NATIONAL MILK PRODUCERS FEDERATION

James Mulhern, *President & Chief Executive Officer* | **Randy Mooney,** *Chairman*

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

November 14, 2014

To whom it may concern:

The National Milk Producers Federation (NMPF), based in Arlington, VA, develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. NMPF's member cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of more than 32,000 dairy producers on Capitol Hill and with government agencies. Our members' productivity is a critical component in maintaining a safe, abundant food supply for an ever-increasing world population.

NMPF and its members are committed to protecting U.S. waterways through voluntary efforts, as well as through regulatory compliance with the Clean Water Act (CWA). Clean water is central to healthy ecosystems, secure water supplies for human and animal consumption, and to the production of milk and other dairy products. For this reason, we applaud the continued efforts of the U.S. Environmental Protection Agency (EPA) and US Army Corps of Engineers (COE) to keep our waters clean. We are committed to working with the EPA and COE to finding effective ways to achieve these important goals.

I. NMPF Interest in Waters of the United State (WOTUS)

Because of the extensive efforts of our members to manage the natural resources on which they depend for their livelihoods, NMPF has a strong interest in the proposed rule to define "Waters of the United States (WOTUS)" under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880; FRL-9901-47-OW). The dairy industry and all of agriculture need the certainty a properly drafted rule would provide.

Eighty percent of the milk production in the U.S. occurs in thirteen states: Arizona, California, Colorado, Iowa, Idaho, Michigan, Minnesota, New Mexico, New York, Pennsylvania, Texas, Washington, and Wisconsin.[1] In two of these states, Arizona and

[1] Milk Production (February 2014). USDA, National Agricultural Statistics Service. ISSN:1949-1557. Accessed November 11, 2014. http://usda.mannlib.cornell.edu/usda/nass/MilkProd//2010s/2014/MilkProd-02-20-2014.pdf

New Mexico, intermittent and ephemeral streams represent 95-96% of the streams in the state, according to the INDUS Corporation maps produced under contract to EPA and based on U.S. Geological Service (USGS) data.[2] In seven of these states, over 50% of the streams are intermittent or ephemeral.[3] In Minnesota and Michigan, ditches comprise 26% and 36%, respectively, of the streams.[4] Using a database of intermittent and seasonal streams from the National Hydrologic Database [specifically titled "USGS Small-scale Dataset – Global Map: 1:1,000,000-Scale Streams of the United States 20146"], 2727 dairy farms with 500 lactating cows or more may be impacted by the proposed rule.

EPA's regulatory impact analysis reveals an increase of 2-3% in waters that will be covered under CWA jurisdiction as a result of this rule. Most of these additional waters will contribute insubstantial downstream flows but will be located at the upstream end of watershed systems where many farm and ranch operations are located. The impact of the expansion will fall disproportionately on farming operations.

Dairy farmers are overwhelmingly outstanding stewards of the natural resource they depend on to support their livelihoods. Notwithstanding the quality of their stewardship and the importance of the food dairy farmers produce for America, the sad fact remains that many outside groups work to eliminate dairy and all agricultural producers from the landscape. The use of the citizen suit provision of the CWA as a tool to accomplish this goal is an unforeseen consequence of the enactment of this important law. Practices that are central to the management of dairy operations, such as use of pesticides, will now be subject to challenge at the whim of members of the public inherently hostile to agriculture. Further difficulties raised by the broad reach of jurisdiction over these additional waters will arise by the application of the Spill Prevention, Control and Countermeasure (SPCC) Rule to these waters. Thus, dairy farmers have a clear, vested interest in the outcome of this rulemaking and its potential impact on their operations.

Unfortunately, the proposed rule falls far short of meeting controlling legal standards for defining WOTUS. Instead of eliminating uncertainty, the proposed rule makes certain the definition of WOTUS, and the procedure for identifying WOTUS, will lead to more confusion and will be justifiably disputed for years into the future. Because agriculture needs the certainty provided by a lawfully promulgated rule, we urge the Administration to make the adjustments suggested below and either reflect the changes in the final rule or withdraw the rule and reissue an amended proposed rule. We welcome the opportunity to meet with you to discuss how we can work together to meet our mutual goals.

The EPA and COE's Interpretive Rule further confused the administration of waters of the United States. In our comments submitted July 7, 2014, NMPF maintained the guidance would have the perverse effect of discouraging water conservation, by changing the long-standing relationship between farmers and the Agriculture Department's Natural Resources Conservation Service (NRCS). We attach these comments again for consideration in the larger context of the proposed rule and request again that EPA and

[2] EPA State and National Maps of Waters and Wetlands. U.S. House of Representatives Committee on Science, Space, and Technology. Accessed November 11, 2014. http://science.house.gov/epa-maps-state-2013#overlay-context

[3] *Ibid.*

[4] *Ibid.*

COE withdraw the Interpretive Rule and work with the dairy industry and other agricultural stakeholders on clarifying and reformulating the 404 exemption eligibility for farming practices (**Appendix A**).

II. The EPA and COE Proposal

Key elements of the proposal's definition for WOTUS are settled law and beyond the reach of legitimate dispute. So for example, traditionally navigable waters (TNW), interstate waters, and territorial seas are all clearly WOTUS as used in the proposal. On the other hand, the definitions for tributaries, impoundments, adjacent waters, and other waters raise significant legal issues. Undergirding the relationship between waters with legally settled and unsettled definitions is the proposal's definition for "significant nexus". The discussion below presents the controversial definitions in the proposal, starting with significant nexus.

