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November 14, 2014

Ms. Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Jo-Ellen Darcy
Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, D.C. 20310-0108

Sent via e-mail: ow-docket@epa.gov,

Subject: Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The State of Utah has reviewed the April 21, 2014, U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army (Army) proposed rule defining "Waters of the United States" under the Clean Water Act (CWA). Under the Proposed Rule, EPA and Army have crafted a complex set of regulatory definitions. The intended purposes of these definitions are to clarify the reach of the jurisdictional waters provision of the Clean Water Act and to reconcile various interpretations of the law contained in opinions of the United States Supreme Court. However, these proposed new definitions include new and poorly defined terms, and appear based upon ambiguous and untested legal theories. Rather than establishing a functional, clear set of standards, defining jurisdictional parameters for the administration of a clean water program, this approach is more likely to result in a return visit to the Supreme Court. The state prefers the EPA and Army establish a functional, clear set of standards, establishing jurisdictional parameters for the administration of a clean water program.

The Proposed Rule will drastically alter the scope of waters currently subject to regulation under the CWA without balancing the effects of the rule on the ability of citizens to make reasonable use of their lands, and upon the ability of the state, as the entity delegated authority under the CWA, to provide a reasonable compliance program. Many aspects of the

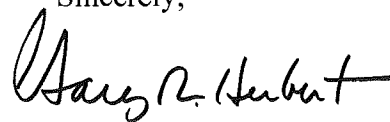
state's CWA permitting program are affected by the proposed rule. These include programs for surface water permitting, Total Maximum Daily Loads (TMDLs), 401 Certification, biosolids, pesticides, storm water, and monitoring and assessment under Section 305(b) and 303(d) of the Clean Water Act. In addition, the Proposed Rule has the potential to severely affect agricultural operations and to increase the regulatory burden on state agencies, which provide funding for education, and which provide for the transportation network within Utah.

The Proposed Rule does not represent a cooperative venture among the states and the federal government to seek a more efficient and effective water quality permitting program. Instead, the Proposed Rule increases uncertainty for many landowners, advances a severe disconnect between permitting and water conservation, and dramatically underestimates the costs to landowners for compliance, as noted by the Small Business Administration. For these reasons, the state strongly requests the EPA and the Army Corps immediately withdraw the Proposed Rule and redefine the goals and objectives of the entire effort before proceeding. Comments upon the details of the Proposed Rule are attached as a consolidated response from the various state agencies, which would be affected by the rule, and on behalf of the citizens of Utah who would have the burden of compliance dramatically raised by the effects of this proposal.

The EPA and the Army should revisit the process to establish the standards for jurisdictional waters. The constitutional authority, which drives the foundation of the Clean Water Act, does not require that the standards for implementation of the jurisdictional waters program be interpreted on a national scale. The differences in topography, geology, and ecology within the vast expanses of the United States argue for a varied approach to creating a workable water quality permitting program. The two federal agencies should work with the states to create a program within regional areas of influence. In this manner, the differences caused by prairie pothole geology can be handled in the appropriate manner while the dry desert washes of the Southwest can be handled by persons with expertise in those areas. While retaining the ultimate approval authority, the EPA and the Army should sponsor regional drafting groups, composed of state personnel with an interest and expertise in each regional area.

We appreciate the opportunity to comment on the Proposed Rule. Utah is ready to coordinate our efforts with those of the Army and the EPA, and to assist in the creation of a workable Clean Water Act permitting program, after the withdrawal of this Proposed Rule.

Sincerely,



Gary R. Herbert
Governor

State of Utah
Comments upon the Draft Rule
Concerning the Definition of “Waters of the United States”
79 Fed. Reg. 22188

I. Introduction

The State of Utah offers these comments based on the state’s experience implementing the Clean Water Act (CWA). These comments have been prepared in consultation with the Utah Department of Agriculture and Food, the Office of Energy Development, the Department of Environmental Quality and the Department of Transportation.

The Proposed Rule operates by first defining core waters—that is, those waters that would fall within the traditional meaning of the term “navigable waters of the United States”: “waters that are ‘navigable in fact’ or readily susceptible of being rendered so.”¹ These core waters are waters that have been traditionally regulated under the CWA and the River and Harbors Act pursuant to Congress’s Commerce authority. Core waters also include interstate waters, interstate wetlands, territorial seas, impoundments of these types of waters, and tributaries.²

The Proposed Rule offers many new definitions of existing terms including “tributaries,” “significant nexus,” and “adjacent.” At the same time the Proposed Rule introduces new terms like “gullies and rills,” and “landscape unit” without offering any corresponding definitions for the new terms. The Proposed Rule also provides a list of waters that are exempt from EPA/Army jurisdiction unless they fall under one of the existing definitions.

The state’s primary concerns include: (1) the agencies’ failure to consult with the state prior to issuing the Proposed Rule; (2) the improper application of the *Rapanos*³ decision and (3) the myriad of confusing definitions that unlawfully enlarge the scope of the agencies’ CWA jurisdiction.

II. Rapanos Decision

Since passage of the CWA, the U.S. Supreme Court has waded into the debate on what constitutes “navigable waters” or “waters of the United States” for purposes of EPA and Army jurisdiction.⁴ In the Proposed Rule, the EPA and Army purportedly rely on the reasoning of a

¹ *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (quoting *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, at 563 (1870)).

² 40 C.F.R. § 230.3(s)(1)-(3).

³ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁴ After Congress enacted the CWA, the Army initially adopted a traditional judicial definition for the Act’s term “navigable waters” wherein waters had to be “‘navigable in fact’ or readily susceptible of being rendered so.” *Rapanos v. United States*, 547 U.S. at 723 (plurality opinion) (quoting *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 563 (1870)). After a district court ruled this definition was too narrow, the Army went to the opposite extreme, issuing regulations that sought to define “waters of the United States” as extending to the limits of Congress’ authority under the Commerce Clause. *Rapanos*, at 724. See also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (Court upheld a portion of regulations to include wetlands that “actually abut[ted] on” traditional navigable waters); But see *Solid Waste Agency of Northern Cook County v. Army of Engineers*, 531 U.S. 159, 164 (2001), (Court held that Army’s assertion of jurisdiction over waters “[w]hich are or would be used as habitat” by migratory birds exceeded Army’s CWA authority because CWA did not reach “nonnavigable, isolated intrastate waters.” *Solid Waste Agency*, at 171).

recent Supreme Court decision, *Rapanos v. United States*, 547 U.S. 715 (2006) for the sweeping regulatory changes.

In *Rapanos* the Supreme Court narrowed the EPA and Army’s regulatory authority under the CWA. *Rapanos* involved the Army’s attempt to assert CWA jurisdiction over several wetlands adjacent to nonnavigable tributaries of core waters. The Court’s majority consisted of two opinions: First, Justice Scalia wrote a plurality opinion on behalf of four Justices rejecting the Army’s expansive interpretation of “waters of the United States.”⁵

Second, Justice Kennedy also rejected the Army’s interpretation, explaining that CWA jurisdiction was only appropriate where the waters involved are “waters that are navigable in fact or that could reasonably be so made” or secondary waters that have a “significant nexus” to in-fact navigable waters.⁶ Writing only for himself, Justice Kennedy articulated that a “significant nexus” exists only where the wetlands, “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.’”⁷ Justice Kennedy explained that the agencies’ overbroad approach is impermissible because it “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”⁸ Justice Kennedy added that an interpretation that permitted the agencies to assert jurisdiction over a “wetlands (however remote)” or “a continuously flowing stream (however small)” would similarly fall outside of the CWA’s reach.⁹

EPA and Army purportedly rely on Justice Kennedy’s concurrence as the basis for many of the changes. However, as demonstrated below, the agencies mischaracterize key aspects of the opinion.

III. Significant Nexus Test As Applied to “Other Waters” Fails To Provide Certainty

The Proposed Rule proposes to include as jurisdictional “other waters, including wetlands” that are not adjacent to core waters but which may be hydrologically connected to core waters. Under the Proposed Rule this would be accomplished when “other waters” are found to be connected under the “significant nexus” test identified by Justice Kennedy in the *Rapanos* decision. However, this approach is fraught with problems both inherently and as applied to specific circumstances.

First, the Proposed Rule does not meaningfully quantify the magnitude of the term

⁵ The plurality first explained that “[i]n applying the definition of [‘waters of the United States’] to ‘ephemeral streams,’ ‘wet meadows,’ storm sewers and culverts, ‘directional sheet flow during storm events,’ drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Army has stretched the term ‘waters of the United States’ beyond parody.” *Rapanos*, at 734. The plurality then held that “waters of the United States” covers only “relatively permanent, standing or continuously flowing bodies of water” and secondary waters, which have a “continuous surface connection” to these relatively permanent waters. *See Rapanos*, at 739-42. In contrast, “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters.” *Id.* at 742.

⁶ *Rapanos*, at 717, 759.

⁷ *Rapanos*, at 780 (emphasis added).

⁸ *Rapanos*, at 778.

⁹ *Rapanos*, at 776-77.

"significant." The Proposed Rule states that a significant nexus exists if there is more than an insubstantial or speculative effect on the chemical, physical or biological integrity on core waters. Dictionaries define "significant" to mean "considerable", "important", "substantial", "meaningful", or "very large." EPA should avoid qualitative language such as the term "significant" in favor of specific standards. The state suggests "significant" could be quantified at 15% of the contributing flow or pollutant loading. In other words, if a non-adjacent water or wetland contributes greater than 15% of the flow or pollutant loading to a down-gradient jurisdictional water, then the "significant nexus" test would be satisfied. If not, the non-adjacent water or wetland would not be considered to have a significant nexus to the down-gradient jurisdictional water and the former would be deemed non-jurisdictional. This would remove the uncertainty that surrounds whether "other waters" would be jurisdictional. A provision could be included in the rule for the Army, or others, to make a case for jurisdiction even when the isolated water or wetlands contribute less than 15% of the flow to the jurisdictional water. But the burden of proof would be on the Army to rebut the presumption that flow or pollutant loading less than 15% is not significant. The Army could reasonably deal with those outliers and bring much greater certainty to the jurisdictional determinations of "other waters."

Second, the Proposed Rule expands the language in *Rapanos* by substituting the word "and" with "or." Justice Kennedy writes a "significant nexus" exists only where the wetlands, "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'."¹⁰ In contrast, the Proposed Rule would direct the EPA and Army to determine a significant nexus exists when "a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, *or* biological integrity of a water identified in paragraphs (a)(1) through (3) of this section." (emphasis added). While Justice Kennedy elucidates a test that requires affect on the chemical, physical *and* biological integrity of downstream core waters, the Proposed Rule would only need an effect from one of these aspects for the water to be determined as having a significant nexus, and thus fall under EPA and Army jurisdiction. The Proposed Rule therefore fails the language of Justice Kennedy's test.

Third, the Proposed Definition for significant nexus contains terms with far reaching implications. The Proposed Rule defines significant nexus in part as "a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section)."¹¹ Under the Proposed Rule, waters are similarly situated when they "perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United

¹⁰ *Rapanos*, at 780 (emphasis added).

