



November 14, 2014

Mr. Ken Kopocis
Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary (Civil Works)
Department of the Army
441 G Street, NW
Washington, D.C. 20314

RE: Docket ID No. EPA-HQ-OW-2011-0880; *Definition of "Waters of the United States" Under the Clean Water Act*, 79 Fed. Reg. 22187, April 21, 2014.

Dear Assistant Administrator Kopocis and Assistant Secretary Darcy:

The Texas and Southwestern Cattle Raisers Association (TSCRA) respectfully submits these comments on the Proposed Definition of "Waters of the United States" (hereafter "proposed rule") published in the Federal Register on April 21, 2014 (Docket ID No. EPA-HQ-OW-2011-0880; 79 Fed. Reg. 22187) by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps).

The proposed rule will have a significant detrimental impact to the U.S. cattle industry as it entails new regulatory requirements on cattle producers. Further, it does not comply with limitations articulated by United States Supreme Court decisions, and overall usurps the federalism concept underpinning the Clean Water Act (CWA) when passed by Congress in 1972. For these reasons and those that follow, TSCRA strongly urges that the proposed rule be completely withdrawn.

TSCRA is a 137-year-old trade association and is the largest and oldest livestock organization based in Texas. TSCRA has a membership of more than 16,500 beef cattle operations, ranching families and businesses. These members represent over 50,000 individuals directly involved in ranching and beef production that manage over four million head of cattle on more than 76 million acres of range and pasture land primarily in Texas and Oklahoma, but throughout the Southwest.

I. The proposed rule would violate the APA because the public has not had an opportunity to provide meaningful comment

The Administrative Procedures Act (APA) requires federal agencies to ensure public participation in the rulemaking process by providing a meaningful opportunity for the public to comment on the rule's content.¹ The agencies have failed to provide the data the rule is based

¹ 5 U.S.C. § 553 (b)-(c); *American Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

upon.² There are a vast number of missing pieces in the proposed rule and throughout the rulemaking process that have precluded the public from receiving a meaningful comment period. And, it has been obvious that the Corps of Engineers did not share equally in developing this rule. It has been frustrating to attend stakeholder outreach meetings where one of the jointly proposing agencies is not in attendance. One example is the small entities meeting that took place on Oct. 15, 2014 at EPA Headquarters. It was stated by EPA officials that the Corps was invited but did not choose to participate in the meeting. This is deeply disappointing, especially considering the regulator-landowner interactions that the Corps has the lead role in under some of the major programs.

First, the agencies only included in the proposed rule a draft scientific report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Connectivity report)*.³ The agencies have indicated that the *Connectivity* report will not be completed until after the comment period has closed and therefore will not be available for the public to comment.⁴ EPA's website states, "This report, *when finalized*, will provide the scientific basis needed to clarify CWA jurisdiction..." (emphasis added).⁵ Second, the agencies have failed to provide the public with relevant maps created for the agencies by the U.S. Geological Service detailing vast networks of streams across the United States that would become jurisdictional under the proposed rule. Third, the proposed rule contains a vast number of requests for methods of regulating the public under this rule without providing the agencies' proposed option, leaving the public to wonder what the agency is even considering and not allowing comments on any specific proposal.

TSCRA would like to provide the agencies with more extensive comments on the proposed rule. Unfortunately, there are too many significant legal holes throughout the document to be able to meaningfully comment on the scientific and legal extent of the proposed rule. As such, we provide comments on what is in the proposed rule, but cannot provide comments on that which is not included. Therefore, TSCRA asserts that the proposed rule prevents the American public from being able to provide meaningful comments on the proposed rule, thereby violating the APA⁶. To correct this fatal flaw the agencies must withdraw the rule and possibly at a later date fill in the gaping holes and provide the public with the information to make meaningful comments.

First, the *Connectivity* report is a draft report. On the same day the report was released to the public, the proposed rule was sent to the Office of Management and Budget (OMB) for interagency review. Numerous officials at numerous times have indicated that the *final* report will not be made available for the public to comment on. This is inappropriate and prevents the public from being able to provide meaningful comments on the proposed rule. The *Connectivity* report is the scientific basis the agencies rely on to support their proposed rule. The science should be final before a proposed rule is developed. Should a final report be completed that is different from the draft report, the public will have been prohibited from commenting on the validity of such science. This flies in the face of this Administration's assertion of transparency and in the face of the APA, which requires that the data (or science) the rule is based on to be

² *Engine Mfrs. Ass'n*, 20 F.3d at 1181 ("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.").

³ *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Washington, DC: U.S. Environmental Protection Agency, (2013).

⁴ EPA website, <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345> (accessed on Sept. 3, 2014).

⁵ *Id.*

⁶ *Supra* Note 1.

presented to the public for comment.⁷ TSCRA asserts that the proposed rule must be either withdrawn or re-proposed with the final *Connectivity* report available for the public to review.

Recently the agencies extended the public comment period with the justification to allow the public to comment on the Scientific Advisory Board's final report.⁸ This extension fails to rectify the procedural failures of the agencies for not providing a *final* report in the proposed rule for comment for a number of reasons. First, the extension was for an additional 25 days, which is hardly enough time to review a technical scientific report. Providing the public with the opportunity to comment on the SAB report is not the same as allowing the public to comment on the final *Connectivity* report and therefore the procedural fouls with this rulemaking remain unresolved.

