given that “[t]he agencies have never interpreted ‘waters of the United States’ to include groundwater and the proposed rule explicitly excludes groundwater . . . .” It is not possible to rely on groundwater to establish jurisdiction without regulating the groundwater itself, which the agencies seem to acknowledge being beyond their authority. For example, suppose an activity with a discharge directly affecting only an area of shallow groundwater that provides some discernible hydrologic connection between a small upstream water and a jurisdictional area downstream. Under the Proposed Rule, the upstream water also must be jurisdictional. Is it the agencies’ position that it is without power to regulate the groundwater between the two putatively jurisdictional areas? If so, then the area constitutes a separation that is analogous to the isolation of the ponds at issue in SWANCC. If the agencies believe they can regulate that area directly under the CWA, then they should so state in a straightforward manner (and be prepared to defend that position in the courts).

30 Id.
31 Id.
32 Id.
33 Id. at 22,218.
Contrary to the customary meaning of “adjacent” (“not distant,” “nearby,” or “having a common endpoint or border”)\(^{34}\), under the agencies’ broadened interpretation, waters located a considerable distance from a tributary or other jurisdictional water may be considered adjacent waters. Again, Justice Kennedy identified that exact scenario as raising a problem for CWA jurisdiction. And far from making the identification of jurisdictional waters “less complicated and more efficient,” the Proposed Rule creates greater confusion and will inevitably lead to more protracted litigation.

The agencies assert jurisdiction too broadly over tributaries.

The Proposed Rule classifies tributaries as jurisdictional by rule and, for the first time, defines the term. The agencies’ conclusion that all tributaries have a significant nexus to jurisdictional waters without any case-specific review to identify factors of significance exceeds the intended limits of \textit{Rapanos}. Thus both the proposed assertion of jurisdiction over all tributaries without any analysis, as well as the definition of the term “tributary,” are excessively broad.

“Tributary” is defined in the Proposed Rule as “a water physically characterized by the presence of a bed and banks and ordinary high water mark \([“OHWM”]\) . . . which contributes flow, either directly or through another [jurisdictional water],” and, additionally, “wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow.”\(^{35}\) While a bed, banks and OHWM can be easily identified in some locations, in others those features are not evident, especially an OHWM. Despite that difficulty, the proposed rule would deem any area with those features to be jurisdictional. Realistically, that has the potential to require examination of miles of upstream tributary features both at the project site and between there and a traditionally navigable waterway. The applicant may not even have access to the entire area due to legal or physical constraints.

The agencies themselves do not yet fully understand the potential reach associated with extending jurisdiction based on these features. In August 2014, well into the comment period for this rulemaking, the Corps released two new documents pertaining to OHWM determinations, one of which readily acknowledges a “need for nationally consistent and defensible regulatory practices.”\(^{36}\) That can only mean that the Corps’ own

\(^{34}\) Merriam-Webster Online Dictionary, \url{http://www.merriam-webster.com/dictionary/adjacent}.

\(^{35}\) 79 Fed. Reg. at 22,263.

\(^{36}\) Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), \textit{A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark Classification}, at 1-2 (August 2014) (hereinafter “OHWM Classification Review”); \textit{see also} Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), \textit{A Guide to Ordinary High Water Mark (OHWM)}
experts in this area would concede that today’s practices have not proven to be nationally consistent and defensible. In fact, the Corps has produced an entire report with the stated objective of determining “the most appropriate factors to include in a national OHWM classification.” As the factors to be used in identifying OHWM have yet to be determined, the agencies may not credibly claim that the proposed rule provides clarification or that it does not expand jurisdiction.

The definition contains no reference to the volume or frequency of flow, which would seem an important consideration in determining whether an area constitutes a “water” or not. That creates additional uncertainty and potential for jurisdictional overreaching. The definition thus could encompass impermanent waters that lack consistent flow, clearly deviating from the standard articulated by Justice Scalia in the Rapanos plurality opinion38 and raising serious problems under the “significant nexus” test.

The inclusion of ditches constitutes an impermissible expansion of jurisdiction.

Although the Proposed Rule would exclude two types of ditches from CWA jurisdiction, ditches that do not meet the criteria for exclusion could be considered waters of the United States. The proposed definition of “tributary” could be interpreted to include man-made waters with artificial features, such as drainage ditches or artificial ponds. Also, ditches with perennial flow are not covered by the exemption, but it is not clear what the agencies believe is meant by “perennial flow.”

The agencies seem to suggest that the exclusions from jurisdiction in the Proposed Rule show restraint. However, the narrowness of the exclusions only serves to demonstrate how broadly the Proposed Rule applies. This is especially apparent with respect to the two exemptions for ditches. The agencies exclude from jurisdiction those ditches that “are excavated wholly in uplands, drain only uplands, and have less than perennial flow,” and those that “do not contribute flow, either directly or through another water,” to various other categories of jurisdictional waters. Those exclusions are categorical, but the categories are tiny. Water flows downhill; the water in an upland ditch is no exception. Further, even if the ditch drains to a feature that generally contains

Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014).