¹¹ 79 Fed. Reg. 22263. "(7) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section."

States’ so that they can be evaluated as a single landscape unit....”¹² This standard will require a wide-ranging geographic analysis to determine the jurisdictional status of a single wetland. Applying this type of standard on a case-by-case basis is inherently time-consuming and expensive.

The preamble to the Proposed Rule attempts to address these concerns by providing broad guidelines for determining whether waters are “similarly situated.” However, even with these guidelines, there is considerable room for case-by-case determinations that will require extensive factual investigations. If EPA and the Army choose to follow the option to make certain determinations regarding the application of the “significant nexus” standard to specific categories of waters, any such determinations should be made through notice-and-comment rulemaking, not guidance, and any determinations would need to be supported by sound science.

IV. List of Exempted Waters Requires Further Clarification

The exemptions in the Proposed Rule contain qualifying language which ultimately serves to completely undercut the possibility of those waters actually being exempt from EPA/Army jurisdiction.

A. Ditches

The Proposed Rule identifies two types of roadside ditches as non-jurisdictional: “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” and “Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4)” - i.e., to traditionally navigable waters. While aiming for clarity, EPA and Army fail to define the word “uplands” in either the proposed or current rule. The term needs to be defined or the wording should be changed to “terrestrial ecosystem” which is the terminology currently used by EPA.

The preamble to the Proposed Rule also provides “[h]istorical evidence, such as photographs, prior delineations, or topographic maps, may be used to determine whether a water body *was excavated* wholly in uplands and drains only uplands, and has less than perennial flow.”¹³ (emphasis added) This implies that the determination of whether the ditch was “excavated wholly in uplands” looks at the conditions that existed at the time the ditch was created. However, the preamble contradicts itself by stating “Ditches that *are excavated* wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water).” The use of the present tense refers to present conditions, rather than conditions at the time of construction. The preamble should be changed to state explicitly that “excavated wholly in uplands” means that the ditch was *originally constructed entirely in uplands*.

The state is also concerned that the term “excavated in” could be interpreted broadly to mean any ditch that is currently *located in* wetlands at any point, even when the wetlands are confined to the ditch itself and formed after the ditch was initially constructed. This interpretation would be inconsistent with the plain meaning of “excavate” which refers to the act

¹² See 79 Fed. Reg. 22263.

¹³ See 79 Fed. Reg. 22203.

of removing or digging out.¹⁴ Even so, the state is concerned that the phrase "excavated in" could be misinterpreted to refer to ditches located in wetlands at any point, including ditches that produce wetlands solely because the ditches are excavated. The preamble should specifically state that the emergence of wetlands and vegetation in a ditch following initial construction does not prevent a finding that the ditch was "excavated wholly in uplands."

The second exclusion for ditches applies to ditches that "do not contribute flow, either directly or through another water," to certain other jurisdictional waters. The preamble does not provide any explanation of how this exclusion will be interpreted. The exclusion could be interpreted very literally, such that *any* downstream connection - no matter how miniscule or indirect - would prevent the exclusion from being applied. This is inconsistent with Justice Kennedy's concurrence in *Rapanos*.¹⁵ The state recommends revising the preamble to clarify that a "speculative or insubstantial" downstream connection does not prevent this exclusion from being applied.¹⁶ The intent of this change is to ensure that a ditch can qualify for this exclusion without needing to research and document potential indirect connections to waters that are tens or even hundreds of miles away from the ditch in question.

1. Perennial Flow

The preamble to the proposed rule explains that "Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal."¹⁷ It also states that "Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation."¹⁸ The state is concerned that this explanation leaves significant ambiguities about the meaning of "perennial flow" in the exclusion for roadside ditches. The description of "perennial flow" implies that the mere presence of water - even standing water - could be considered "flow." The second sentence attempts to address that concern by noting that "water that *only* stands or pools" is not perennial flow (emphasis added). This statement is troubling as it implies that the year-round presence of water will be considered "perennial flow" unless it can be established that the water "*only stands or pools*" throughout the year. In other words, the preamble suggests that year-round presence of water is "perennial flow," unless the water never flows at all.

EPA should clarify that "less than perennial flow" means intermittent and ephemeral flow. Under this approach, a ditch with intermittent or ephemeral flow would qualify for the exclusion if it is excavated in uplands and drains only uplands. This clarification is consistent with the intent of the proposed regulation. It also is consistent with the 2008 EPA/Army Corps. Guidance Memorandum on CWA Jurisdiction, which stated that the agencies generally would not assert jurisdiction over "ditches (including roadside ditches) excavated wholly in and

¹⁴ See "Excavate." Merriam-Webster.com (Accessed May 22, 2014), available at <http://www.merriam-webster.com/dictionary/excavate>.

¹⁵ "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." *Rapanos*, 547 U.S. at 780.

¹⁶ This phrase is adopted from the definition of "significant nexus" in the proposed rule. That definition states that "For an effect to be significant, it must be more than speculative or insubstantial." 79 Fed. Reg. 22263. The definition, in turn, borrows this phrase from Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 780 (2006).

¹⁷ See 79 Fed. Reg. 22203.