Next, the agencies failed to provide the public with relevant maps that were available to the agency that detail the stream systems and wetlands across the U.S.⁹ The proposed rule includes a definition of "tributary" that includes anything connected to an otherwise jurisdictional water that has a bed, bank and Ordinary High Water Mark (OHWM) as a jurisdictional water.¹⁰ A map of the U.S. stream systems would be extremely relevant in illustrating the types of streams that the agencies propose to regulate. The agencies have not identified which waters located on the maps are *not* jurisdictional under their proposed rule. Instead of attempting to be transparent and actually clarify which streams and ditches across the country the agencies intend to regulate under this proposed rule, the agencies have withheld vital information that the public would have used to evaluate the proposal. TSCRA asserts that the agencies have inappropriately withheld relevant maps showing the nation's streams and wetlands in violation of the APA.

Without providing maps or more information in some form, the public has been left to comment on a proposed rule that is unintelligible. At outreach meetings and in presentations, agency officials have refused to articulate how the rule would be interpreted on the ground and refused to answer hypothetical situations. Without doing so the agencies have failed to provide the public with a clear picture of what they propose to regulate, thereby depriving the public of a meaningful opportunity to provide comment. If the agencies cannot articulate on maps or through other means a clear picture of what they propose to regulate how is the American public supposed to comment on what they cannot possibly understand?

Finally, there are over forty places in the proposed rule where the agency has requested comments. Many of these requests ask for new ideas and approaches relative to the topic because the agency has failed to provide a proposed approach. As an example, the agencies request comments on:

"... specific options for establishing additional precision in the definition of "neighboring" through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only

⁷ *Supra* Note 2.

⁸ EPA Desk Statement, available at <http://blogs.cq.com/cqblog-assets/govdoc-4559957>.

⁹ House Science Committee, *EPA State and National Maps of Waters and Wetlands*, (accessed on Sept. 2, 2014), available at <http://science.house.gov/epa-maps-state-2013#overlay-context>.

¹⁰ Proposed Rule at 22199.

waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters.” (Proposed Rule at 22209).

If the agencies receive public comments on these extremely important criteria and circumstances and finalize a rule that establishes criteria and obligations on landowners by selecting a certain interval of floodplain or circumstances based on a public comment, the agencies must then allow the public at large to comment on the approach the agencies have selected. These issues are too important for the agency to leave blank in the proposal, choose a suggestion made by one public commenter and then finalize a rule based on such selection. The public will not have had an opportunity to comment on the basis of EPA’s selection of such an approach.

Instead, the agencies should select an approach gathered from public commenters and then re-propose the rule to allow for meaningful comments on such approach. As it currently stands the agencies have failed to adequately define what approach they are proposing in order to receive meaningful comments on how that approach will impact the public.

EPA and the Corps must provide the public with the information they need to make meaningful comments on the proposed rule. As it stands, the agencies have gone out of their way to prevent the public from accessing relevant information in the agencies’ possession, and have no intent of allowing the public to comment on the final scientific basis.

II. The proposed rule is beyond the scope of authority provided to the agencies under the CWA and therefore is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law

TSCRA asserts that the proposed rule expands the federal government’s jurisdiction beyond the CWA’s authority as provided by Congress. The proposed rule would expand the authority of the agencies to cover thousands, if not millions, of new features through the agencies’ use of broad and ambiguous language, making it a limitless expansion of authority that cannot be supported by the CWA or the Commerce Clause of the U.S. Constitution.

Since the inception of the CWA the agencies’ jurisdiction has been limited. In two relatively recent Supreme Court decisions, the agencies were told by the high court that their interpretation was beyond the scope of the CWA, but yet again the agencies are claiming limitless authority over the nation’s waters. It is a blatant misrepresentation for the agencies to claim the proposed rule is not any more authority than the agencies have claimed in the past. Perhaps the agencies should be reminded that they were wrong in their belief of their scope of jurisdiction twice in the past fifteen years. In *SWANCC* and *Rapanos* the Supreme Court was clear that the agencies NEVER had authority under the CWA to regulate all waters.¹¹ The

¹¹ *SWANCC v. EPA*, 531 U.S. 159 (2001) (holding the Corps interpretation of jurisdiction pursuant to the Migratory Bird Rule “exceeds the authority granted to respondent [Corps] under § 404(a) of the CWA”); *Rapanos v. United States*, 547 U.S. 715 (2006) (J. Scalia, finding the Corps’ interpretation was not based on a permissible construction of the statute because the phrase “waters of the United States” means only those “relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes” [citing Webster’s New International Dictionary 2882 (2d. ed.)], and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide

agencies' authority was NEVER as broad as the Migratory Bird Rule, and the agencies' usage of such a rule was ILLEGAL. The proposed rule is an expansion from the current regulations and the agency should be transparent enough to admit it.