A. Significant Nexus

The term significant nexus refers to a water, including wetlands, either alone or in combination with other similarly situated waters in the region that significantly affects the chemical, physical, or biological integrity of a TNW, interstate water, or territorial sea. For an effect to be significant, it must be more than speculative or insubstantial.[5] Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . . .'"[6]

For adjacent waters other than wetlands adjacent to TNW, the Administration understands Justice Kennedy to use significant nexus as a framework for establishing categories of water that are *per se* WOTUS.[7] As will be discussed further below, this broad understanding of jurisdiction captures all tributaries, all adjacent wetlands, and potentially significant numbers of other waters as well. The Administration indicates the scientific literature shows that "tributaries and adjacent waters play an important role in maintaining the chemical, physical and biological integrity of traditional navigable waters, interstate waters, and the territorial seas—and of other jurisdictional waters—<u>because of</u> their hydrological and ecological connections to and interactions with those waters. Therefore, it is appropriate to protect all tributaries and adjacent waters, because the tributaries, adjacent waters, and the downstream traditional navigable waters, interstate waters, and the territorial seas function as an integrated system."[8]

B. Tributaries

The proposal defines tributaries as waters physically characterized by the presence of a bed and banks and ordinary high water mark which contributes flow to a TNW and other waters.[9] A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks so long

[5] 79 Federal Register 22199-22200.
[6] 79 Federal Register 22194.
[7] 79 Federal Register 22260.
[8] *Ibid.*
[9] 79 Federal Register 22201.

as a bed and banks and an ordinary high water mark can be identified upstream of the break.[10] Tributaries in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries because they significantly affect the chemical, physical, or biological integrity of TNW and other jurisdictional waters.[11] The significant nexus relating to pollution transport from all tributaries "in and of itself justifies assertion of CWA jurisdiction over all tributaries by rule."[12]

Headwaters, intermittent, and ephemeral streams are included in the definition of tributary. Scientific literature "clearly demonstrates that streams, regardless of their size or how frequently they flow, strongly influence how downstream waters function."[13] When the functional contributions of tributaries that are small, flow infrequently, or are a substantial distance from the nearest TNW are considered in the aggregate at the watershed scale, the scientific evidence supports a legal determination that they meet the significant nexus standard.[14]

According to the maps produced by INDUS Corporation for EPA using USGS data, 77% of streams and waterbodies nationwide are ephemeral or intermittent. Each state map includes the notation that "[a]lthough the intermittent and emphemeral stream classifications are distinguished from each other in the dataset, many ephemeral streams are included in the 'intermittent' category. In addition, some ephemeral streams in the Southwest have been classified as washes . . . . No streams in the state have yet been classified in the ephemeral category (data current as of October 2009)."[15]

In two letters to Congressman Lamar Smith, Chairman of the U.S. House Committee on Science, Space, and Technology, dated July 28 and August 6, 2014, Nancy Stoner, Acting Assistant Administrator of the EPA Office of Water stated:

> *"While there are maps depicting water resources on both a national and state scale maintained by multiple agencies, I wish to be clear that EPA is not aware of maps prepared by any agency, including the EPA, of waters that are currently jurisdictional under the CWA or that would be jurisdictional under the proposed rule. . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and these data are not available and are not shown on any EPA maps."*[16]

Two types of ditches that might otherwise be evaluated as tributaries but are excluded under the rule are: Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and, ditches that do not contribute flow to a WOTUS.[17] Other ditches are jurisdictional.

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[10] 79 Federal Register 22201-22202.
[11] 79 Federal Register 22204.
[12] *Ibid.*
[13] 79 Federal Register 22196.
[14] 79 Federal Register 22206.
[15] EPA State and National Maps of Waters and Wetlands. U.S. House of Representatives Committee on Science, Space, and Technology. Accessed November 11, 2014. http://science.house.gov/epa-maps-state-2013#overlay-context
[16] Accessed November 11, 2014. http://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf
[17] 79 Federal Register 22203.

C. Adjacent Waters

All waters adjacent to TNW, tributaries, waters used in commerce, territorial seas, and impoundments are WOTUS. The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent waters. The term neighboring includes waters located with the riparian area or floodplain of a TNW or tributary or other similar water, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such waters.[18] The size of a floodplain will also vary and require the professional judgment of the agencies to determine which flood interval to use to determine whether a water is in the floodplain and therefore adjacent to a jurisdictional water and a WOTUS for the purpose of this rule.[19]

The Administration relies on an interpretation of Justice Kennedy's work to support these definitions. According to the Administration, Justice Kennedy deems wetlands to be jurisdictional if they "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'."[20] The Administration next relies on Justice Kennedy's statement that it may identify "categories of tributaries that, due to their volume of flow, 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 aquatic system incorporating navigable waters."[21] Wetlands without a hydrologic connection also perform important hydrologic functions for a watershed system by storing floodwaters and retaining and transforming nutrients, metals, and pesticides.[22] Consequently, adjacent waters are included *per se* as WOTUS.[23] Adjacent wetlands are similarly situated because of the "similar functions" they provide.[24]

Tributaries and their adjacent waters and the TNW are an integrated ecological system. Discharges of pollutants, including discharges of dredged or fill material into the system must be regulated under the CWA to restore and maintain the chemical, physical, and biological integrity of these waters.[25] Discharge of many pollutants into adjacent waters "often flow into and thereby pollute the traditional navigable waters."[26]

According to the Administration, neighboring waters with a surface or shallow subsurface connection to jurisdictional waters have a significant nexus to these waters. Through the hydrologic connection, they can exchange water, along with chemicals and organisms within that water, and subsequently have a significant effect on the properties of the jurisdictional waters, particularly in combination with other adjacent waters in the watershed.[27] Where a neighboring water is outside of the floodplain and riparian area of

[18] 79 Federal Register 22207.
[19] 79 Federal Register 22209.
[20] 79 Federal Register 22260.
[21] *Ibid.*
[22] 79 Federal Register 22197, 22223, and 22261.
[23] 79 Federal Register 22197.
[24] 79 Federal Register 22261.
[25] 79 Federal Register 22209-22210.
[26] *Ibid.*
[27] *Ibid.*

a tributary, but is connected by a shallow subsurface hydrologic connection with such tributary, the agencies will assess the distance between the water body and tributary in determining whether or not the water body is adjacent.[28] The agencies recognize that in specific circumstances, the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination.[29]

D. Other Waters

Other waters are simply all other waters that have not already been defined to be jurisdictional or which are not otherwise exempted. The definition of "other waters" makes clear they are not jurisdictional as a category of waters. Rather, they are jurisdictional provided they are found on a case-specific basis to have a significant nexus to TNW and other principal waters. Other waters will be evaluated either individually, or as a group of waters where they are determined to be similarly situated in the region. Waters are similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water. For other waters that perform similar functions, their landscape position within the watershed relative to each other or to a jurisdictional water is generally the determinative factor for aggregating waters in a significant waters analysis.[30]