¹⁸ *Id.*

draining only uplands and *that do not carry a relatively permanent flow of water.*¹⁹

B. Gullies, Rills and non-wetland swales

The state is also concerned about the exemption for “*gullies, rills and non-wetland swales.*”²⁰ These are exempted, but no definition is given for them. The Merriam-Webster diction defines “gully” as “1: a trench which was originally worn in the earth by running water and through which water often runs after rain. 2: a small valley or gulch.”²¹ The same dictionary offers this definition for ‘rill’, “channel made by a small stream.”²² “Swell” is then defined as “a low-lying or depressed and often wet stretch of land.”²³ In the West, there are examples of gullies and rills which meet the common dictionary definition of said features, but will also have a bed, bank, and ordinary high water mark. They can also contribute flow during certain times of the year. These features could qualify it as a tributary under the definition of tributary found in the proposed rule. (See Exhibit B) Once again, the Proposed Rule in its current form creates too much uncertainty.

C. Groundwater

The proposed rule also exempts groundwater from EPA and Army jurisdiction. However, this is undermined by the Proposed Rule’s reliance on the hydrologic connections and in particular on “shallow subsurface hydrologic connections” as a basis for establishing jurisdiction.²⁴ However, this term is not defined. Generally speaking, subsurface water is considered to be ground water, yet, ground water is specifically listed as exempted water in this proposal.²⁵ Further, the agencies have stated that if the waters are jurisdictional upstream, they remain jurisdictional if they disappear and then resurface downstream.²⁶ This conflict makes it very difficult to know where groundwater begins and how groundwater is different from a “shallow subsurface connection.” More importantly this appears to be an unwarranted expansion of jurisdiction to groundwater while at the same time claiming that groundwater is exempt from jurisdiction.

V. **The New Definitions in the Proposed Rule are Overly Broad and Lead to Greater Uncertainty**

A. Tributaries

The Proposed Rule declares that all “tributaries” of both core waters and impoundments

¹⁹ Environmental Protection Agency/Army Corps., Clean Water Act Jurisdiction Memorandum, 1, issued Dec. 2, 2008, available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf (accessed 11/10/2014).

²⁰ See 79 Fed. Reg. 22263.

²¹ Merriam-Webster's Collegiate Dictionary, eleventh edition, 2004.

²² *Id.*

²³ *Id.*

²⁴ See 79 Fed. Reg. 22263.

²⁵ *Id.*

²⁶ See 79 Fed. Reg. 22263.

of core waters (dams or reservoirs) are always covered by the CWA.²⁷ The Proposed definition of "tributaries" is extremely broad, and includes "ponds, impoundments, canals, and ditches" not otherwise excluded in the proposed rule.²⁸ Waters are even deemed tributaries under the proposed rule "if they contribute flow, either directly or through another water" to a jurisdictional water, and tributaries are still deemed as such even if the water passes man-made breaks such as "culverts, pipes, or dams."²⁹ The EPA and Army explain that this definition is correct because the tributaries "significantly" affect chemical, physical and biological integrity of traditional navigable waters, interstate waters, and/or territorial seas. Specifically, the term "significant" is used to justify the expansion to the proposed rules tributary definition. However, "significance" has not been clearly defined with quantitative measures of the chemical, biological, or physical effects of a tributary on downstream waters. The absence of quantitative measures makes it extremely difficult to determine which waters qualify as a tributary.

The proposed definition for a tributary as the "presence of a bed and banks and ordinary high water mark... which contributes flow, either directly or through another water" has a broad sweeping effect on waters found in the arid western states.³⁰ In Utah, there are numerous washes or gullies which have these characteristic and contribute flow on a seasonal or less-than-seasonal basis. In the west, livestock producers have placed stock-watering ponds along washes and gullies to collect and store water for livestock uses. (See Exhibit C) These areas have not previously fallen under the jurisdiction of the CWA and, therefore, have not required a 404 permit. Because of the nature of these areas, routine maintenances is required. Under the proposed rule these producers would be required to obtain a 404 permit to maintain their stock watering ponds. This will add a substantial burden to livestock producers as it will create additional costs and a significant amount of time as it currently takes at least 4-6 months for a permit to be issued. In addition, this process will provide another avenue for environmental organizations to halt grazing on public lands.

The Proposed Rule continues to use the "ordinary high water mark" as an indicator for determining a tributary despite the fact that the plurality of the Supreme Court and Justice Kennedy have stated specifically it is not a reliable standard.³¹ Both Justice Scalia's plurality and Justice Kennedy's opinions reject the idea of using an ordinary high water mark as a means of determining a signification nexus. Justice Kennedy said that the use of the ordinary high water mark would expand the breadth of jurisdiction so that it would allow for the "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it."³² As much of the Proposed Rule seems to rest upon Justice Kennedy's opinion in *Rapanos*, it is conveniently odd to ignore his opinion on an ordinary high water mark. The use of the ordinary high water mark vastly expands the jurisdiction of the CWA and should not be relied upon as a standard.

²⁷ See 79 Fed. Reg. 22263 (proposed April 21, 2014)(to potentially be codified at 40 C.F.R. § 230.3(s)(5)).

²⁸ See 79 Fed. Reg. 22263 (proposed April 21, 2014) (to potentially be codified at 40 C.F.R. § 230.3(u)(5)).

²⁹ *Id.*

³⁰ See 79 Fed. Reg. 22263..

³¹ See *Rapanos*, at 725, 781.

³² *Rapanos*, at 781.

B. Adjacent

The proposed rule has the potential to expand the universe of "adjacent waters" that are deemed jurisdictional by rule. The definition of "adjacent" itself would not change: it would continue to be defined as "bordering, contiguous, or neighboring." But, in effect, the definition of "adjacent" *would* be changed by including a new and relatively expansive definition of "neighboring."