37 OHWM Classification Review, supra note 36, at 3.

38 547 U.S. at 739 (finding that the agencies’ authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters.).


40 Id.
water in an upland area, such that it does not typically affect downstream waters, the agencies’ “fill and spill” theory means jurisdiction can be found on the basis of periodic overflow. How many ditches have the agencies identified that never, under any circumstances, contribute any amount of flow to downstream waters or wetlands?

A reasonable reading of the Proposed Rule would lead to the conclusion that the very drainage ditches considered in Rapanos—the same ones, according to the Court, that the agencies improperly brought within CWA jurisdiction—are jurisdictional. However, Justice Kennedy indicated that a ditch ought not to be jurisdictional where it is “located many miles from any navigable-in-fact water and carry only insubstantial flow towards it.”

The Agencies’ Economic Analysis Underestimates Costs

The agencies’ cost-benefit analysis of the Proposed Rule significantly underestimates its associated costs. The agencies rely on data concerning requests for jurisdictional determinations in fiscal years 2009–2010 to determine the Proposed Rule’s economic impacts. However, economic activity was constrained and construction activity was at a low point during that time due to the recession. For example, per U.S. Census Bureau data on seasonally adjusted monthly total construction, the average monthly spending on construction for that two-year baseline period was lower than the monthly average of any previous year since 2002. Additionally, current (September 2014 (preliminary)) construction spending and the monthly average for 2014 thus far are much higher than the 2009-2010 average.

The choice to focus on 404 permitting activity during a recession may introduce another bias. Economic constraints during the recession likely led developers to avoid higher-cost projects compared to others, and jurisdictional determinations result in delay and direct costs, in addition to costs associated with mitigation and avoidance. That suggests a likelihood that jurisdictional determinations at that time may have fallen at an even greater rate than the overall slowdown in construction activity.

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41 Id. at 22,208.
42 Rapanos, 547 U.S. at 786.
43 Economic Analysis of Proposed Revised Definition of Waters of the United States (Mar. 2014).
44 U.S. Census Bureau, Construction Spending, Historical Data, Historical Value Put in Place: Monthly, Seasonally Adjusted (available at http://www.census.gov/construction/c30/historical_data.html, file (totsatime.xls) downloaded Nov. 6, 2014). All statements regarding construction spending amounts in this portion of the comments are derived from this same source.
The agencies’ chosen baseline to measure economic effects does not reasonably represent a normal level of permitting activity for purposes of evaluating the Proposed Rule’s economic impact. The economic analysis is therefore fundamentally flawed.

**The Proposed Rule Reflects an Improper Disregard of Science**

As noted above, EPA’s connectivity report, which the agencies purport to rely on as the foundation of the Proposed Rule, has only recently undergone review at the SAB and is not final. The data released after publication of the proposed rule is too complex and voluminous to review during the time allowed, even with the four-week extension. At least as important, EPA has not provided a formal response to the SAB’s review or indicated its view as to the legal and regulatory significance of the SAB’s findings. That is critically important and something the agencies can and should publish for notice and comment prior to finalizing a rule.

The agencies’ rulemaking process is entirely disordered. The scientific analysis supporting a rulemaking should be conducted and finalized before the rule is proposed, particularly where, as here, the relevant scientific and legal concepts are intertwined. In this instance, the troubling conclusion is that the agencies set the policy goal of greater control of land use decisions first and only afterwards sought for a rationale.

**The Agricultural Interpretive Rule Is Procedurally and Substantively Inadequate**

The agricultural “interpretive rule” governing approved conservation practices, which was issued concurrently with the proposed rule, should be withdrawn. First, because this interpretive rule effectively changes existing regulations, it is subject to public notice and comment requirements under the Administrative Procedure Act (“APA”), and the agencies must provide the public an opportunity to comment on it. In addition, there is a great deal of confusion and uncertainty among the agricultural community regarding the applicability of 404(f)(1)(A) exemptions. NWC encourages the agencies to withdraw the interpretive rule and ensure that any future changes to normal exemptions comply with the APA. The entire Republican membership of the Senate Committee on Agriculture agrees that the interpretive rule must be withdrawn immediately.

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In summary, NWC urges the agencies not to finalize the rule as proposed. The Proposed Rule exceeds the proper scope of the agencies’ authority as provided by the CWA and subsequently clarified by the courts. Most fundamentally, the Kennedy concurrence in Rapanos requires the establishment of a “significant” nexus to traditionally navigable waters. The Proposed Rule exceeds Justice Kennedy’s instructions and would assert jurisdiction on the basis of virtually any connection. We urge the agencies to reconsider and adopt a more reasonable construction of the Kennedy concurrence and narrower definitions of several key terms. The public must also be provided an opportunity to review and comment on the final scientific report before the rule is finalized.

Thank you for the opportunity to provide these comments. Please feel free to contact me if I may provide additional information.

Respectfully submitted,

Amy W. Larson, Esq.
President