

October 23, 2014

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave. N.W. (1101A)  
Washington, DC 20460

Jo Ellen Darcy  
Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Washington, DC 20310-0108

Sent Via: Electronic Mail and U.S. Post

Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act;  
**Docket ID No. EPA-HQ-OW-2011-0880**

Dear Administrator McCarthy and Assistant Secretary Darcy:

This letter, on behalf of the citizens of the State of Kansas, conveys our concerns over the proposed rule by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers ("Federal agencies") defining "Waters of the United States." (WOTUS). The rule, as proposed, not only has significant impact on Kansas landowners and land managers in their ability to make land use decisions, but also places a burden upon, and impacts the state's ability to manage and regulate the water resources under Kansas jurisdiction.

Kansas appreciates the Federal agencies heeding past comments on guidance regarding WOTUS, and subsequently pursuing rulemaking to clarify the application of the Clean Water Act ("the Act") on waters found in the Nation. However, the hue and cry of commentary and criticism from multiple sectors, including states, indicates the Federal agencies have fallen short in their responsibility to exercise proper Federalism by failing to consult with the states that would be tasked to administer the Clean Water Act under the new definition of what constitutes jurisdictional waters. Kansas has seen improvements in water quality in recent years and corresponding removal of streams from the impaired 303d list. These improvements are the result of appropriate positive coordination of federal and state agencies with individual landowners. The proposed rule changes that balance to lessen the burden on the federal government marginally, while creating significant additional unnecessary requirements for both state agencies and individual landowners. If implemented, Kansas' citizens' motivation to participate in practices that improve the environment will dry up faster than an ephemeral stream after a thunderstorm. The net effect of this rule will be additional expenditures at the state level and a decrease in water quality from our current path.

This is particularly troubling for states, which are recognized by the Act, as the co-regulators with the Federal agencies of the Act. For states to be relegated to the status of interested party, indistinguishable from the myriad of environmental, agricultural and development commenters on the rule, effectively undermines the states' role and discretion for effective administration under the Act. It dilutes their input on the repercussions and consequences of the proposed rule. This is particularly true for Kansas, which believes the rule is not necessary and represents an actual expansion of waters subject to the jurisdiction of the Clean Water Act triggering consequences, unintended or not, that limit the state's and individual landowner's ability to effectively manage waters that are truly significant in value and contribution. For a detailed analysis on the expansive nature of the proposed rule in Kansas, please refer to Appendix A of this letter.

Kansas ranks third in the nation in terms of acres of land devoted to farming. Agriculture comprises 90% of the land use in the State and 99% of our land is held in the private sector. Agriculture and related food and food processing industries contribute an estimated \$53 billion to the state's economy, 39% of the state's GDP. These lands are dissected by a historic stream network created by conditions totally unlike those seen today. Rainfall across Kansas ranges from 40 inches in the southeast to 15 inches in western Kansas. That low western rainfall and resulting runoff along with depths to water from the land surface ranging from 150 – 200 feet to the High Plains Aquifer makes all but the major streams in the west ephemeral, with their channel beds permanently above the water table. These streams, now and forever, only flow in response to localized rainfall. Yet, under the proposed rule, any smaller order streams with a bed, bank and ordinary high water mark may be classed as tributaries, and as such, are considered jurisdictional under the Clean Water Act.

Kansas Surface Water Quality Standards apply the full extent of the Clean Water Act on identified classified waters. These waters include perennial and intermittent streams, but not ephemeral streams, ditches, grass or vegetated waterways or culverts, per State law (K.S.A. 82a-2001(a)(2)). Kansas classified streams are WOTUS, with designated uses established and numeric water quality criteria used to assess and protect those uses. As inventoried on our Surface Water Register, those classified streams comprise 30,620 miles of perennial and intermittent streams. The latest iteration of the National Hydrographic Database identifies numerous smaller order streams in Kansas, most of which are ephemeral, and increases the stream mileage to over 174,000 miles. Hence, if the NHD represents the distribution of tributaries in Kansas, the proposed rule, with its blanket declaration that all tributaries are jurisdictional, cannot be viewed as anything but an expansion in the number of waters under the purview of the Clean Water Act. The current statutory exclusion of ephemeral streams is incorporated in Kansas' Surface Water Quality Standards and has, heretofore, been approved by EPA. Therefore, not only does the proposed rule's treatment of tributaries conflict with State law, but it contradicts previous EPA positions supporting the exclusion of ephemeral streams from all aspects of the Clean Water Act.

The irony here is such an expansion of Federal oversight is not necessary because Kansas has sufficient authorities to protect unclassified streams, including ephemeral streams. While such streams may not be WOTUS, they are waters of the State. This very comprehensive list

includes rivers, creeks, brooks, sloughs, draws, arroyos, canals, springs, seeps, cavern streams, associated alluvial aquifers, natural lakes, oxbows, man-made reservoirs, lakes and ponds, and wetlands (K.A.R. 28-16-28b(ggg)). Despite the lack of designated uses or specific numeric criteria applied to such waters, they are protected by Kansas' narrative criteria (K.A.R. 28-16-28e (b)), keeping those waters free from toxic, harmful and undesirable substances and conditions. State law (K.S.A. 821-2001(a)(1)) allows unclassified waters to become classified, thereby protected as WOTUS, in cases where threatened and endangered species are present, where the stream segments provide important refuge and permit recolonization despite low flows or where such streams are below new or existing NPDES permitted discharges. If Kansas is already effectively protecting these waters, what benefit is there for the expansion of EPA authority? To continuously change the rules hampers growth and limits economic development. In short the proposed regulation is duplicative, costly, and creates an environment of uncertainty.