The proposed definition of "neighboring" includes "waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." The preamble explains that this definition "captures those waters that in practice the agencies have identified as having a *significant effect* on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas." The preamble also notes that "Adjacent" as defined in the agencies' regulations has always included an element of *reasonable proximity*.³³ (emphasis added)

More specifically, the state is concerned the proposed definition of "neighboring" will be interpreted to eliminate the dual requirements of "reasonable proximity" and "significant effect." For example, the proposed rule would allow "waters with a shallow subsurface hydrologic connection" to be deemed "neighboring" irrespective of the degree of that subsurface connection and the distance of that connection. If read literally, this definition would allow a water to be deemed adjacent, and therefore jurisdictional by rule, based on a geographically remote and hydrologically insignificant subsurface connection.

The definition of "neighboring" should include an explicit requirement for both "reasonable proximity" and "significant effect." The rule should include specific criteria for determining whether these requirements are met. Under this approach, the *existence* of a subsurface hydrological connection would not automatically result in a finding that waters are jurisdictional by rule. Similarly, location within a riparian area or floodplain would not be enough, on its own, to cause waters to be deemed jurisdictional by rule. Instead, the waters would be deemed "adjacent" and thus jurisdictional by rule only if they are actually located close to other jurisdictional waters and have a significant effect on the chemical, physical, and biological integrity of those waters.

The proposed definitions of "riparian area" and "floodplain"³⁴ are also a concern because they do not include a requirement for "reasonable proximity" and "significant effect."³⁵ In particular, the definition of "floodplain" - which includes areas "inundated during periods of moderate to high water flows" - could encompass areas that are subject to flooding only during rare and extreme flooding events. The effect of these definitions would define as "adjacent" -

³³ See 79 Fed. Reg. 22207.

³⁴ "Riparian areas" and "floodplain" terms mentioned in the definition of "neighboring" which is a term used in the definition of "adjacent." In addition to adding confusion, this nesting of definitions has the practical effect of expanding the reach of CWA into floodplains or riparian areas that contain what otherwise may be relatively isolated water bodies.

³⁵ The proposed regulations define "riparian area" as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." While the term "directly influence" does help to limit the scope of the definition, it does not require a *significant* effect.

and thus jurisdictional by rule – waters that are not in any reasonable sense adjacent to core waters.

The proposed rule creates a new definition for the term “riparian area” which modifies the definition currently relied upon by EPA and Army. In addition, the proposed definition would require a “best professional judgment” determination by the agencies in order to determine whether the area is considered to be “riparian.”³⁶ This creates uncertainty among those landowners with lands alongside waterways. The definition should be changed to the definition currently being used by EPA in their Water Quality Standards Academy Glossary, “riparian zone: an area adjacent to and along a watercourse that often is vegetated and that constitutes a buffer zone between the nearby lands and the watercourse.”³⁷ To add further consistency among commonly used terms, the word “land” should be changed to “terrestrial ecosystem.” This new definition is simple, self-supporting and easily understood.

The Proposed Rule defines “floodplain” to include areas “inundated during periods of moderate to high flows.”³⁸ Moderate flows of water are not considered a flood event and, therefore, would not contribute significant sediment to the floodplain. The Proposed Rule should adhere to commonly understood geographic principles and definitions. As currently proposed, the interpretation of what is considered to be a floodplain would be left up to EPA or Army staff for a “best professional judgment” analysis,³⁹ leading to uncertainty and inconsistency.

VI. The Practical Effects of the Proposed Rule

The state is concerned about the costs and delays imposed by the Proposed Rule, in addition to other implications for state agencies. The Proposed Rule will subject more activities to CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen suits challenging local actions based on the applicability and interpretation of new-found authorities. These issues are in addition to the likely delays as currently there is already a substantial backlog of pending CWA permit requests.⁴⁰ If this rule is finalized, additional projects will require permits, thereby, increasing the backlog. In addition, the costs of obtaining Army permits are significant and will impose a great burden on landowners, businesses and agricultural producers in the state.

A. Utah’s 402 (UPDES) Program

Utah has long been delegated from EPA the responsibility of administering the National Pollutant Discharge Elimination System (NPDES) Program. This is the program governed by Section 402 of the Clean Water Act. By statute, anyone discharging pollutants to “Waters of the State,” which are defined as all Utah waters, both ground water and surface waters, including

³⁶ See 79 Fed. Reg. 22208.

³⁷ Environmental Protection Agency, *Water Quality Standards Academy Glossary*, at 22 (1997) available at <http://water.epa.gov/learn/training/standardsacademy/upload/WQSGlossary9-2012.pdf> (accessed 11/10/2014).

³⁸ See 79 Fed. Reg. 22263.

³⁹ *Id.* at 22209.

⁴⁰ The current backlog for permits is between 15,000-20,000 and on average, it takes two to three years to receive an individual permit. Brief for the American Farm Bureau Federation as Amicus Curiae, p. 31, *Sackett v. E.P.A.* 132 S.Ct. 1367 (2012). Here, the American Farm Bureau Federation filed the amicus curiae brief in the case abbreviated “*Sackett v. E.P.A.*”

ephemeral and intermittent streams, must secure a permit to do so.⁴¹ Utah has no other surface water permitting program other than the one administered under the federal NPDES program.

Under the proposed EPA rule, it appears that a significant number of Utah stream miles will become non-jurisdictional since the waters flow into closed basins that are neither tributaries of navigable waters or have a significant nexus to navigable waters. The state estimates this to be 983 stream miles, or 5.8% of all Utah perennial stream miles, 24,933 miles of intermittent stream, or 16.1% of all Utah intermittent streams and 24,933 lake acres or 16.1% of all Utah lake acreage (see map attached as Exhibit D). It is not possible to determine, except on a case-by-case basis, the increased number of intermittent stream miles that would become jurisdictional under the proposed rule due to the need to identify if the intermittent streams are defined by a bed, bank and ordinary high-water mark.