Similarly situated waters may be identified as sufficiently close together when they are within a contiguous area of land with relatively homogeneous soils, vegetation, and landform.[31] In determining whether other waters are sufficiently close to each other or to a water of the United States, the agencies would also consider hydrologic connectivity to each other or to a jurisdictional water, even though these waters may fulfill important functions for otherwise jurisdictional waters even without a hydrological function. Similar functions include factors such as habitat, water storage, sediment retention, and pollution sequestration. The agencies would assess the combined effects of similarly situated other waters in the region on the chemical, physical, or biological integrity of TNW, interstate water, or territorial sea in conducting a significant nexus analysis.[32] The agencies also sought comment on the possibility of making other waters jurisdictional by ecoregion.[33]

The agencies prepared a Regulatory Impact Analysis (RIA) in support of the proposed rule. The RIA utilized data records from the COE ORM2 (Operation and Maintenance Business Information Link, Regulatory Module) to "evaluate the extent to which EPA and the Corps may assert CWA jurisdiction as a result of this proposed rule." In a sample test run to make the evaluation, the RIA found that roughly 98% of tested streams and wetlands were jurisdictional. No positive determinations were made for "other waters" even though the agencies had projected that 17% of this group would be jurisdictional.

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[28] 79 Federal Register 22207.
[29] 79 Federal Register 22208.
[30] 79 Federal Register 22211.
[31] 79 Federal Register 22213.
[32] *Ibid.*
[33] 79 Federal Register 22215.

III. Supreme Court Standards for Determining WOTUS

A. United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)

The issue before the Court in Riverside Bayview Homes was whether the CWA conferred authority on the COE to require the developer to obtain a dredge and fill permit prior to commencing a project that would affect a wetland adjacent to and actually abut a navigable water.[34] The Court was not called upon to address the question of the authority of the COE to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water [ ] and it did not express any opinion on that question.[35]

The phrase "waters of the U.S." refers primarily to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'" than the wetlands adjacent to such features.[36] Nevertheless, after observing that a wet land may not appear to fall within the term "waters" as used by the CWA, the Court recognized that such a simplistic approach "does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."[37]

The Court was also concerned with the authority needed to abate pollution. "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater, moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at their source.'"[38]

"In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[39] The Court found the Corp's judgment that adjacent wetlands that "actually abut" and are "inseparably bound up" with waters of the United States to be reasonable, and the wetlands are therefore jurisdictional.[40]

B. Solid Waste Agency of Northern Cook County (SWANCC) v. United States, 531 U.S. 159 (2001)

In this case, the Supreme Court was called upon to decide whether the COE's regulatory authority extended over an abandoned sand and gravel pit in northern Illinois which provided habitat for migratory birds. The CWA authorizes the government to regulate the discharge of fill material into "navigable waters," 33 U.S.C. §1344(a), which the statute defines as "the waters of the United States, including the territorial seas," §1362(7). COE interpreted these words to cover the abandoned gravel pit at issue here

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[34] 474 U.S. at 126.
[35] 474 U.S. at 131, fn. 8.
[36] 474 U. S. at 131.
[37] 474 U.S. at 132.
[38] S. Rep. No. 92-414, p. 77 (1972). 474 U.S. at 132-33.
[39] 474 U.S. at 134.
[40] 474 U.S. at 135.

because it is used as habitat for migratory birds. They issued a regulation giving the public notice of this interpretation. The Supreme Court concluded "'The Migratory Bird Rule' is not fairly supported by the CWA."[41]

The Court explained that in Riverside Bayview Homes, it found that Congress intended to "regulate at least some waters that would not be deemed navigable under the classical understanding of that term."[42] Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands that "actually abutted" and were "inseparably bound up with the 'waters' of the United States."[43] This "significant nexus" between the wetlands and navigable waters informed the Court's opinion in Riverside Bayview Homes.[44]

The Court in Riverside Bayview Homes expressed no opinion about the government's authority to regulate wetlands that were not adjacent to open bodies of water. The Court in SWANCC opined that to rule for the government, it would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. "But we conclude the text of the statute will not allow this."[45] Such a ruling would assume "the use of the word navigable in the statute . . . does not have any independent significance."[46]

While the word "navigable" in the statute was of "limited effect", it is quite another thing "to give it no effect whatever."[47] "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."[48]

The COE then argued that where Congress did not address the precise question before the Court, whether the CWA confers federal jurisdiction over isolated intrastate waters that are used as habitat by migratory birds, then the Court should grant deference to the agency's interpretation of the statute under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*[49] However, the issue of deference under Chevron only arises if the statute is not clear on its face. Here, the Court found the CWA to be "clear" that jurisdiction is not extended to isolated, intrastate waters.[50] Even if the Court were to have found the statute to be ambiguous, it would not have deferred to the government's interpretation of the statute because of the particular factors at play in this case as discussed below.[51]

"Where an administrative interpretation of a statue invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . This concern is

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[41] 531 U.S. at 167.
[42] *Ibid*.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid* at 168.
[46] *Ibid* at 172.
[47] *Ibid.*
[48] *Ibid*.
[49] 467 U. S. 837 (1984).
[50] 531 U.S. at 172.
[51] *Ibid.*

heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[52]

The COE indicated that millions of dollars are spent in hunting and viewing migratory birds, thus raising a significant claim of commerce clause power to regulate the birds. Nevertheless, the Court found "nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. Regulation of land use [is] a function traditionally performed by local governments. Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U. S. C. §1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by the government's interpretation, and therefore reject the request for administrative deference." [53]

C. Rapanos v. United States, 547 U.S. 715 (2005)

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. Regulators informed Mr. Rapanos that his saturated fields were "waters of the United States," that could not be filled without a permit. The issue in the case is whether the federal government has jurisdiction under the CWA over wetlands that are adjacent to non-navigable tributaries.

Five Justices joined the judgment of the Court to remand the case to the District Court for consideration using the correct legal standard. A plurality of four justices joined Justice Scalia's opinion. Justice Kennedy authored his own opinion in support of the majority. Most observers believe the Kennedy opinion will have to be satisfied for waters to be jurisdictional under the CWA. He carves a careful space for jurisdiction that has been misapplied by many involved in the issue.