Kansas has a track record of progressive and innovative protection of its waters, whether WOTUS or otherwise. Our TMDLs are established on a watershed basis and direct corrective action to whatever tributaries contribute to the impairment seen at the outlet of the watershed. We aggressively apply our antidegradation policy of the Water Quality Standards to limit new discharges into previously unimpacted streams. Kansas essentially bans any discharges into wetlands. Our state livestock waste management program has effectively minimized impacts from facilities below the Federal threshold of 1000 animal units since 1977. Wastewater reuse has become a typical management technique, particularly in the semi-arid western regions of the State, eliminating the discharge of associated pollutants to waterways. Again, these protections are applied to waters of the State which are more comprehensive in their sweep than even the proposed definitions of WOTUS. The need for Federal oversight in these matters is dubious, but would become the norm should the proposed rule be adopted.

Where we draw the line in regulation is over land use decisions. That has always been the purview of local government and the rights of individual landowners. Because of the dominance of agricultural land use in Kansas, our citizens' interaction with the Clean Water Act should be minimal, as designed by the Act itself. Section 404(f)(1)(A) exempts "normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products or upland soil and water conservation practices from the provisions of Section 404." Farm and stock ponds, irrigation ditches, the maintenance of drainage ditches and farm roads are all exempt from Section 404 requirements.

Furthermore, the Act's other regulatory program, the NPDES permitting program authorized under Section 402, controls and limits the discharge of pollutants into waters by point sources. But point sources as defined by Section 502(14) do not include agricultural stormwater discharges nor return flows from irrigated agriculture. Clearly, the Act did not intend to impose itself on the practice and routine of farming.

The inclusion of an "interpretive rule" outlining exempt conservation practices is both redundant and limiting. Such a list invites unnecessary Federal scrutiny and requirements on any practice designed to conserve soil and water, but which may not fit neatly among the 56 practices the Federal agencies deem permissible. For example, gradient terraces are employed to reduce

runoff over sloped land, thereby retaining soil and enhancing water conservation in many Kansas farm fields. In fact, EPA cites such terraces among their list of urban stormwater best management practices. Yet, this practice is not included among the 56 "exempt" practices. Is it EPA's position that installation of gradient terraces requires 404 permitting? Kansas has an estimated 290,000 miles of terraces protecting over 9 million acres, this ranks second in the nation. At today's costs this represents over \$1.9 billion in conservation investment by landowners and government agencies. Requiring permits on new and even rebuilt terraces will hinder the implementation of this widely accepted best management practice. The clarification sought by the proposed rule as to its application has, in fact, introduced more questions than answers. We are concerned that the interpretive rule, in concert with the proposed rule, will quell the desire of many agricultural producers to employ conservation practices, leading to a net increase in pollutant loading from our lands. We already have reports those voluntary conservation efforts to protect playa lakes in western Kansas are diminishing for fear of Federal interference.

It is clear to Kansas that the Federal agencies intend the proposed rule to facilitate the issuance of Section 404 permits while reducing staff workloads by eliminating the need for site-specific determinations on jurisdiction. By claiming broad categories such as tributaries are jurisdictional; all determinations may be made from the desktop of Federal staff through maps and aerial photography. With the inclusion of adjacent waters to the coverage provided by tributaries, positive jurisdiction determinations will become automatic, without consideration of site-specific conditions. The Federal agencies believe all tributaries contain a bed, a bank and an ordinary high water mark and channels with those three characteristics are jurisdictional, regardless of flow conditions. Kansas refutes that, noting especially in the case of western Kansas streams, that the location of the channel above the regional water table, the frequency of flow occurring in the channel and the longitudinal distance between the channel site and actual downstream perennial or seasonal water warrant equal consideration. The latter factors play to the concept of "significant nexus" and connectivity among streams, and more closely embrace Justice Kennedy's insistence that mere hydrologic connection does not bestow ecological significance to certain waters.

The Federal agencies believe that all tributaries should be jurisdictional because they are connected to the stream system and are poised to contribute flow and material to downstream waters, thereby influencing the physical, chemical and biological nature of those waters. Kansas believes connectivity in the western stream networks is tenuous and episodic, at best. As an example, Kansas cites recent flow conditions seen on an intermittent stream, the Smoky Hill River above Cedar Bluff Reservoir in Gove and Trego counties (see Appendix B to this letter). While the Smoky Hill River is a classified water under Kansas Water Quality Standards, and therefore, a WOTUS, it nonetheless is illustrative of the typical flow conditions seen in western Kansas that contradict the belief that upstream-downstream connections should automatically be assumed.

Rains in August 2013 induced runoff in Gove County as noted by the rise in flow seen at the U.S. Geological Survey gaging station at Elkader, Kansas. The corresponding flow seen 50 miles downstream at the USGS station near Arnold, Kansas is attenuated and much reduced in volume and peak. Subsequent rains later in August triggered a rise in flow at Arnold, but because of the localized nature of the rains, no response was seen upstream at Elkader.