In the proposed rule the agencies have decided to run away with the Kennedy concurrence in *Rapanos* as their sole method of determining jurisdiction for non-navigable waters. While TSCRA disagrees that the agencies legally are allowed to completely disregard the plurality opinion authored by Justice Scalia, the agencies still failed to stay within the bounds of the Kennedy concurring opinion. In Kennedy's own words, "[i]n some instances, as exemplified by *Riverside Bayview*, the connection between a non-navigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act." (*Rapanos*, J. Kennedy, at 10). It is a far cry from Justice Kennedy's "some instances" to wrap all ephemeral streams, isolated ponds, wetlands and ditches under the CWA as per se jurisdictional through the tributaries and adjacent waters categories, or provide an Other Waters category that is so vague as to be an administratively convenient "catch all" category. Neither the plurality nor Kennedy's concurrence can support such a broad theory of jurisdiction.

Despite the agencies' assertion that no new types of waters will be swept under the CWA's jurisdiction, isolated wetlands, farm ponds, and ditches have never been generally asserted to be jurisdictional waters in the agencies' regulations. In fact, until recently the Corps and EPA have specifically rejected ditches from the category of "waters of the U.S."¹² Never before have the agencies claimed per se jurisdiction over features simply because they have a bed, bank and ordinary high water mark and might flow once per 100 years into a jurisdictional water. Never before have the agencies claimed that all open waters in floodplains and riparian areas are jurisdiction "as a category," without a case specific significant nexus analysis. And never before have the agencies claimed and it been upheld by the Supreme Court that an isolated pond or wetland could become a "water of the U.S." based on some tenuous connection to downstream waters. Even the Congressional Research Service (CRS) stated that the proposed rule has a "broadly defined" new definition of tributary, validating our concern that the proposed rule is a significant expansion compared to current regulations.¹³

The agencies cannot claim that the proposed definition is not an expansion based on jurisdiction they asserted under their Migratory Bird rule, because that theory of jurisdiction was struck down by the Supreme Court in *SWANCC*.¹⁴ The agencies cannot claim the proposed rule

drainage for rainfall") (J. Kennedy, disagreeing with the dissent because the dissent "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable water").

¹² 40 Fed. Reg. 31320-21 (July 25, 1975) (stating that "drainage and irrigation ditches have been excluded" from jurisdiction under the CWA).

¹³ Congressional Research Service, *EPA and the Army Corps' Proposed Rule to Define "Waters of the United States"*, available at

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&sqi=2&ved=0CB4QFjAA&url=http%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2FR43455.pdf&ei=JRYGVJJzqjIBPjvvcgK&usg=AFQjCNGq5dlTONE-KCN-v-5FOmTuh38v2w&sig2=UBrr5c69WZitk_UwSF9Odg&bvm=bv.74115972,d.aWw, (accessed on Sept. 2, 2014) ("the term "tributary" is newly and broadly defined in the proposal").

¹³ Congressional Research Service, *EPA and the Army Corps' Proposed Rule to Define "Waters of the United States"*, available at

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&sqi=2&ved=0CB4QFjAA&url=http%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2FR43455.pdf&ei=JRYGVJJzqjIBPjvvcgK&usg=AFQjCNGq5dlTONE-KCN-v-5FOmTuh38v2w&sig2=UBrr5c69WZitk_UwSF9Odg&bvm=bv.74115972,d.aWw, (accessed on Sept. 2, 2014) ("the term "tributary" is newly and broadly defined in the proposal").

¹⁴ *Supra* Note 9.

is not an expansion based on their “any hydrological connection” theory because that too was struck down by the Supreme Court in *Rapanos*.¹⁵ The agencies cannot claim the proposed rule is not an expansion based on previous guidance documents, because guidance documents are not legally binding, cannot change the substance of the underlying regulation, and rarely can receive judicial review. TSCRA asserts that the proposed rule has expanded the jurisdiction of the CWA to waters that the Supreme Court has said are beyond its scope, thereby making the proposed rule (if finalized) “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law” under the APA.¹⁶

a. The broad category “Tributaries” is unsupported by *Rapanos*

The agencies claim jurisdiction broadly over all tributaries with no site-specific analysis needed. By rule, the agencies have declared anything with a bed, bank and OHWM that might ever contribute flow to be a jurisdictional water, without regard to their impact to downstream TNWs and therefore without regard to whether each will satisfy the significant nexus test. The negative impact of such a broad categorical sweep is compounded by the fact that due to the agencies’ new category of per se jurisdictional “adjacent waters” all open water “adjacent” to these tributaries will also become jurisdictional. This is an expansion of the agencies’ authority and cannot be reconciled with the Supreme Court decisions.

The definition of “tributary” under the proposed rule is overly broad, encompassing any wet or dry feature that has a bed, a bank, and an OHWM that might ever contribute flow “directly or through another water, . . .” to either a Traditional Navigable Waters (TNW), an interstate water or wetland, a territorial sea or an impoundment a TNW, an interstate water or wetland, or a territorial sea. It also encompasses waters that lack a bed, bank and OHWM if they contribute flow directly or through another water to a TNW, an interstate water or wetland, or a territorial sea. (Proposed Rule at 22241).

This definition cannot be supported by either the plurality or Justice Kennedy’s concurrence in *Rapanos*. The plurality opinion stated, “The breadth of the Corps’ existing standard for tributaries—which seems to leave room for regulating drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it—precludes that standard’s adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.”¹⁷ Justice Kennedy stated, “[t]hrough regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.”