Justice Kennedy begins by setting out the broad framework within which the question of jurisdiction must be considered. "Consistent with SWANCC and Riverside Bayview and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a), and it pursued that objective by restricting dumping and filling in 'navigable waters,' §§1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 CFR §320.4(b)(2). Accordingly, wetlands

[52] 531 U.S. at 172-73.
[53] *Ibid* at 174.

possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' 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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" [54]

Justice Kennedy next observes the dissent "concludes that the ambiguity in the phrase 'navigable waters' allows the Corps to construe the statute as reaching all 'non-isolated wetlands,' just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in Riverside Bayview. This, though, seems incorrect. The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of Riverside Bayview; and so the Corps' assertion of jurisdiction cannot rest on that case." [55]

The Corps' adjacency standard is reasonable in some of its applications. "[I]t may well be the case that Riverside Bayview's reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries. Through regulations or adjudication, the Corps may choose to 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." [56]

"The Corps' existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics," §328.3(e). This standard presumably provides a rough measure of the volume and regularity of flow. It may well provide a reasonable measure of whether <u>specific</u> (emphasis added) minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act. Yet 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. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC." [57]

"Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case 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. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter

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[54] 547 U.S. at 779-80.
[55] *Ibid* at 780.
[56] *Ibid* at 781.
[57] *Ibid* at 781-82.

of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." [58]

Justice Kennedy next considered the evidence in the Rapanos case regarding the significant nexus of the wetlands. He noted, "[m]uch the same evidence introduced at trial should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are connected. The Court of Appeals, however, though recognizing that under SWANCC such a nexus was required for jurisdiction, held that a significant nexus 'can be satisfied by the presence of a hydrologic connection.' Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain. Under the analysis described earlier, . . ., mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." [59]

With respect to the evidence in Carabell, Justice Kennedy noted the conditional quality of the evidence submitted to show the significant nexus of the wetlands in question. He said, "the conditional language in these assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims, see 5 U. S. C. §706(2)(E)." [60] Additionally, the wetland at issue was adjacent to a ditch opposite to a berm on the property's edge. "[M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. A more specific inquiry, based on the significant nexus standard, is therefore necessary." [61]

IV. Analysis of EPA and COE Proposal

The EPA and COE's definition of WOTUS for determining jurisdiction under the CWA was addressed in a number of important aspects by the Supreme Court in Riverside Bayview Homes, SWANCC, and Rapanos. Following these decisions, the Administration had an opportunity to issue a rule that would have put behind us the long-standing controversy over the extent of federal jurisdiction over waters in the United State by conforming to the precepts of these decisions. Such a rule would have met the urgent need of the environmental community and users of the land for certainty in their management and use of the land. No one is served by the confusion that has ruled over this area of the law.

Unfortunately, the proposed rule adds to the confusion surrounding the administration of WOTUS by veering away from applicable legal requirements in a number of respects as will be discussed below. All sectors of our nation need to work together to achieve the vital water quality objectives of the CWA. Instead, the fruits of this proposal will drive

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[58] *Ibid* at 782.
[59] *Ibid* at 784-85.
[60] *Ibid* at 786.
[61] *Ibid.*

the opposite result of continuing the politicization and litigation of the issue which drains away precious collective resources from our important work.

In broad terms, the proposal relies on favorable language in the Supreme Court decisions and ignores the language that conflicts with the definitions proposed by the agencies. The important qualification to this characterization is the EPA and COE have classified "other waters" as non-jurisdictional as a result of the SWANCC decision, although the treatment of isolated wetlands or waters under the proposal is still incorrect. In particular, the proposal virtually reads the statutory requirement of "navigability" out of the factors required by the Supreme Court for determining jurisdiction. As a consequence, the proposal is confusing and not lawful in some important respects.

Among the most important results of this incomplete reading of the law is the EPA and COE's almost exclusive reliance on the goals of the CWA (promote the physical, chemical, and biological integrity of the waters) to justify aggregated water jurisdictional determinations, while ignoring the navigability requirement. The goals of the Act are critical to framing the effort to achieve water quality. However, they confer no affirmative authority, nor impose any duty or limitation on authority through which the agencies may act. Only the requirement that the federal action is limited to "navigable waters" provides substantive authority for the agencies' to use in carrying out their missions. The agencies' may use whatever discretion is available under the term "navigable waters" to achieve the goals of the CWA. But that discretion must be exercised within the bounds of substantive statutory authority to be lawful.

As an initial matter, it may be observed that in only one decision, Riverside Bayview Homes, did the Supreme Court affirm the government's determination of jurisdiction. In that case, the Court affirmed that wetlands that "actually abutted" and were "inseparably bound" with a stream that was navigable in fact were WOTUS. The rationale for reaching this result was that "the Corps must necessarily choose some point at which water ends and land begins." It was reasonable under these circumstances for the Corps to find the wetlands to be jurisdictional. The Court expressed no opinion about whether wetlands not adjacent to open bodies of water are jurisdictional.

The Court in SWANCC rejected as a violation of the CWA the Corps' determination that an abandoned, isolated sand and gravel pit was jurisdictional. In Rapanos, the Supreme Court remanded the case to the District Court for application of the correct standard of law to jurisdictional determinations for wetlands adjacent to non-navigable tributaries, including one wetland that was separated from the tributary (a ditch) by a man-made berm. On this thin record of decisions upholding jurisdictional determinations, the government is currently asserting extensive jurisdiction and potential jurisdiction over "immense stretches of intrastate land" giving it regulatory authority tantamount to that exercised by a local zoning board. [62] The import of the government's assertion comes into clearer focus by considering its determination of jurisdiction over particular bodies of water.

[62] 547 U.S. at 738.

A. Tributaries

The starting point here is that the EPA and COE interpret Justice Kennedy's opinion in Rapanos as making lawful the use of the significant nexus test as a framework for establishing categories of water that are *per se* WOTUS. As the proposal observes, tributaries flow downstream to other jurisdictional waters and function as part of an integrated system. Tributaries meet the test because of their hydrological and ecological connections to and interactions with the downstream jurisdictional waters. (emphasis added). Their role in transporting pollution downstream "in and of itself justifies assertion of CWA jurisdiction over all tributaries by rule.