Challenging the proposed rule's principle that all tributaries make expected contributions to downstream waters, the relative change in pool elevation in Cedar Bluff Reservoir, downstream

from the Arnold station, is negligible and insignificant. Stream connectivity on the Smoky Hill River reflects the findings of EPA's Scientific Advisory Board, who cautioned the Federal agencies that connectivity is not a binary attribute, but instead has a wide continuum of significance. Our concern here is not with a larger stream such as the Smoky Hill River, but instead where the proposed rule will take us, i.e., the tributary to the tributary to the tributary of the Smoky Hill River. Those small order streams will be, in fact, ephemeral and the significance of their impacts very marginal, if even measurable. Flow movement in Kansas ephemeral streams is more likely to move vertically downward by deep percolation than longitudinally along the channel in the downstream direction.

This federal expansion decreases the competitiveness of businesses and increases costs for all residents of the state. Sweeping application of clean water programs on such marginal waters will force private landowners, industries and local government to expend resources to protect those waters with little environmental benefit. They will see additional vulnerability to third party litigation and citizen suits that will have standing through broader jurisdiction under the Act. Mitigation for impacts on ephemeral channels and adjacent waters will escalate the costs of projects intended to improve water supply and conservation. State pesticide programs and regulations will need to be revised as the line between applications to terrestrial and aquatic resources becomes blurred by the proposed rule. Counties will become restrained in routine ditch maintenance or control of noxious weeds for fear of running afoul of the Act. New permitting conditions and limitations for land applications of livestock waste or wastewater sludge that affect minor drainages add operational costs to agricultural and municipal waste water management.

Because of the sweeping scope of the proposed rule to all aspects of the Clean Water Act, the quest by the Federal agencies to reduce the burden of their staffs' workload in making jurisdictional determinations will shift other workload burdens to Kansas agency staff. Application of the Clean Water Act through water quality standards, total maximum daily loads, 305b assessments, or certain permitting, e.g., general NPDES permits for pesticide applications on, over or near waters that see flow only on the occasion of localized rain, will divert and distract State resources away from the more pressing priority of protecting the established surface waters of the State. It cost Kansas over \$300,000 annually (in 2004 dollars) to conduct 500 simplified, expedited Use Attainability Analyses (UAAs) on Kansas streams. Should the proposed rule come into force, Kansas can expect to expend significantly greater amounts over a number of years re-doing those UAAs and performing new UAAs as our universe of classified streams expands many times over with the inclusion of ephemeral tributaries.

The impetus for the proposed rule was clarification of Clean Water Act jurisdiction after the Supreme Court's *SWANCC* and *Rapanos* decisions, decisions that narrowed the scope of Federal authority when protecting wetlands from impacts of solid waste disposal and commercial development through the Section 404 program. Two tests for jurisdiction arose from the *Rapanos* decision. The first test came from the plurality of the Supreme Court as expressed by Justice Scalia that jurisdiction applied to relatively permanent waters, i.e., not ordinarily dry channels. The second test came from Justice Kennedy's introduction of finding a significant nexus of waters having an ecologic interconnection (but not a speculative or insubstantial connection). The proposed rule overrides the Scalia test and parses the Kennedy test to equate connectivity to significant ecological function, thereby promoting a near boundless view of Federal authority. Furthermore, the sweep of the rule applies all Clean Water Act



programs to an expanded population of waters, resulting in extension to agricultural activities that the Act has historically viewed as exempt. The resulting overreach by the Federal agencies complicates matters better suited for State resource management. Proclamations from the Federal agencies that the proposed rule represents no expansion in jurisdiction under the Clean Water Act contradicts recent statements from EPA that 60% of waters in the Nation need Federal protection. And yet, historical positions and documents of the Federal agencies clearly establish that ephemeral channels were not viewed automatically as WOTUS.

Kansas acknowledges that some ephemeral streams may actually be significant contributors affecting the conditions of downstream waters. Therefore, we believe such streams should not be dealt as tributaries as outlined in the proposed rule but viewed by the Federal agencies as "other waters".. That approach requires case-by-case determinations, which is an appropriate evaluation for ephemeral streams. This analysis does add to the work burden of Federal staff, but correct jurisdictional determinations demand such an investment. Under the proposed rule, Federal expenditure of resources and energy will be forthcoming as necessary in rebutting appeals of the automatic inclusion of all tributaries as jurisdictional. Kansas believes the citizens of the State are better served when determinations are done upfront in light of all available data pertinent to the issue at hand. State agency personnel have the knowledge, background and experience in assisting the Federal agencies in jurisdictional determinations with these specific "other waters". The interaction of Federal and State personnel better advances cooperative Federalism than the blanket application of the Clean Water Act envisioned under the proposed rule. As a backstop, many of the waters found not to be jurisdictional are protected, where warranted, by State authorities applied to waters of the State. As stated previously, the watershed orientation of programs, such as the Kansas TMDL program, applies corrective actions to any contributing sources within that watershed, regardless if they lie on classified or unclassified waters.

In summary, we urge retraction of the proposed rule and associated interpretive rule in their current state, in order for the Federal agencies to properly clarify jurisdiction of the Clean Water Act, particularly regarding Section 404 protection of wetlands without trampling current State authorities. In its current form, the proposed rule will create an expanded universe of Waters of the United States in Kansas, many of which will be ephemeral in nature and all beholden to the full suite of Clean Water Act programs. Kansas ephemeral streams do not automatically possess a significant nexus and more often than not, do not impose impacts on the downstream waters actually used by the citizens of Kansas. Tributaries in western Kansas need more than a bed, bank and high water mark to delineate significance. The frequency of flow supported by regional ground water is equally important and will determine the degree that such channels actually make downstream contributions.