Even Justice Kennedy’s concurrence in *Rapanos* recognized that the Corps’ definition of “tributary” at that time left “wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it. . . .”¹⁸ It can easily be determined that both the plurality and Justice Kennedy would *not* find all waters with a bed, bank, and OHWM to meet the requisite significant nexus test that “perform important functions

¹⁵ *Rapanos*, J. Scalia, at 3 (“A wetland may not be considered “adjacent to” remote “waters of the United States” based on a mere hydrologic connection.”).

¹⁶ 5 U.S.C. § 706.

¹⁷ *Rapanos*, J. Scalia, at 4.

¹⁸ *Rapanos*, J. Kennedy, at 24-25 (stating that when looking at adjacent wetlands the Corps can only find “adjacent wetlands” jurisdictional for “certain major tributaries” because the Corps current definition for “tributary” was so broad as to include remote drains, ditches, and streams remote from any TNW).

for an aquatic system incorporating navigable waters.” To the contrary, Kennedy actually criticized the plurality opinion for potentially wrapping in many such waters that simply have a trickle of water running, but a trickle that runs into an otherwise navigable water either year-round or seasonally.¹⁹

i. The broad definition of tributaries encompasses ponds, ditches and other features that are beyond the agencies’ authority

The plain language of the definition of tributary encompasses numerous isolated and, in many cases, dry features that are far beyond the agencies’ authority under the CWA. It would encompass isolated ponds not otherwise excluded that somehow be connected through a surface connection, groundwater, or any other connection to a nearby (a)(1) through (4) water. It encompasses isolated wetlands in pastures that may be connected to a nearby creek through ground water or ditches. It encompasses virtually all artificial stock ponds west of the Mississippi River, of which, virtually all will have been built on a drainage (ephemeral streams) in order to fill with water. It is clear that the plain language of the definition makes the category almost limitless.

TSCRA asserts that the agencies’ definition of “tributary” is a limitless category that has the potential to wrap every natural pond, isolated wetland, or ditch into the federal regulatory scheme, which violates the language and spirit of the Supreme Court’s decisions in *SWANCC* and *Rapanos*.²⁰ It is clear that the phrase “waters of the U.S.” is not limitless, yet that is exactly what the agencies have proposed through their broad and ill-defined term “tributary.” Key phrases have been left undefined. The definition for “through another water,” a key phrase in the definition, was simply left out by the agencies. Not only does this foster confusion instead of clarity in the regulated community, it could be stretched by regulators or litigants now or in the future. If the agencies’ intent was not to create such a broad definition, than they should have put such intent in the regulation. TSCRA members cannot “take agency officials’ word for it.”

The agencies have excluded consideration of flow, making the definition completely dependent on land features, not actual water. And even with regard to the land features, the agencies contradict themselves. The agencies state that a tributary needs a bed, bank and OHWM but then turned around in the next sentence and contradicted themselves, saying that in fact a regulator does NOT need to find a bed, bank or OHWM to find a jurisdictional tributary. (Proposed Rule at 22241). Again, these contradictions only provide added confusion.

ii. Not all waters under the definition of tributary will satisfy the significant nexus analysis

The agencies cannot categorically make anything with a bed, bank and OHWM that takes water somewhere downstream jurisdictional. The proposed rule is clear that the definition of ‘tributary’ does in fact include all ephemeral, intermittent and perennial features and that rate of flow (or any flow) is simply not a factor. (Proposed Rule at 22206; (“...the agencies conclude that tributaries, including headwaters, intermittent, and ephemeral streams, and especially when

¹⁹ *Rapanos*, J. Kennedy, at 12 (criticizing the plurality for allowing “[t]he merest trickle, if continuous, would count as a “water” subject to federal regulation...”).

²⁰ *Rapanos v. United States*, 547 U.S. 715 (2006); (J. Scalia, Indicating “navigable” invokes a limit on the CWA jurisdiction the plurality stated “...that the qualifier “navigable” is not devoid of significance...the waters of the United States in 1362(7) cannot bear the expansive meaning that the Corps would give it”); *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); (In striking down the agencies’ Migratory Bird Rule the court stated, “we find nothing approaching a clear statement from Congress that it intended 404(a) to reach an abandoned sand and gravel pit such as we have here”).

all tributaries in a watershed are considered in combination, have a significant nexus to traditional navigable waters, interstate waters, or territorial seas...”). TSCRA asserts that the definition of tributary is overly broad because the agencies cannot make all tributaries per se jurisdictional without satisfying the significant nexus analysis.

Additionally, TSCRA disagrees that *Riverside Bayview* and *Rapanos* allow the agencies to take the adjacent wetlands “significant nexus” and “similarly situated” test and apply it to all tributaries. Both cases analyzed “adjacent wetlands,” neither were analyzing the far removed, isolated waters, which the agencies now seek to apply this test to. Since *Rapanos*, even a lower court has recognized the importance of such distinction.²¹ In *Baykeeper*, the 9th Circuit recognized the distinction between wetlands that are adjacent to navigable waters and other waters such as ponds, streams, and other waters that might also be near navigable waters. The agencies have failed to adequately explain their justification in applying such a test to all categories of water features.