If the proposed rule goes into effect, Utah may be obligated to develop a companion state surface water permitting program to the federal NPDES program, otherwise 62 NPDES permits may become invalid as a consequence of the receiving waters associated with those permits being deemed non-jurisdictional.

B. State Parks

The state, through the Utah Division of Parks and Recreation, manages large areas of public land in Utah. When building or maintaining facilities that may impact streams, it has participated in Utah Department of Water Rights Stream Alteration Program (Stream Alterations). Project review through Utah’s Stream Alteration process takes approximately 30 days from application to permit. However, if a permit requires Army involvement, the permitting process time increases from 30 days to a minimum of 6 months. The state is concerned that agencies like the Division of Parks and Recreation will be required to go to the Army for any water crossing which will greatly impact construction costs and timelines. The Division of Parks and Recreation current Army permits have taken well over a year to complete and, in some cases, have stretched into two years. Without information on the regulatory processes that will arise from this rule, it is hard to determine the costs and impacts of the rule. The state is also concerned about new mitigation measures and costs that may now be required by the Proposed Rule.

C. Energy Sector

The value of the state’s direct energy production is nearly \$5 billion dollars annually, and jobs in the energy sector pay almost twice the state average.⁴² Revenues from energy development on state trust lands provide crucial funding to Utah’s schools. Additionally, a multitude of energy and infrastructure projects underway in the state will provide direct benefits to the nation and region through increased access to energy resources, improved transportation systems with economic and environmental benefits, and efficient resource development. The EPA’s proposed rule imposes unjustified and unnecessary costs and burdens on energy production and infrastructure projects, and the many benefits that flow from them, and should be

⁴¹ Utah Code Ann. § 19-5-107 (West 1953).

⁴² Michael Vanden Berg, Utah Geologic Survey, “Utah’s Energy Landscape,” 3rd Edition, 2014 at 9, *available at* <http://energy.utah.gov/wp-content/uploads/Utahs-Energy-Landscape-3rd-Edition.pdf> (accessed 11/10/14).

reconsidered to allow for sensible and understandable interpretations of Waters of the U.S.

The Environmental Protection Agency's (EPA) proposed rule for the definition of "waters of the United States" unreasonably impedes responsible domestic energy development by unnecessarily increasing the time and expense of project and infrastructure permitting. Energy companies already face burdensome costs and delays from numerous federal requirements. According to the National Association of Environmental Professionals, final Environmental Impact Statements (EIS) issued in 2012 under the National Environmental Policy Act (NEPA) averaged 4.6 years to complete.⁴³ The Government Accountability Office in a 2014 report to Congress found the median EIS contractor cost for Department of Energy projects was \$1.4 million.⁴⁴

The EPA's proposed rule would extend federal jurisdiction to whole new categories of natural and artificial features, including poorly defined "tributary," "adjacent," and "neighboring" waters that would by regulatory rule be assumed to have a "significant nexus" to navigable water. This approach would unfairly expose the energy industry to numerous lawsuits where they would have the legal burden of showing that some water feature does not have a "significant nexus." The EPA's approach turns established law on its head and undermines current best practices for assessing Waters of the U.S. The EPA's ambiguous legal terms and shifting of the legal burden of proof will create enormous costs and delays to energy production and infrastructure projects.

The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a "bed, bank and ordinary water mark and flow directly or indirectly into a 'water of the United States,' regardless of perennial, intermittent or ephemeral flow." This broad declaration would require numerous energy production and infrastructure projects to potentially get a number of new Clean Water Act (CWA) permits and/or certifications, including sections 303, 304, 305 (state water quality standards), 311 (oil spill prevention), 401 (state water quality certification), 402 (effluent/stormwater discharge permits), and 404 (dredge and fill permits). Compliance with these new permitting and certification requirements would cost industry enormous amounts of time and money. The average time it takes to acquire a 404 permit is 788 days and costs an average of \$271,596.⁴⁵ Since the proposed rule has placed the legal burden of proof on industry, the cost and burden of these new permitting requirements would be greatly enhanced.

The expansive and uncertain application of this proposed rule would require significant state and local government time and money to implement without any evidence that it will improve the state's system for protecting its water resources. State and local governments must make tough decisions on how to deploy limited personnel and budget. Increased compliance costs created by the Proposed Rule would likely reduce government responsiveness to other regulatory needs in the energy sector, which would further hamper energy development that is so

⁴³ U.S. Government Accountability Office, "National Environmental Policy Act: Little Information Exists on NEPA Analyses," GAO-14-370, at 14 (April 2014), available at <http://gao.gov/assets/670/662546.pdf> (accessed 11/10/2014).

⁴⁴ *Id.* at 13.

⁴⁵ David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process" (2002) available at <http://are.berkeley.edu/~sunding/Economics%20of%20Environmental%20Regulation.pdf> (accessed 11/10/2014).

crucial to economic development for the state.

D. Agriculture

In the State of Utah, agriculture uses 80% of the available water resources.⁴⁶ Any changes to the jurisdictional reach of the CWA will have dramatic effect on the agricultural industry. It will create uncertainty in which practices are acceptable. As an example, an agricultural producer using groundwater might believe her practices are exempt under the Proposed Rule, while these waters might be determined as jurisdictional if there is a "shallow subsurface connection" to core waters thus necessitating a CWA permit.