Application of enhanced Federal oversight is not necessary, given the definition of "waters of the State" within the Kansas Water Quality Standards and the protective narrative provisions provided to such waters by State authority. The proposed rule will result in unnecessary expenditure of finite resources by State, local and private agencies and interests on matters of marginal environmental significance. The proposed rule will chill any voluntary investment and application of protective conservation practices by our citizens who eschew interacting with the Federal agencies, while directing other programs of the Clean Water Act away from real areas of real need.

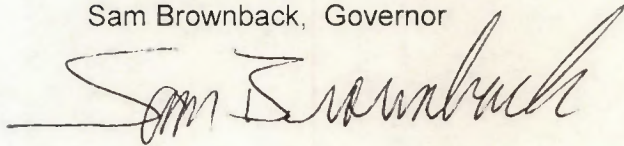
The next steps taken by the Federal agencies must adhere more closely to cooperative Federalism and not render lip service to consultation with the States as required by Executive Order 13132. Whatever shape the proposed rule takes will have profound impact on the State

agencies tasked with applying and administering the Clean Water Act on Kansas waters. Those implementing the rule should have a say in the scope of the rule. If the Federal agencies believe there are gaps in the protective coverage provided by State of Kansas authority, they need to express their concerns and intentions of solving those shortcomings with any proposed rule. Failing to do so leaves only speculative and insubstantial concerns, precisely contradicting Justice Kennedy's caution in establishing "significant nexus" for waters

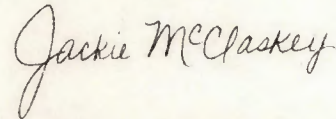
Kansas stands ready to address any challenges to protecting our natural resources and maintaining water quality at levels supportive of the uses designated for our streams, lakes and wetlands. The proposed rule places an undue burden on the agriculture and energy industries, two of the most important contributors to the Kansas economy. It does nothing to help us protect our natural resources and, in fact, the proposed rule introduces more challenges into the process of environmental protection and will likely reduce voluntary participation in land stewardship. This rule needs to be withdrawn and any future discussions should begin with the full consultation and advice of the States.

Sincerely,

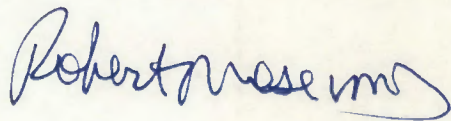
Sam Brownback, Governor



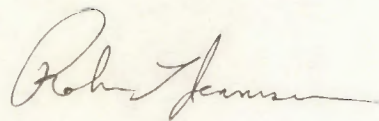
Jackie McClaskey, Secretary of Agriculture



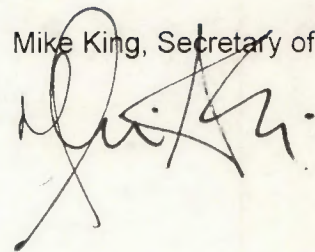
Dr. Robert Moser,  
Secretary of Health and Environment



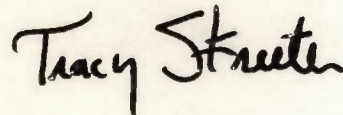
Robin Jennison, Secretary of Wildlife  
Parks and Tourism



Mike King, Secretary of Transportation



Tracy Streeter, Director Kansas Water  
Office



## Appendix A: Expansion of Jurisdictional Waters in Kansas under the Proposed Rule: An Analysis

While the EPA/ACOE economic analysis states the Rule will expand the jurisdictional scope of the CWA by only 2.7%<sup>1</sup>, Kansas analyses show the expansion is significantly larger – over 400%. The basis for the expansion lies in the treatment of ephemeral waters and ditches. The preamble to the Rule states:

*“As discussed in this preamble and Appendix A, tributaries as proposed to be defined perform the requisite functions for them to be considered “waters of the United States” by rule..... All tributary streams, including perennial, intermittent, and ephemeral streams, are physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”*

We believe this statement and statements made by EPA and the ACOE during numerous webcasts and conference calls indicates all ephemeral waters would be presumptively determined to be “tributaries” and thus, Waters of the United States (WOTUS). In Kansas we have identified approximately 31,000 miles of perennial and intermittent waters that have been treated as WOTUS for several decades. While the number has fluctuated slightly, 31,000 miles is a good approximation. The National Hydrography Dataset (NHD), which the USGS states is “...used to portray surface water on The National Map...”<sup>2</sup> claims Kansas has 174,410 miles of streams. Thus, NHD apparently identifies approximately 133,000 additional miles of ephemeral streams. As per the preamble to the Rule and EPA/ACOE statements, the additional 133,000 miles would result in a 460% increase in the number of Kansas waters presumed to be jurisdictional under the Rule. A far cry from the 2.7% increase predicted in the EPA/COE economic analysis.