Surely, the agencies cannot assert that a rain event occurring only once every 100 years is enough to make a dry creek bed a jurisdictional water? And adding together numerous small ephemeral streams that rarely flow to find a “significant nexus” is overly broad. TSCRA asserts that dry washes that rarely contribute flow to a TNW do NOT have a “significant nexus” to TNWs, and therefore cannot be jurisdictional. The agencies conclude that “...streams, regardless of their size or how frequently they flow, strongly influence how downstream waters function.” (Proposed Rule at 22196). In laymen’s terms the phrase “regardless of their size or how frequently they flow” means “all.” The proposed rule makes *all* streams federal.

Justice Kennedy was clear that “other waters” cannot contain those waters that have little or no connection.²² There are many streams across the country that have little or no connection to TNWs, which makes the agencies’ blanket rule covering all streams beyond the purview of the CWA. If in fact all streams are now federal waters, despite their lack of a significant connection to TNWs, it raises a constitutional question about the CWA itself.

iii. The agencies should not make ditches or ephemeral streams tributaries

A dry ditch could be a “water of the U.S.” under the proposed definition if it flows once per year but drains to a jurisdictional creek. Is it truly the agencies intent to capture all ditches that ever drain to a larger ditch that then drains to creek or other water the agency defines as a TNW? If not, the agencies should make that clear. American ranches throughout the United States have millions of these features dotted across their landscapes. Let us be clear, DITCHES DRAIN! That is their purpose. They will be connected eventually leading to some other jurisdictional water, therefore all ditches will be jurisdictional. The agencies’ use of the phrase “through another water” could remove all ditches from the excluded categories and could make them jurisdictional. Making these features jurisdictional would cripple the production of food and fiber across this country by requiring permits to conduct many routine activities no longer exempt under different sections of the CWA due to the agencies’ new interpretation of the 404(f)(1)(A) exemption for “normal farming, silviculture and ranching activities.” Ditches should not be per se jurisdictional tributaries.

TSCRA that the agencies have underestimated how many ditches will be captured by their proposed definition of “tributaries” and therefore have not adequately analyzed their impact on

²¹ *San Francisco Baykeeper v. Cargill Salt Division*, 418 F.3d 700, 707 (9th Cir. 2007).

²² *Rapanos*, J. Kennedy, at 10.

downstream jurisdictional waters to categorically say they have a “significant nexus” to these downstream jurisdictional waters. The definition of tributary captures different features of size and scope which will have varying effects on TNWs. These differences are too great to categorically find *anything* with a bed, bank and OHWM that ever contributes flow will have a significant nexus to downstream jurisdictional waters.

The exclusions provided by the agencies for ditches are addressed in Sec. III.b. below, but as they are included under the definition of tributary they are addressed here as well. TSCRA strongly believes that very few, if any, ditches will actually fall into the (b)(3) or (b)(4) categories of the proposed definition. EPA and the Corps should show the American public on maps, by state, how many ditches will be jurisdictional and how many will not. The agencies should also map the sheer expanse of their proposed definition and respond to maps presented to the agencies from industry showing our projection and interpretation of their proposed definition. It is our understanding that the agencies were provided these types of maps by the U.S. Geological Service (USGS), but the agencies failed to provide this important information to the American public, which would have provided a clear picture to everyone exactly what the expansion of the proposed rule would be. Because the maps were not provided to the public by EPA in a timely manner, the public has not had adequate time to analyze and ultimately, comment on them. Precluding the public from having the ability to meaningfully comment is a violation of the APA.²³

TSCRA asserts that only stream features with “relatively permanent, standing or continuous” flow, pursuant to Justice Scalia’s Plurality Opinion in *Rapanos* should be included in the definition of “tributary.”²⁴ This would limit the number of features that can be considered “tributaries” to those that could actually have a significant impact on the water quality of downstream waters, pursuant to the decision in *Rapanos*.²⁵ It would also provide needed clarity to the ranching community.

TSCRA asserts that intermittent and ephemeral features should NOT be considered “waters of the U.S.” because these features are best regulated by states and localities, and were not intended by Congress to be regulated by the federal government. EPA’s own *Rapanos* Guidance states, “Justice Scalia emphasizes that relatively permanent waters do not include tributaries ‘whose flow is coming and going at intervals...broken, fitful.’”²⁶ While TSCRA disagrees with the guidance’s ultimate position of being able to claim jurisdiction over intermittent or ephemeral streams under a significant nexus analysis, we request the agencies explain the rationale of this significant policy shift.

It is also necessary for the agency to articulate their definition of “ditches,” and provide a clear indication of the difference between a ditch and a gully. The agencies exclude gullies, but there are many features on the landscape where it is unclear whether the feature will be a regulated ditch, or an unregulated gully.²⁷ The agencies explanation in the preamble regarding gullies is inadequate for landowners to adequately distinguish them from regulated tributaries.²⁸ The agencies’ explanation says that gullies are younger than streams and lack an OHWM.

²³ *Supra* Note 2.

²⁴ *Rapanos*, J. Scalia, at 20 (In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features “that are described in ordinary parlance as “stream[,]. . .oceans, rivers, [and] lakes.”).