The Proposed Rule would not only create uncertainty, but it will create time delays in obtaining permits which previously were not required. Further, it will lead to an increase in permitting and increase costs to the agricultural producer which will increase food cost to the public. Even if permits are eventually determined not to be necessary, there are still costs associated with Environmental Assessments (EAs) and cultural resource assessments, which would be necessary to make those determinations. With an average wait for 404 permits being 4-6 months, that could be the loss of an entire grazing permit, or crop production. In an industry that is so completely reliant on climate, it is difficult to anticipate and plan for the unforeseen events and variability in climate. Aside from the wait time in permitting and the cost of EAs to determine if there is a need for a permit, there is the cost of a 404 permit. It is estimated that an individual permit to deposit fill material costs \$43,687 with an additional \$11,797 for each acre of water affected.⁴⁷ This would make any permit necessarily cost-prohibitive for most agricultural producers in the state.

The Proposed Rule will increase the cost for certain projects as new permits will be required. While the agencies have given assurances that normal farming practices will be exempted from permitting, the normal farming practices exemption only applies to 404 permitting, not to any of the other permits required by the CWA if the water is determined to be jurisdictional.⁴⁸ While most of the east does not rely on irrigation systems of ditches and pumps to spread the water, the arid west utilizes intricate irrigation systems that are essential for production. With those differences in mind, the examples cited in the proposal to demonstrate normal farming practices do not include irrigation practices, but practices related to tillage.⁴⁹ It is clear that western states and their farming practices were not considered in the development of these rules.

While there are narrow exemptions for ditches, using the terms and definitions provided in the Proposed Rule, including "shallow subsurface connections", would ensure that most ditches will be considered jurisdictional. These include all ditches and not just those used for agricultural purposes.

⁴⁶ *Flowing Toward 2050: Utah's Water Outlook*, Utah Foundation, Research Report 723, at 3 (Sept. 2014), available at <http://www.utahfoundation.org/uploads/rr723.pdf> (accessed 11/10/14).

⁴⁷ Sunding & Zilberman, *The Economics of Environmental Regulation By Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *Natural Resources J.* 59, 74-75 (2002).

⁴⁸ See State of Utah Comment Letter on Interpretive Rule, dated July 7, 2014.

⁴⁹ See 33 C.F.R. 1344(f).

VII. Other Issues and Recommendations

A. Executive Order 13132

Despite the federalism implications of the rule, **EPA and the Army have failed to consult with the states as required under Executive Order (EO) 13132**. Failure to do so undermines the cooperative federalism at the heart of the CWA and ignores the substantial direct effects on state governments and the distribution of power and responsibilities at the federal, state, and local levels of government.

B. Flawed Economic Analysis

The rule does not comport with EO 12866. The proposing agencies have used a flawed methodology for calculating benefits and a deficient approach toward calculating incremental costs. The analysis fails to conform to even the most basic principles of economic analysis. As a result, the analysis does not provide the public and policy makers credible information about the magnitude of the rule's impacts. For example, the economic analysis relies on nearly 20-year old cost data that has not been adjusted for inflation. In concluding that the rule would increase the waters subject to permitting requirements by only 2.7 percent, the proposing agencies rely on a data base that is incomplete and not representative of those waters that are subject to jurisdiction under current regulation. Their use of the 2.7 percent figure to extrapolate likely cost impacts in other CWA programs introduces further bias in the benefit-cost analysis.

In addition, EPA's economic analysis has been limited to costs association with section 404 of the CWA and fails to consider the full costs of implementing expanded jurisdiction. The cost of this expansion will impact all programs of the CWA, including sections 303, 311, 401, and 402. EPA has significantly underestimated the costs associated with this rule.

C. Failure to Examine Implications on Other CWA Programs

The rule does not provide an explanation or clear understanding about how the expansion of CWA jurisdiction and transfer of ultimate authority might affect other CWA programs, state law, water rights, land use, governances, and regulated parties. The rule leaves unresolved a myriad of questions about how these programs and new regulatory requirements will be interpreted and applied. In other words, the rule does not minimize the uncertainty of interpretation that currently exists in the Section 404 wetlands permitting program, by expanding jurisdiction to the entire panoply of CWA programs, the rule increases the uncertainty that the agencies are purporting to reduce.

D. Mapping of Jurisdictional Waters

It is critical that the EPA and/or Army maintain a database that allows a graphical/visual representation of jurisdictional determinations. This would allow the public and other governmental agencies the ability to see what previous jurisdictional determinations have been made – perhaps on the same stream location. This recommendation is made knowing that the jurisdictional determinations are good for only five years. It is unreasonable for proponents of

projects to be obligated to assume jurisdiction in every instance in order to move ahead with their projects.

E. Appropriate Time Frame for Making Jurisdictional Determinations

The state believes the EPA and/or Army need to make its jurisdictional determinations within a "reasonable" time frame. Michigan, one of only two states delegated the Section 404 program, is obligated by state statute to process wetlands permits within 90 days (150 days if there is a public hearing). Michigan's average time frame for processing wetland permits is 9 days following the receipt of a complete permit application and 46 days if the permit needs to be public-noticed. Yet only 58% of the Army's wetland applications are completed within 120 days with the average jurisdictional determination taking 90 days. Some permits take over 700 days to complete. That level of performance and those time frames are unreasonable.

The state believes that within 180 days of receiving a complete application, the agencies should be able to make a decision. If they cannot, the state proposes the waters or wetlands would, by default, be deemed to be non-jurisdictional due to inaction. A 180-day time frame would allow the agencies time to prioritize the workload for jurisdictional determinations and focus on the most crucial ones.

In general, uncertainty and time delays produce much of the conflict and disagreement on EPA's proposed rule in making jurisdictional determinations. The two recommendations noted above would go a long way in resolving these disagreements.