Although not documented in the preamble, EPA and the ACOE have asserted on calls and webcasts with stakeholders that ephemeral waters were *always* considered WOTUS, thus including them in the definition of tributaries was not an expansion. We do not believe ephemeral waters have *always* been considered *de facto* tributaries for CWA jurisdictional purposes. We base our belief on four specific items:

1. **Approved Kansas State Water Quality Standards (WQS).** By copy of a November 2, 2003 letter from Mr. Leo J. Alderman, Director of the Water, Wetlands, and Pesticide Division at EPA’s Region 7 Office to Roderick L. Bremby, Secretary of KDHE, EPA approved Kansas Water Quality Standards submitted to EPA on September 26, 2003. An approved provision in those WQS stated that “*Classified streams segments other than those described in subsection (a)(1)(E) shall not include ephemeral streams, grass, vegetative, or other waterways; culverts; or ditches.*”

---

<sup>1</sup>Economic Analysis of Proposed Revised Definition of Waters of the United States. March 2014. U.S. Environmental Protection Agency. Retrieved September 12, 2014. [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_economic\\_analysis.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf)

<sup>2</sup> U.S. Geological Survey - National Hydrography Dataset. U.S. Geological Survey, 2014. Retrieved September 15, 2014. <http://nhd.usgs.gov/>



“Classified streams” are those streams in Kansas that are assigned designated uses, and the designated uses are supported by water quality criteria (K .A.R. 28-16-28d). That provision of the Kansas WQS was also approved by EPA.

Kansas WQS are developed pursuant to 40 CFR §131. 40 CFR §131.2 states in part “A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act).”

Therefore, Kansas considers the classified streams to be WOTUS within Kansas’ borders since they have designated uses and criteria and serve the purposes of the Clean Water Act. Further, since EPA approved Kansas WQS that unconditionally exclude ephemeral waters; we have to conclude EPA has not always considered ephemeral waters to be considered jurisdictional under the CWA.

Similarly, we do not believe ditches were ever intended to be included in the definition of WOTUS. Our EPA-approved WQS specifically excluded ditches. Thus, to bring *any* ditches under the regulatory umbrella of the CWA would clearly be an expansion, and an expansion well beyond the 2.7% estimated by EPA and ACOE.

2. **EPA/ACOE Memorandum date June 5, 2007, titled *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States***<sup>3</sup>. The memorandum provided guidance on implementing jurisdictional water determinations based on the Supreme Court cases referenced in the title of the memorandum. The format of the guidance was to describe waters where EPA and the ACOE would:

- a. Assert jurisdiction,
- b. Not exert jurisdiction, and
- c. Exert jurisdiction based on a “*fact-specific analysis to determine whether they have a significant nexus with a non-navigable water*”

Item c, above, is the key to Kansas argument regarding automatic inclusion of ephemeral waters into WOTUS. The document introduces the term “non-navigable tributaries that are not relatively permanent”. Those waters are further defined to mean “...waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).” Clearly this definition describes ephemeral waters. Thus, as late as 2007, EPA and the ACOE did not include ephemeral waters in the subset of tributaries. They were unmistakably considered “other” waters requiring a site-specific jurisdictional determination. Clearly, this document supports the Kansas contention that the Rule is greatly expanding its reach.

---

<sup>3</sup> Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States. US Environmental Protection Agency, June 5, 2007. Retrieved September 12, 2014. [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007\\_6\\_5\\_wetlands\\_RapanosGuidance6507.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf)

In addition, the document (with emphasis added) states:

*“...ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. **Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water.**”*

The guidance clearly acknowledges that ditches may contribute flow downstream (usually the purpose of a ditch) but is still not jurisdictional. The proposed Rule, however seems to ignore the previous guidance by not only including ditches in the rule, but sweeping them into the definition of a “tributary” based on the following Rule language:

*“A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.”*

This definition precludes EPA or the ACOE from mandatory site-specific evaluations of ditches to determine significant nexus. Again, the sweeping of numerous ditches (including roadside ditches) into the definition of a “tributary” is a significant expansion of CWA jurisdiction.

3. **ACOE guidance dated June 5, 2007 titled *Questions and Answers for Rapanos and Carabell Decision***<sup>4</sup>. The Question and Answer (Q&A) was published concurrently with EPA/ACOE memorandum referenced in item 2, above but published only as ACOE guidance. Q&A 19 specifically addresses ephemeral waters and states:

*“19. How does the Rapanos guidance address ephemeral waters?”*

- A. *CWA jurisdiction over an ephemeral water body, and its adjacent wetlands, if any, will be assessed using the significant nexus standard. An ephemeral water body is jurisdictional under the CWA if the agencies can demonstrate that the ephemeral water body, in combination with its adjacent wetlands, if any, will have a significant effect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of traditional navigable water.”*

---

<sup>4</sup> Questions and Answers for Rapanos and Carabell Decision. US Corps of Engineers, June 5, 2007. Retrieved September 12, 2014.

[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/rapanos\\_qa\\_06-05-07.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf)

The guidance clearly states that ephemeral waters will be subject to a significant nexus test. This implies a case-by-case analysis.

However, the preamble (with emphasis added) to the proposed Rule states:

*"In addition, the agencies propose that **"other waters"** (those not fitting in any of the above categories) **could be determined** to be "waters of the United States" **through a case-specific showing** that, either alone or in combination with similarly situated "other waters" in the region, **they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas.**"*

In the context of the proposed Rule, ephemeral waters would be properly placed in the "other waters" category to comport with the ACOE. As discussed above, however, the Rule sweeps ephemeral waters into the "tributary" category where a site-specific evaluation and significant nexus need not be evaluated. This again supports Kansas contention the Rule has broadly swept ephemeral waters into the "tributary" category as opposed to the "other waters" category and greatly expanding the scope of jurisdictional waters.