²⁵ *Id.*

²⁶ EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*, at 7 (Dec. 2, 2008).

²⁷ Proposed Rule at 22218.

²⁸ *Id.*

First, how do the agencies' propose that a landowner will know the age of the stream/gully and at what age does a gully become a stream? Second, considering the confusion and inconsistent application of distinguishing an OHWM, as noted by Justice Kennedy in *Rapanos*, making this distinction is not helpful.²⁹ The agencies cannot include an indicator like OHWM that is inconsistently applied and can change as a matter of policy without notice and comment.

Most recently, the Corps released new guidance documents for determining OHWM.³⁰ If the definition and determination can be so easily changed without public input, it provides little clarity and certainty to the regulated community. TSCRA requests the agencies recognize that OHWM is not an adequate indicator, ephemeral drainages can be recognized as gullies by many livestock producers and the agencies should include all such features in their definition of excluded gullies.

The proposed rule states "...ditches not excluded in section (b) that, either directly or **through other tributaries**, convey water to..." Yet, this is in conflict with the actual definition for a tributary that states "...which contributes flow, either directly or **through another water**,..."³¹ It is unclear whether to be a tributary the feature must contribute water through any means (i.e. "another water") or through another tributary. Contributing flow through any type of water is clearly expansive, essentially making anything with a bed, bank and OHWM a "tributary" and subject to the CWA. It also contradicts the agencies' statements and proposition that the proposed definition does not regulate groundwater, if groundwater can serve as the connection, and part of, a "tributary." TSCRA asserts that neither Congress nor the Commerce Clause of Article I of the U.S. Constitution intended or allows such a result.³² The agencies' definition of "tributary" violates the CWA and is beyond the authority of Congress to grant such unlimited authority based on the restrictions under the Commerce Clause of the U.S. Constitution.

Additionally, if the intent is to provide clarity to the regulated public, the agencies should give terms their common meaning. The term "tributary" to most landowners in the country is going to be a flowing feature like a river, creek, or stream. Ponds and wetlands are not what most would consider a "tributary" and therefore TSCRA requests the agencies to remove ponds, wetlands and any other non-flowing feature from inclusion in the definition of "tributary."

TSCRA encourages the agency to withdraw the proposed rule, convene stakeholder discussions to address these important issues and ways the agencies can legally address any

²⁹ *Rapanos*, J. Kennedy, at 24 (In describing the application of the Corps' OHWM criteria, "[a]ssuming it is subject to reasonably consistent application, but see U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297 pp. 3—4 (Feb. 2004), <http://www.gao.gov/new.intems/d04297.pdf> (noting variation in results among Corps district offices)").

³⁰ U.S. Army Corps of Engineers, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States*, August 2014 (available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.usace.army.mil%2FPortals%2F2%2Fdocs%2Fcivilworks%2Fregulatory%2Freg_supp%2Fwest_mt_finalsupp_aug2014.pdf&ei=XPVBNL7OYayyASdpIDgDQ&usg=AFQjCNFpOFIjYqyPWZYkMlrsLibS3LyCGA&sig2=LGUyEdz-C299Q0hrmCNGbA); U.S. Army Engineers, *A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification*, August 2014 (available at <http://acwc.sdp.sirsi.net/client/search/asset/1036026>).

³¹ Proposed Rule at 22202.

³² *SWANCC* at 173; ("...we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited...But this [Migratory Bird Rule] is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends.").

concerns that they have. As it is currently written, the definition of “tributary” under the proposed rule goes far beyond what the Supreme Court has articulated as a limit to federal jurisdiction.

b. The category “Adjacent Waters” wraps every open water in a floodplain and riparian area under federal jurisdiction, making the category virtually limitless

The agencies definition of “adjacent” captures every open water in a floodplain and riparian area, despite whether they are isolated or have a significant connection to downstream waters, contrary to Justice Kennedy’s concurring opinion in *Rapanos* (*Rapanos*, J. Kennedy, concurring, at 21-22, “...the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far”).

Similarly, the agencies’ interpretation that their authority is so great to categorically command every open water in a boundless floodplain or riparian area to be a federal water, regardless of connection, cannot stand. In his concurring opinion Justice Kennedy cites *Riverside Bayview Homes* regarding the Corps inclusion of adjacent wetlands as waters of the U.S. In that case as well as Justice Kennedy’s opinion, adjacent wetlands that abut a navigable-in-fact water can be jurisdictional because they have such a close connection to that navigable-in-fact water.³³

What the agencies have done in this proposed rule however, goes against the logic and reasoning in all three Supreme Court decisions. The agencies have expanded the category of “adjacent wetlands” to “adjacent waters” and expanded the word “adjacent” to mean any open water within a floodplain or riparian area, the size and scope of both are undefined in the proposed rule and left to the “best professional judgment” of the regulator. The agencies have made the new category of “adjacent waters” virtually limitless, violating the CWA and contrary to the Supreme Court decisions.