Tributaries include headwaters, and intermittent and ephemeral streams. All tributaries have a significant nexus to traditionally navigable or interstate waters, and territorial seas. The nexus exists regardless of their size or how frequently they flow. What you have here is a judgment that all tributaries in a watershed are WOTUS because they are connected to downstream waters. Aggregating the effects of tributaries in watersheds makes this connection significant. The particular characteristics and therefore significant nexus of an individual tributary is irrelevant to this inquiry. The proposal makes no effort to identify gradients of significance for individual tributaries or even categories of tributaries even though the Supreme Court requires substantial evidence at this level of detail for there to be federal jurisdiction over a water.

Although the scientific literature relied on by the government is more equivocating on the significance of the nexus of various waters in a watershed system than indicated in the proposal, for the purpose of our point, we will assume (unless indicated otherwise) for this comment that the proposal accurately captures the principle conclusions of research on the relationship of waters in and out of a watershed. As relevant here, this means we accept that the aggregated effects of all tributaries in a watershed have important impacts on downstream waters for the reasons stated in the proposal. We recognize that abatement of pollution is an important goal of the CWA.

Even with the assumed scientific support for its position, the government's proposal does not pass legal muster. The Rapanos decision dealt with identifying the correct legal standard for determining whether wetlands adjacent to non-navigable tributaries were jurisdictional under the CWA. To make this judgment, the Court and Justice Kennedy had to determine first whether the tributary itself was jurisdictional. Justice Kennedy rejects the Corps' theory that the wetlands at issue are jurisdictional simply because they are adjacent to tributaries. [63] He explains that the ordinary high water mark standard for determining jurisdiction, "may well provide a reasonable measure of whether **specific** (emphasis added) minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." [64]

On the other hand, the breadth of the OHWM standard, which covers the 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 applicable standard for identifying jurisdictional tributaries or the wetlands adjacent to them. [65] "Indeed, in

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[63] 547 U.S. at 781.
[64] *Ibid*.
[65] *Ibid*.

many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC." [66]

The proposal for the definition of tributaries is in clear conflict with these standards. The touchstone for Justice's Kennedy's limitations is the statutory requirement of navigability. Flow volume and proximity to navigable waters are two factors that may significantly affect the chemical, physical, and biological properties of the navigable waters. Additionally, "other relevant considerations" may also affect the nexus between tributaries and navigable waters. Presumably, these other considerations possess the same measurable, physical qualities as flow volume and proximity as would be required by the canon of statutory construction, *ejusdem generis*.

Notwithstanding Justice Kennedy's rejection as overly broad of the same standard for tributary jurisdiction as that advanced in the current proposal, he also seeks to help the government see the way forward by providing detail on how tributaries could be deemed jurisdictional. The OHWM standard could apply to "certain **major** tributaries". (emphasis added). [67] "The Corps may choose to 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 wetland adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." [68]

Justice Kennedy recognizes that in theory certain ephemeral and intermittent streams may meet the requirement for jurisdiction. While the OHWM may support the inclusion of **specific** ephemeral and intermittent streams, he nevertheless concludes the OHWM standard is too broad by sweeping in all such streams. Mere hydrological and ecological connections do not meet the controlling test. The connections must be significant. The issue of significance and jurisdiction rests on physical relationships that must be shown through evidence on individual streams, which may be aggregated as categories, as will be discussed further below. The proposal's inclusion of all tributaries without showing evidence of the significance of their flow or proximity to TNW violates these standards of law.

The EPA and COE seek to avoid these strictures by pointing to the scientific literature which found that "streams, regardless of their size or how frequently they flow, strongly influence how downstream waters function."[69] "Tributaries that are small, flow infrequently, or are a substantial distance from the nearest [TNW] are essential components of the tributary network. . . ."[70] As indicated above, the scientific literature and the government reach this conclusion by aggregating the effects of the tributaries. The government ignores the requirement that evidence about flow and proximity of individual, non-navigable streams are needed to make jurisdictional determinations as a matter of law.

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[66] *Ibid* at 782.
[67] 547 U.S. at 780.
[68] *Ibid.*
[69] 79 Federal Register 22196.
[70] 79 Federal Register 22206.

Even if one assumes the point about aggregated effects to be true, it nevertheless falls outside the legal framework for determining which waters of the United States are jurisdictional for the reasons discussed above. The science is only relevant to the extent it supports conclusions that are permissible as a matter of law. For this reason, lumped together, unevaluated, small and remote streams may be essential to a watershed system in a hydrological sense, but are irrelevant as a matter of law and do not support the government's conclusion that all tributaries are jurisdictional.

In further defense of its position, the EPA and COE points out that the Supreme Court has never rejected its standard for tributaries.[71] This is true, but it places an untenable burden of support on a bent-over, slender reed of incomplete analysis. We know, for example, that the plurality in Rapanos would exclude intermittent and ephemeral streams from jurisdiction.[72] This view is not surprising given the plurality's judgment that "the waters of the United States include only relatively permanent, standing, or flowing bodies of water."[73] Combined with Justice Kennedy's limitations on the definition for tributary, five Justices would strike down the government's proposed definition for tributaries under certain applications. At a minimum, it can be fairly said there are not five Justices sitting on this Court who have expressed a view in support of the proposed definition of tributaries, even if in fact, it has never been struck down.

The EPA and COE also try to justify inclusion of all tributaries because they may all transport pollution downstream. Abatement of pollution is central to the concerns addressed by the CWA. Defining all tributaries as WOTUS is not necessary to achieve this goal. The Act does not forbid the "addition of any pollutant directly to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters."[74] In other words, the discharge of a pollutant into a remote, non-navigable water would still be actionable under the CWA if the pollutant found its way into a TNW because the discharge of those pollutants is prohibited unless they are regulated by a National Pollution Discharge Elimination System (NPDES) permit. The EPA and COE have articulated no adequate justification why the definition for WOTUS is needed to stop pollution.