With respect to ditches, the ACOE guidance addressed ditches in Q&A 18 by stating (with emphasis added):

*"18. How does the guidance address swales, erosional features, and small washes?*

- A. Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. **Likewise, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States, because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.**"*

The Q&A states significant nexus is necessary to determine if a ditch is jurisdictional. As indicated in item 2 above, ditches are presumed to be "tributaries" which would not require any type of nexus testing. Again, we see this as an unequivocal expansion of CWA jurisdiction.

**4. Recent editorial, speech, and blog comments made by Administrator McCarthy.<sup>5</sup>**

In those remarks, the Administrator stated *"Unfortunately, 60 percent of our nation's streams and millions of acres of wetlands currently lack clear protection from pollution under the Clean Water Act."* Those statements leave the clear impression that the majority of US waters do not currently have clear protection under the CWA. Thus, if those 60 percent that "lack clear protection" are brought under the umbrella of the CWA, a significantly larger expansion than estimated in the economic analysis for the Rule.

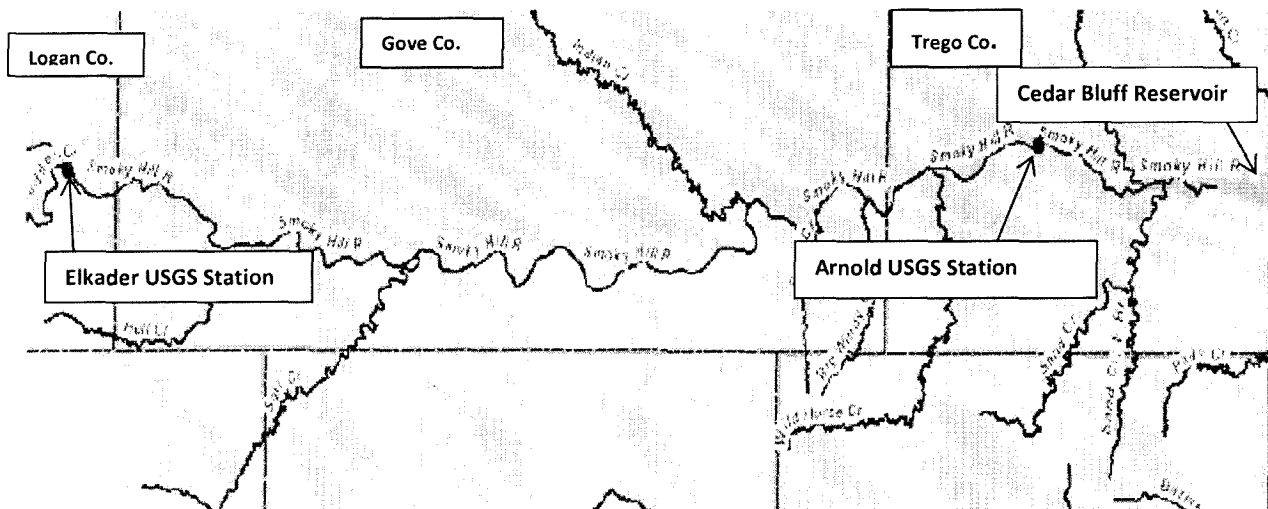
---

<sup>5</sup> [http://www.huffingtonpost.com/gina-mccarthy/clean-water-act\\_b\\_5900734.html](http://www.huffingtonpost.com/gina-mccarthy/clean-water-act_b_5900734.html)

To reiterate, we believe the evidence is clear that by including ephemeral waters and ditches in the definition of “tributary”, EPA and ACOE would significantly expand the scope of CWA jurisdiction – much more so than the 2.7% estimated in the EPA/ACOE economic analysis. As such, the economic analysis of the rule is flawed, and does not provide the public with an accurate accounting of the impact of the proposed Rule. For that reason alone, the Rule should be withdrawn.

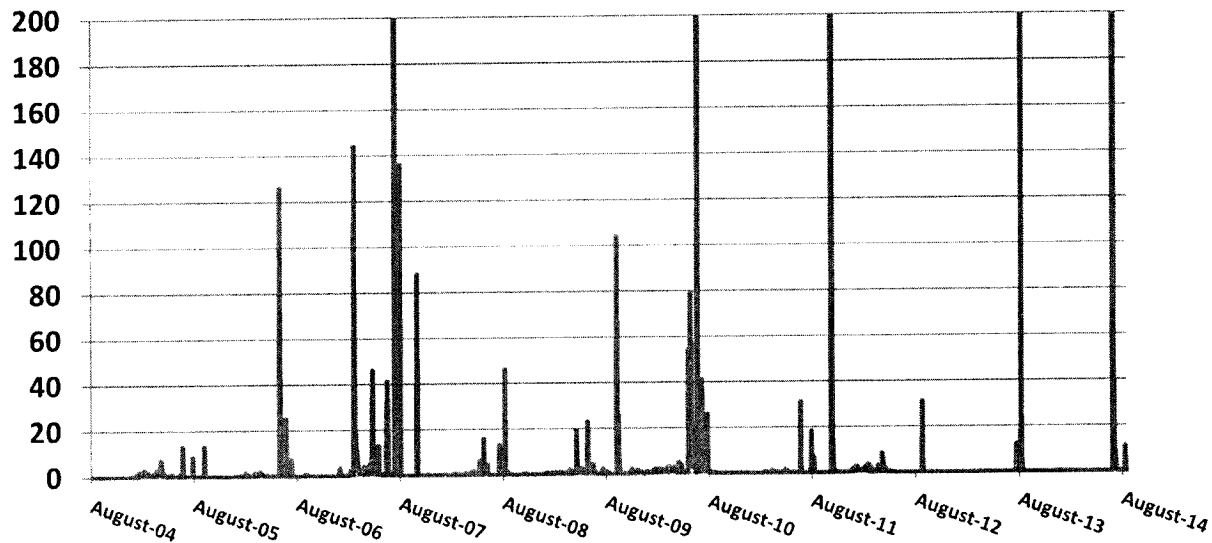
#### **Appendix B: Analysis of Streamflow Movement along the Smoky Hill River**