Justice Kennedy summed it up well when he stated, “Because such a nexus was lacking with respect to isolated ponds [in *Riverside Bayview Homes*], the Court held that the plain test of the statute did not permit the Corps’ action.” (*Rapanos*, J. Kennedy, concurring at 9). Geographically located in an undefined floodplain area does not remove a feature from being “isolated.” There are countless ponds and wetlands in floodplains or riparian areas that are considered “isolated.” Based on *Riverside Bayview Homes* and even Justice Kennedy’s opinion in *Rapanos*, these isolated features LACK a significant nexus connection to a TNW and therefore cannot be a “water of the U.S.,” putting the proposed definition beyond the bounds of the law itself.

On more than one occasion during the comment period, the agencies have said the “adjacent waters” category does not include every water within a floodplain and riparian area, but simply those that have a connection to another jurisdictional water. Perhaps these officials should read the words that were placed in the Federal Register on April 21, 2014. “The term neighboring, for purposes of the term “adjacent,” includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), **or** waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.” (Proposed Rule at 22207 (emphasis added)). The plain language of the regulation makes *all* waters within a floodplain or riparian area jurisdictional and any water left

³³ *Rapanos*, J. Kennedy, at 8-9.

outside those areas that might have some surface or subsurface hydrologic connection can also be included. The agencies are out of bounds. Not every water within a floodplain and riparian area meet Justice Kennedy's "significant nexus" test and therefore you cannot make them jurisdictional by rule. This change in the definition has a very real possibility to impact every single operation in the United States that is involved in production agriculture, usurping the federal-state partnership that underpins the CWA.

In *Rapanos*, the court evaluated jurisdiction over adjacent wetlands. In his concurring opinion, Justice Kennedy stated that the agencies could "identify categories of tributaries that, due to their volume of flow, their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." (*Rapanos*, J. Kennedy, concurring, at 24). In fact, the entire analysis of adjacency goes no further than wetlands adjacent to these major tributaries, but the Corps and EPA has expounded upon this language (major tributaries of TNWs) to say that any waters that are in the floodplain or riparian area of (a)(1)-(5) waters are considered adjacent. (a)(1)-(5) includes TNWs; interstate waters; the territorial seas; impoundments of TNWs, interstate waters or the territorial seas; and tributaries of TNWs, interstate waters, the territorial seas, or impoundments. (Proposed Rule at 22198-99). This is clearly an expansion of what the Supreme Court would consider "adjacent."

The term "adjacent" should have the plain meaning of the word if the true intent of the regulation is to provide clarity to the regulated community. Using the common definition of the word allows the vast majority of people to have a shared understanding of its meaning. The term "neighboring" within the agencies' definition of "adjacent" is beyond the common understanding of what would be an "adjacent water" to a TNW. A simple google search should enlighten the agencies on the public's understanding of the term "neighboring." That search results in a definition for "neighboring" of "next to or very near another place; adjacent."³⁴ If the agencies' definition of neighboring can include all waters within an undefined floodplain and riparian area they have gone well beyond the common understanding of the term, making the category of "adjacent waters" virtually limitless.

TSCRA asserts that the agencies expansive definition for "neighboring" in their per se jurisdictional category of "adjacent waters" is beyond the scope of the CWA. It is so expansive that it obliterates the federal-state partnership under the CWA, and pushes the outer limits of the Commerce Clause of the Constitution. Based on the Supreme Court's decisions in *Rapanos* and *SWANCC*, the agencies cannot finalize a regulation that makes any open water within a floodplain or riparian area per se jurisdictional. TSCRA strongly encourages the agencies not to change the "adjacent wetlands" category to "adjacent waters" and not to finalize their definition of "neighboring."

c. The category "Other Waters" gives the agencies the discretion to find any water jurisdictional

In Justice Kennedy's concurring opinion in *Rapanos* he states, "Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a non-navigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking."³⁵ What the agencies have done under the proposed rule is to contort this language and stretch it beyond its conscionable limit.

³⁴ Google definition of "neighboring," available at https://www.google.com/?gws_rd=ssl#q=define+neighboring.

³⁵ *Rapanos*, J. Kennedy, concurring, at 10.

The phrase “...may be so close” is a far cry from what the agencies have done under the proposed rule in the “Other Waters” category, which is to potentially aggregate similarly situated waters (even puddles) within the same watershed to find them all jurisdictional.³⁶ The agencies have left themselves enough flexibility to find all isolated puddles (the agencies specifically chose not to exclude puddles) in the same watershed could hold back enough water to qualify as meeting the agencies flexible “significant nexus” determination. (Proposed Rule at 22218).

TSCRA asserts that the agencies cannot rely on EPA’s Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013). The agencies failed to have their scientific arm focus on the most fundamental scientific matters that are inseparably linked to the legal limits of the law: “significance” of connectivity, and that connectivity to TNWs instead of “downstream waters.” Additionally, because the report was still under review when the proposed rule was published in the federal register, it is not a final document and therefore is subject to change and the public will not have a meaningful opportunity to comment on the final as the basis for this rule.

When the agencies crafted their proposed rule and requested its Office of Research and Development to develop this *Connectivity* report, the logical and fundament request to the researchers should have been to look at the importance (or “significance”) of connections of these smaller waters to TNWs. It is unclear to the cattle industry how and why the agencies failed to ask the most important question that science should have informed under this regulation, “what is significance.” The agencies response about that term being a legal question is weak at best. It is a legal term that requires scientific analysis. The agencies failure to even request an adequate and relevant analysis puts the entire report into the unusable category. TSCRA asserts that because the *Connectivity* report does not address the significance of connections it cannot be relied upon in the proposed rule.