Recognition that not all tributaries are jurisdictional would not place an additional evidentiary burden on the EPA and COE in prosecuting a discharge case. The proof of downstream flow of pollutants required appears substantially similar, if not identical, to the proof of a hydrologic connection that would be required to prove that an upstream channel or wetland is a WOTUS.[75] While the concern about pollution abatement is correct, it does not overturn the statutory requirement for jurisdiction. As a matter of law, the concern does not require jurisdiction over all tributaries as proposed by the government for it to be addressed.

The EPA and COE's position on tributaries is also puzzling because the agencies recognize there is a gradient in the contributions of tributaries to downstream waters but then does not factor this recognition into its proposal. "The existence of a connection, a nexus, does not by itself establish that it is a 'significant nexus.' There is a gradient in

[71] 79 Federal Register 22204 and 22252.
[72] 547 U.S. at 732 n.5.
[73] *Ibid* at 732.
[74] 474 U.S. at 133; 33 U.S.C. § 1362(12)(A).
[75] *Ibid*.

the relation of waters to each other, and this is documented in the [Scientific] Report."[76] The agencies conclude that "the relative strength of downstream effects informs the [their] conclusions about the significance of those effects for purposes of interpreting the CWA."[77] Had the lessons about downstream effects been absorbed and the agencies followed the legal requirements for determining jurisdiction over tributaries, the proposal would have been better received by parties committed to stabilizing federal regulation of U.S. waters and promoting clean water. Instead, the proposal only creates more uncertainty in this arena.

Perhaps most disconcerting of all is that the EPA and COE themselves do not know which tributaries are ephemeral or intermittent as indicated in the agencies' correspondence with Congress. The evidence to support the conclusion that this class of streams in WOTUS is not speculative; it is nonexistent. The designation of these tributaries as WOTUS does not approach the legal standards Justice Kennedy requires for this determination. Aggregating all streams, known and unknown, does not touch the requirement that jurisdictional streams must contribute substantial flow to downstream waters and must be reasonably proximate to them.

As a final note, the agencies' definitions for ditches are also confusing and should be clarified in the final rule. If an upland ditch with less than perennial flow contributes even minor flows to an otherwise jurisdictional water, will the ditch then not be deemed jurisdictional? What is confusing is that the proposal seemed to exclude upland ditches with less than perennial flow. Additionally, it would be helpful to more carefully define "upland" to provide greater clarity on the type of ditches the agencies are contemplating with these exceptions.

B. Adjacent and Neighboring Waters

Wetlands, other waters, and neighboring waters that are adjacent to TNW, tributaries, and other jurisdictional waters are *per se* WOTUS. No mention is made in the proposal about a requirement for assessing the significance of the volume of water flowing through a connection to a WOTUS, only that a hydrological connection has to exist for jurisdiction to be established. Wetlands may also be WOTUS because of the storage functions they perform even without a hydrological connection. No guidance is offered for assessing the significant nexus of storage wetlands.

The most straight-forward issue in the proposal with adjacent wetlands is their over-inclusion as WOTUS. Justice Kennedy makes clear that federal "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[78] For adjacent waters to be WOTUS, a determination that the anchor tributary is WOTUS has to be made first. But, Justice Kennedy indicates that some applications of the same tributary rule as in the government's proposal are too broad which in effect excludes from WOTUS those tributaries that are too remote from otherwise jurisdictional waters or carry minimal volumes of water. If a tributary is not WOTUS, neither would the adjacent wetlands be. "Indeed, in many cases wetlands adjacent to tributaries covered by this standard might

[76] 79 Federal Register 22193.
[77] 79 Federal Register 22196.
[78] 547 U.S. at 779.

appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC."[79]

The EPA and COE try to bring some certainty to adjacency determinations by declaring that all wetlands in a floodplain are WOTUS. This aggregate approach introduces several legal difficulties. First, the law requires the significant nexus for wetlands to be determined by first looking at specific examples. According to Justice Kennedy, "[w]here an adequate nexus is established for a **particular** wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region."[80] Other comparable wetlands would also meet the standard for significance.

The significant nexus for wetlands would also have to be measured by the frequency of flooding by the anchor stream. The proposal leaves open the question of what scope of floodplain should be assigned to a particular stream to be resolved on a case-by-case determination. The significance of the nexus of a particular wetland to a jurisdictional water is affected by the frequency of flooding as well as the hydrological connection between the wetland and the reference water. This situation raises the question of whether it is appropriate to make floodplain wetlands *per se* WOTUS when case-by-case determinations will still need to be made for the scope of the floodplain, which is related to the significant nexus of the individual wetlands to the anchor stream. We urge the government to abandon the existing *per se* application of adjacency until such time as it makes scope of floodplain determinations for individual streams and relates this finding to the significance of the hydrological connection between the waters in the floodplain and the reference stream.

Another weakness EPA and COE's wetlands proposal is its treatment of neighboring wetlands and waters. These features may be in or outside the floodplain and are also deemed *per se* WOTUS. Neighboring wetlands or waters outside the floodplain need a shallow subsurface hydrologic connection or confined surface connection to WOTUS to qualify. The proposal requires a case-by-case determination about both whether hydrologic connection exists and the strength of that connection.

The strength of the connection would have to be assessed to pass muster under controlling standards, notwithstanding the difficulty of identifying and documenting subsurface connections.[81] The fact that identifying the connections could be difficult raises the real possibility that determinations will be made using "speculative" information, which does not pass muster according to the Supreme Court.

The proposal states that neighboring wetlands and waters outside of the floodplain will be deemed adjacent depending on their distance to the nearest tributary.[82] Neighboring wetlands outside the floodplain are isolated and should be excluded under SWANCC as not meeting the statutory requirement for navigability. Even if not isolated, how can they be *per se* jurisdictional when their proximity will be assessed on a case-by-case basis? The Supreme Court in Riverside Bayview Homes provided an idea of its thinking on the

[79] *Ibid* at 781-82.
[80] *Ibid* at 782.
[81] 79 Federal Register 22210.
[82] 79 Federal Register 22207 and 22211.

scope of jurisdictional wetlands when it stated: "[I]t is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined, i.e. permanently standing, open waters.[83] Attaching a label of "adjacency" to neighboring waters outside the floodplain does not magically transform them into the wetlands the Supreme Court contemplated as adjacent in its decisions. These waters are isolated and are not jurisdictional under the CWA.