The Smoky Hill River above Cedar Bluff Reservoir is an intermittent, classified stream identified in the Kansas Surface Water Register comprising numerous stream segments with varying designated uses.



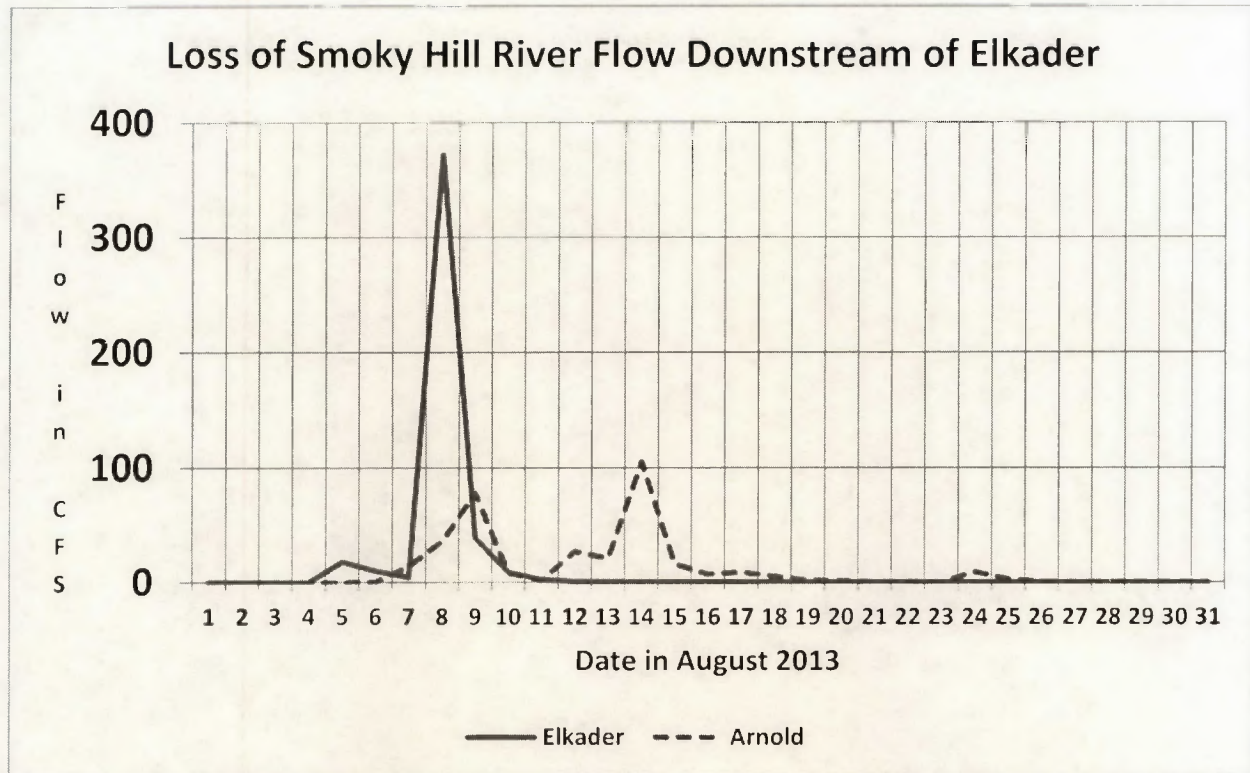
U.S. Geological Survey has been measuring flow on the Smoky Hill River at Elkader since 1939 and 50 miles downstream near Arnold since 1950. Seasonal peaks in streamflow are seen on the river separated by extended periods of low or no flow. The flow patterns are typical of an intermittent stream in Kansas.

## Daily Flow on Smoky Hill River near Elkader, 2004-2014



In August 2013, above average rains fell in Logan County (4.6"), near normal rains fell in Gove County (2.4") and below average precipitation fell in Trego County (1.25"). Flows on the Smoky Hill River at Elkader responded to rains falling the first 10 days of the month, particularly in Logan County. Less rain fell to the east in Gove and Trego counties. A second period of rainfall occurred between August 13-15, with more rain falling in eastern Gove and western Trego counties. That rainfall induced a rise in flow at the downstream Arnold station.