F. Exemption for "Maintenance of Ditches"

The preamble to the proposed rule recognizes that the rule "does not affect longstanding exemptions in the CWA for farming, silvicultural, ranching and other activities," including "maintenance of drainage ditches."⁵⁰ Recently, EPA and Army released an "interpretive rule" that clarifies the exemption for certain agricultural, silvicultural, and ranching practices under Section 404(f)(1)(A) of the Clean Water Act.⁵¹ The Army and EPA do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Act.

Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Army's Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act." (issued July 4, 2007). This exemption includes the following definition of "drainage ditch":

For purposes of this RGL, a drainage ditch is a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation.

⁵⁰ See 79 Fed. Reg. 22193, 22194.

⁵¹ See 79 Fed. Reg. 22276.

However, a ditch that diverts water from an open body of water (e.g., stream, lake, or reservoir) for irrigation purposes is an irrigation ditch, even if a substantial portion of the flow or volume is diverted.

By its own terms, this definition encompasses many roadside ditches. Yet, because the exemption is included in a guidance document that also addresses irrigation ditches, it may be misunderstood to apply only in an agricultural context. To date, there is no published guidance that specifically recognizes the applicability of this exemption to *roadside* ditches.

To ensure that this exemption is properly applied, we request that the Army and EPA issue an interpretive rule or other appropriate guidance clarifying that the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches. In combination with the exclusion for some ditches in the proposed rule, this clarification would help to ensure that routine ditch maintenance activities can be conducted without undue regulatory burdens.



Exhibit A
9 Mile Irrigation Reservoir



Exhibit B
Gully with bed, bank, and ordinary high water mark



Exhibit C
Stock Watering Pond

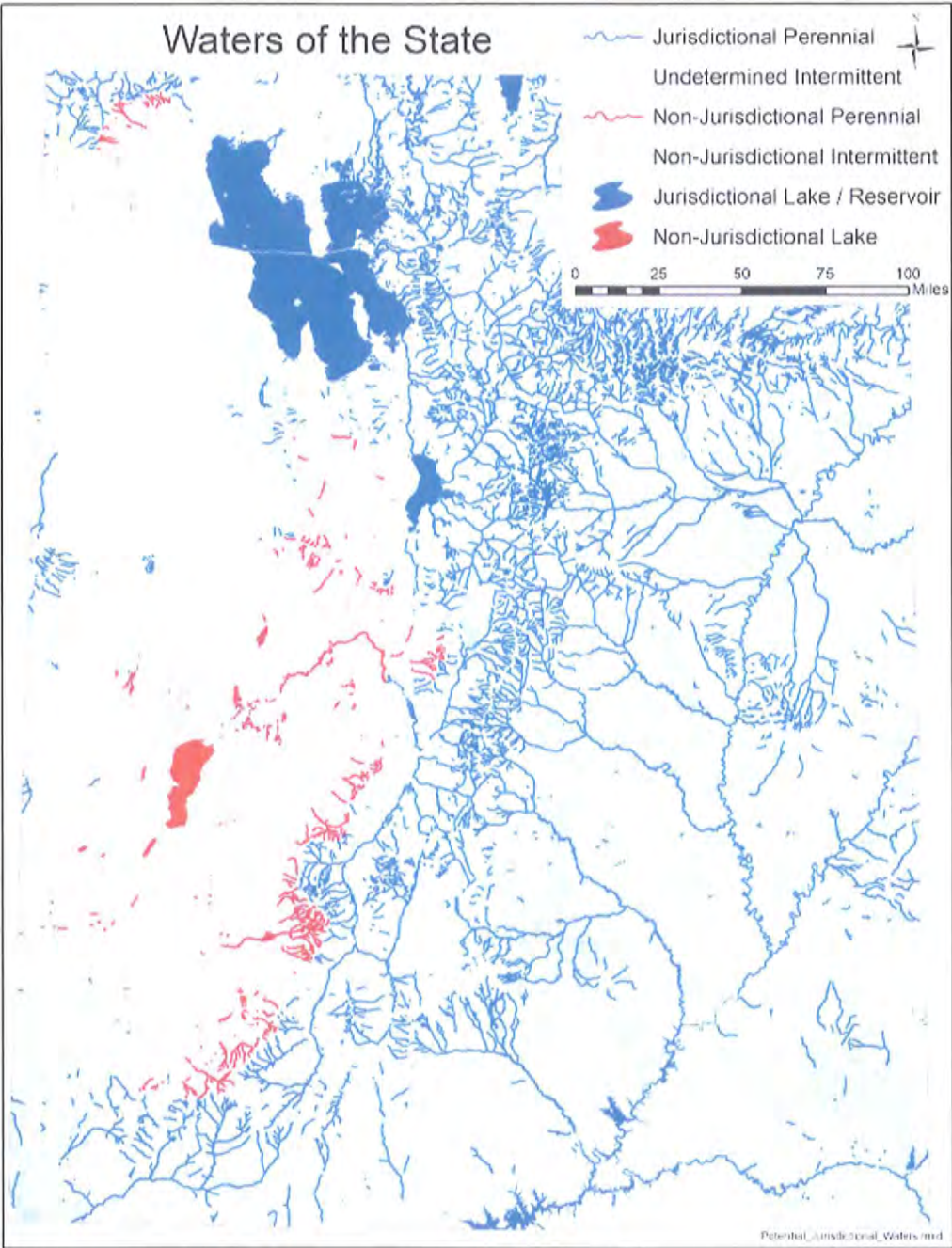


Exhibit D
Map of Potential Jurisdictional Waters in Utah