Finally, the proposal provides that adjacent waters do not lose their WOTUS designation because they are separated from a tributary system by dikes or berms.[84] What if the berm interrupts a considerable amount of the flow that would otherwise move from the wetland to a TNW and the remaining flow is minimal? Given the need to show a significant nexus to qualify as WOTUS, it would seem inappropriate to keep wetlands separated by berms from tributaries as categorical WOTUS. A case-specific determination about the quality of the hydrologic connection is required both to assess the volume of water that flows downstream and the affect periodic floods may have on that wetland system.

The proposal notes that dams and berms do not block all water flow.[85] Dams, for example, "allow seepage under the foundation of the dam and through the dam itself." [86] Is seepage significant enough of a hydrologic connection for the affected wetland to retain its WOTUS designation? The EPA and COE should clarify this matter by respecting the standards in Supreme Court precedent and excluding waters outside berms and dams that allow only minimal flows through the structures from jurisdiction. Characterizing these waters as WOTUS severely compromises any meaning that might otherwise be attached to the standard of "significant nexus." The wetland at issue in Carabell (the companion case to Rapanos) was adjacent to a ditch opposite to a berm on the property's edge. Justice Kennedy commented: "Mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. A more specific inquiry, based on the significant nexus standard, is therefore necessary." [87]

C. Other Waters

"Other waters" are all those that are not jurisdictional and can only be deemed jurisdictional following a case-by-case determination of either individual waters or groups of waters that are similarly situated in the region. Other waters are similarly situated when they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water.

The most important point to be made about other waters is they are excluded as a matter of law from jurisdiction under the CWA according to the standard in SWANCC. The Supreme Court in that case said the statute was "clear" on its face that isolated waters do not meet the test for navigability in the statute. It did not consider any other factor, ecological or otherwise, in reaching this result. The Court reached this result even though it considered the concept of significant nexus to otherwise jurisdictional waters and found it lacking under the facts before it. ("It was the significant nexus between the

[83] 474 U.S. at 133.
[84] 79 Federal Register 22207.
[85] 79 Federal Register 22243.
[86] *Ibid.*
[87] 547 U.S. at 786.

wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*." [88]) The Court in Riverside Bayview Homes reinforced this view in stating it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined, i.e. permanently standing, open waters.[89] Riverside Bayview Homes is the only affirmative Supreme Court holding defining jurisdictional wetlands. Other waters are too remote from open, traditionally navigable water as a matter of law to justify consideration as WOTUS.

Draft science relied on by the government further reinforces this point. "The literature reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional (other water) settings."[90] An executive summary of a meta-report cited by the government concludes that the **generalized** (emphasis added) model of flood control, recharge promotion and flow maintenance by wetlands is confined largely to floodplain wetlands, while many other wetland types perform alternative functions – partly or fully.[91] Under these circumstances, it would at best be speculative for the government to insist these waters may have a significant nexus to downstream waters by indicating criteria for their inclusion as jurisdictional.

The quality of evidence to support including "other waters" as WOTUS is likely considerably less than speculative. As the Regulatory Impact Analysis showed, no "other waters" proved to be jurisdictional even though the agencies had projected that 17% would be. Positive jurisdictional determinations for streams and wetlands were roughly 98%. In other words, the record shows the agencies are claiming potential jurisdiction over waters for which their own evidence shows an absence of a significant nexus.

The proposal for other waters suffers from other legal infirmities. Other waters are to be evaluated either alone or in combination with similarly situated waters in the region.[92] In deciding whether to evaluate wetlands as a group, the government will look to their "inherent physical characteristics; because they provide similar functions; because they were formed by similar geomorphic processes; and, by their level of biological diversity", among other reasons[93]. Other possible functions that "might demonstrate a significant nexus " include "sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of habitat."[94] This list of functions does nothing to distinguish the significance of the functions of individual wetlands. It also does not address volume of flow or proximity to TNW which are the criteria Justice Kennedy uses for determining significant nexus. All wetlands share some of these attributes and many perform similar functions. As indicated above, Justice Kennedy requires a "specific inquiry" to show significant nexus. Wetland functions operating at the aggregate level are not responsive to this test.

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[88] 531 U.S. at 167.
[89] 474 U.S. at 133.
[90] 79 Federal Register 22225.
[91] A. Bullock and M. Acreman, "The Role of Wetlands in the Hydrological Cycle," *Hydrology and Earth System* Sciences 7:358-389 (2003); cited 79 Federal Register 22214. See also Leibowitz & Nadeau, Isolated Wetlands: State-of-the-Science and Future Directions, 23 Wetlands 663, 669 (2003)(noting that "'isolated is generally a matter of degree").
[92] 79 Federal Register 22212.
[93] 79 Federal Register 22247.
[94] 79 Federal Register 22261.

It should be noted the provision of habitat function is an example of a wetland function that would not meet the significant nexus test under any circumstance. The crux of the significant nexus test between two waters is the volume of water contributed from one to the other, the amount of resource storage performed, and the proximity to TNW. These factors directly contribute to the physical, chemical, and biological water quality of a TNW, which is the goal of the CWA. Wildlife habitat is a secondary benefit, and an important one, of good water quality. It is not, however, a factor for determining the significant nexus of two bodies of water as indicated by the reliance of the Court in SWANCC exclusively on the navigability requirement of the CWA in rejecting federal jurisdiction over isolated waters.

The agencies use the term "region" to potentially cover vast amounts of territory such as ecoregions in which "other waters" could be found jurisdictional. Justice Kennedy used the term with regard to wetlands that are adjacent to TNW and possibly some tributaries. These are wetlands that are located in floodplains. Defining "region" to make this extravagant reach for additional waters flies in the face of the lessons from Riverside Bayview Homes, SWANCC, and Rapanos.