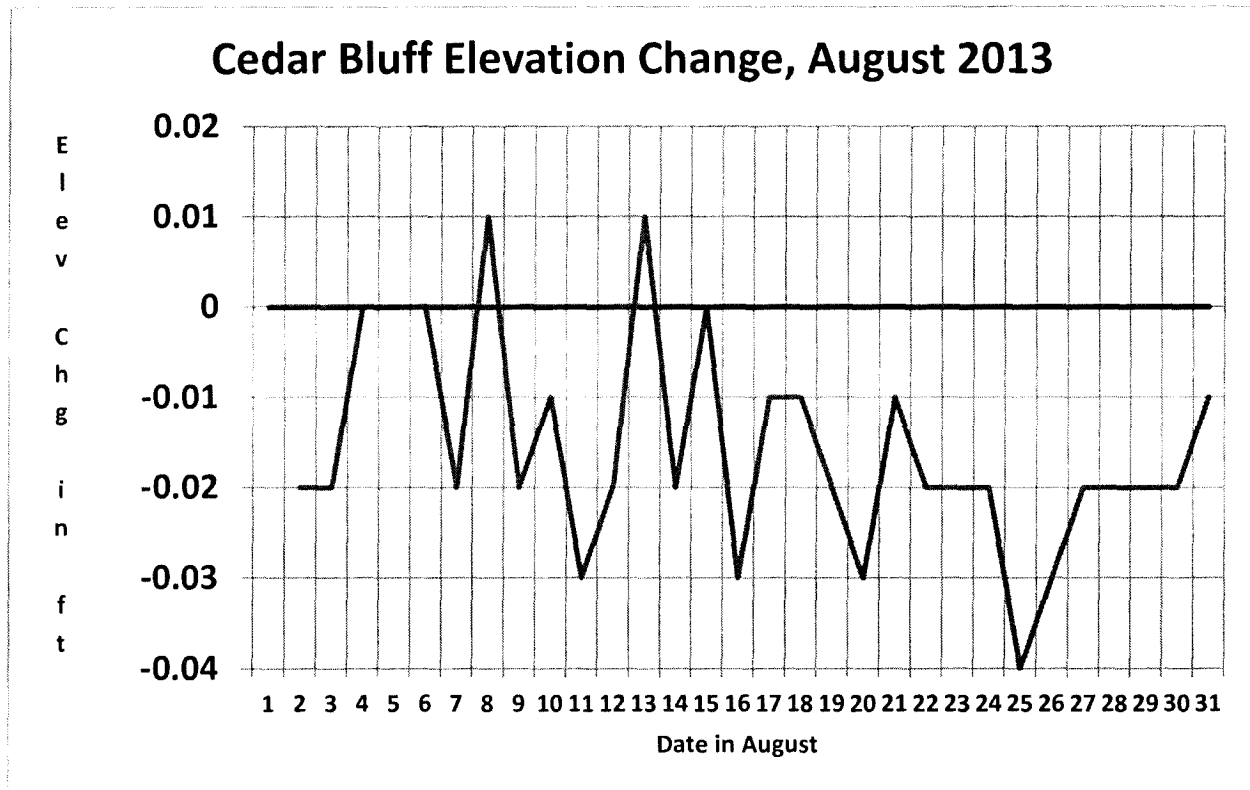




The first rain generated over 900 acre-feet of streamflow at Elkader during the first 12 days of August. Flows at Arnold only totaled 369 acre-feet during the same period. The second rain spurred 315 acre-feet of flow at Arnold from the 13<sup>th</sup> to the end of the month. Only 5 acre-feet of flow occurred at the upstream Elkader station during the same timeframe.

The flow patterns indicate the nature of flow along stream channels of western Kansas that see streamflow only a portion of the time. Flows from upstream are often induced vertically downward via percolation through the channel bed rather than moving in the downstream direction. The result is a losing stream. Conversely, flows seen at the downstream station, Arnold, may or may not be related to flow conditions seen upstream. More often, those flows are direct result of localized rainfall generating runoff to the Smoky Hill River. There is a degree of separation among the stream segments between the two USGS stations which contradicts the constant connectivity presupposed by the tributary provision of the proposed rule of the Federal agencies.

Meanwhile, the most significant water resource in the region, Cedar Bluff Reservoir seemed oblivious to flows in the major tributary leading to it in August of 2013. The relative change in pool elevation registered by the Bureau of Reclamation at the reservoir indicates the most inconsequential increase during the two flow periods. Otherwise, the pool consistently lost volume to the pervasive evapotranspiration forces that limit the availability of surface water in western Kansas. The lack of response belies the notion of significant contribution to the lake from the upstream watershed during these runoff events. Again, flows are more than likely to be drawn downward into the underlying unconsolidated deposits of western Kansas streams than to move longitudinally and contribute flow and loads to downstream reaches.



Even this phenomenon is not constant along the Smoky Hill River. For example, rains at the end of June generated sufficient runoff at both USGS stations to create notable hydrographs and by the Fourth of July Cedar Bluff Reservoir had seen a jump in elevation of over 2.5 feet. There was still volumetric loss of flow in the downstream direction and the primary driver for the conditions was a heavy pattern of daily rain during the last weekend of June. Once rains ceased, the typical disjointed, upstream-downstream relationship in flow conveyance and loss returned to the Smoky Hill River.

These observations lend credence to the admonition of EPA's Scientific Advisory Board that stream connectivity is not a binary principle; there are varying degrees of significance to the levels of connectivity among streams, especially when surface water is limited and renders streamflow to an intermittent or ephemeral regime.