For the reasons indicated above, the EPA and COE performs a disservice to the public by suggesting that other waters could be made jurisdictional using case-by-case determinations. Should procedures be issued for making jurisdictional determinations for other waters, producers will be left with virtually permanent uncertainty as to the status of minor wet features on their land. The discussion about ecoregions or hydrological regions deepens the confusion introduced in the proposal. Other waters are outside the floodplain and are therefore isolated (from jurisdictional waters) by definition. The volume of water they contribute individually is minimal. The mere fact remote wetlands perform a storage function does not make these waters unremote or the storage function significant to TNW. The other waters discussion in its current frame, including the related issue of ecoregions, should be omitted from the final rule. The agencies' good faith and credibility depends on it.

D. State Involvement

The proposal makes the attainment of the CWA's water quality goals harder by significantly reducing the role of states in managing waters of the United States. Achievement of water quality goals is an enormous and complex task. The government should be seeking to incentivize involvement from as many interested public and private entities as possible, not blocking their participation as a matter of common sense. Moreover, Congress recognizes and protects the primary responsibilities and rights of States to prevent pollution and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.[95] The Supreme Court observed that "[r]egulation of land use, as through the issuance of the development permits sought by [the parties] in [Rapanos and Carabell], is a quintessential state and local power."[96] The government should also be seeking greater state involvement in clean water regulation as a matter of congressional policy.

[95] 33 U.S.C. § 1251(b).
[96] 547 U.S. at 738.

The Supreme Court has previously struck down a government attempt to overreach its statutory authority in regulating waters of the United States in SWANCC. As relevant here, the Court explained that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended the result. . . . This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[97] Even if the construction of the statute is otherwise acceptable, "the Court will construe the statute to avoid [constitutional] problems."[98]

The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board.[99] We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority.[100] Such a statement does not exist. To the extent the proposal claims too much jurisdiction over waters of the United States, it should get no deference from the courts.

V. Solutions

Broadly speaking, there are two solutions to the conundrum raised by the EPA and COE's issuance of a legally deficient WOTUS proposal that ideally would be pursued simultaneously. First, issue a new proposal that conforms to controlling legal principles. As we have indicated in this comment, NMPF strongly believes agriculture needs the certainty of a WOTUS rule that can survive legal scrutiny.

Second, NMPF urges the agencies to refocus its attention on the actual work to be carried out to implement the CWA. As proposed the WOTUS rule may intrude into traditionally State spheres of responsibility, but it will do nothing to actually stop pollution. At a time when the whole government is forced to operate under severely constrained budgets, we believe the EPA and COE should do more to actually fight pollution and do less to disrupt settled expectations about federal and state relations.

A. Reissue a WOTUS Draft Proposal

A reissued proposal would cure the defects identified in the discussion above. In particular, it would give weight to the navigability requirement by showing how individual waters meet the criteria for significant nexus as set forth by Justice Kennedy in Rapanos. It is clear the EPA and COE understands there is a gradient in the connectivity of upstream to downstream waters. This understanding needs to be applies to meet Supreme Court standards for jurisdiction.

First, the reissued proposal should place intermittent and ephemeral streams in the (a)(7) category of "other waters" and then deem individual streams or groups of them jurisdictional if they meet the criteria for navigability and significant nexus. Some of

[97] 531 U.S. at 172-73.
[98] *Ibid* at 173.
[99] 547 U.S. at 738.
[100] *Ibid* at 173.

these streams will be jurisdictional. Justice Kennedy laid out the principle criteria for how to make this determination:

- The government may choose to identify categories of major 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 they may be deemed jurisdictional under the CWA. Unlike the current proposal, the categories in this case will be based on "substantial evidence" regarding flow and proximity. The government will have to make a decision about what volume of water and/or distance from TNW will meet the requirement that the nexus in question is significant. Once the basis for this decision is determined, the government could choose to call "major" those tributaries that demonstrate flow and proximity that exceed the threshold and include them all as jurisdictional.

- The government should identify specific standards for defining specific minor tributaries as WOTUS. Standards would be set for flow and proximity to establish the significant nexus for specific streams. Minor streams with evidence of a flow regime that exceeds the "significance" threshold based on substantial evidence could be deemed jurisdictional. It is clear from Rapanos that a de minimus flow regime will not suffice to make a stream jurisdictional, notwithstanding the aggregate effects of all such flows on downstream waters.

Wetlands and other waters that are adjacent to streams that are not jurisdictional cannot be jurisdictional themselves. They should be excluded until such time as the excluded streams may be deemed jurisdictional. They would otherwise be excluded as isolated according to SWANCC. The key factor for determining wetland jurisdiction is adjacency to a WOTUS.

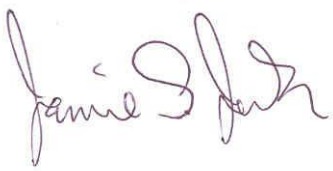
For those streams that are jurisdictional, no decision should be made concerning adjacent wetlands or waters until the scope of the floodplain is determined and the significant nexus of the wetlands is determined. Wetlands separated from other jurisdictional waters by berms or dikes need a site specific evaluation as to whether they meet the significant test. Neighboring waters outside the scope of the floodplain should be excluded from the definition of rule and omitted in a new draft.

The agencies should use notice and comment procedures to publish maps showing specific water features that are jurisdictional as a matter of fairness to producers, landowners, and all parties interested in the ecological status of the land. Should the agencies not delete the "other waters" category, the "significant nexus" definition is overly broad and should be revised. Aggregation on a watershed basis can cover a wide landscape, depending on the point of entry under consideration. The agencies make no effort to restrict the scope of watershed. Additionally the "similarly situated" language is confusing and lacks clear definition. For example how is a farmer to know if his "other water" is similarly situated with another waterbody that may be 25 miles away? What is "sufficiently close" and how is that determined?

VI. Conclusion

Thank you for the opportunity to comment on this important issue. NMPF continues to see a need for clarification of WOTUS; however, this proposal further complicates the issue and has the potential to do significant harm to dairy farmers. In conjunction with the EPA/COE Interpretive Rule, the concerns are magnified. As shown earlier, dairy farmers have a vested interest in the outcome of this rulemaking and its potential impact on their operations. As indicated above, the current proposal and Interpretive Rule should be withdrawn, revised, and reissued. We hope you accept our offer to work with you both in modifying the proposed rule and in devising a plan for our association and other stakeholders to meet our shared commitment to clean water.

Sincerely,



Jamie Jonker
Vice President
Sustainability & Scientific Affairs