The proposed rule states, “[t]he Report also concludes that wetlands and open waters in floodplains of streams and rivers and in riparian areas have a strong influence on downstream waters.” (Proposed Rule at 22196). Unfortunately, EPA did not request its Office of Research and Development to frame the report in terms of effects on Traditionally Navigable Waters (TNWs). The report focuses on “downstream waters.” It is unclear what that could entail exactly, but the broader interpretation could mean any water that is downstream from the water in question. Justice Kennedy’s concurring opinion referenced above only allows isolated waters to be federally jurisdictional if they are significantly connected to a TNW, not “a downstream water.” (Rapanos, J. Kennedy, concurring, at 10). This is an unwarranted expansion from the Kennedy opinion, and as he reiterates there is a limit to federal jurisdiction. His significant nexus test must be constrained to TNWs, instead of downstream waters, as the latter would obliterate any form of line describing the limit to federal jurisdiction under the CWA. The agencies cannot rely on the *Connectivity* report because it does not analyze the impacts to TNWs.

Additionally, TSCRA asserts that the agencies cannot rely on the *Connectivity* report because it has not been fully reviewed by the Scientific Advisory Board (SAB). At the time of publication in the federal register, the *Connectivity* report is a draft report, without incorporating the suggestions of the SAB panel. It is extremely troublesome that the agencies did not allow their own science to inform their rulemaking. It seems like the proposed rule was written before EPA’s ORD department even assembled the *Connectivity* report. If that were not the case then the agencies would have waited to propose a rule until the SAB review of the report was completed. As it stands, the public will not have a meaningful opportunity to comment on a

³⁶ Proposed Rule at 22211, (“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 (a)(3)...”).

proposed rule that was informed by the final *Connectivity* report. The only logical reason to do this is if the agencies knew they would not have a final report that was different from the draft report. This is a brave assumption from the agencies, and shows that more likely, the agencies had the proposed rule written and then fit the science to meet its proposed rule. TSCRA again asserts that the agencies cannot rely on the draft *Connectivity* report for the reasons described above to support their proposed rule.

If the agencies incorporate a final *Connectivity* report in their final “waters of the U.S.” definition, it will be substantively different than the proposed rule, requiring the agencies to resubmit the proposed rule to the public for comments. As it stands, the public cannot meaningfully comment on the proposed rule.

III. The proposed rule does not provide additional clarity

TSCRA is disappointed in the proposed rule’s lack of clarity due to ambiguous or undefined terms and phrases. This section describes in detail the terms and phrases throughout the proposal that were left undefined or whose definition is left so ambiguous that farmers and ranchers will be left wondering, with no possible way of determining, whether waters on their property will be jurisdictional or not. The agencies have failed in their stated purpose of providing clarity to the regulated community and the public at large. The proposed rule only increases confusion. TSCRA encourages the agency to withdraw the proposed rule, continue to fill in the blanks and only re-propose a new definition when those gaps have been filled. As it stands, it is extremely unclear how far the agencies intend federal jurisdiction to extend and if taken to the maximum extent possible the proposed rule wraps in virtually every feature across the nation, which contravenes not only the CWA itself but also the Commerce Clause of the U.S. Constitution.

d. Ambiguous Terms and Phrases

TSCRA asserts that the vast instances of undefined terms and phrases throughout the proposed rule make meaningful comments on the proposed rule impossible. TSCRA cannot provide comments on the impact of a proposed definition that does not exist, or has a wide range of interpretations. This section attempts to identify those legally important terms and phrases that the agencies have failed to adequately describe. However, TSCRA asserts that unless the agencies re-propose the definition with adequately defined terms and phrases for these legally significant terms that the public can comment on, they have not satisfied the notice and comment requirements under the APA.

i. Dry Land

The agencies use the phrase “dry land(s)” numerous times throughout the proposed rule, yet never defined the phrase.³⁷ It is unclear to TSCRA where a water ends and “dry land” begins. EPA and the Corps should define the term to allow the public to fully understand the proposed rule and its extent.

ii. Uplands

The term “uplands” is used throughout the proposed rule. It is a very significant legal term, especially as it applies to ditches and ponds, yet the agencies have failed to provide any sort of description of this important legal term. At one point, an EPA official, while looking at an

³⁷ Proposed Rule at 22193, 22199, 22218-19, 22263-74.

ephemeral stream jumped on the bank of the stream and said “if it doesn’t jiggle, it’s an upland.” This is woefully inadequate. The legal description of an upland should already have been included in the proposed rule. TSCRA would like the opportunity to comment on it, but the agencies have failed to provide it and therefore it is impossible to meaningfully comment.

TSCRA strongly criticizes the agencies for failing to notice such regulatory requirements. The regulated public cannot possibly be aware of their obligations if the agencies fail to define what they mean. This regulation is one of the largest in the history of the Office of Water. It is beyond comprehension how the definition of “uplands” along with others in this section were innocently “overlooked.” TSCRA asserts that the agencies must withdraw the proposed rule, provide the necessary legal definitions of terms and phrases throughout the proposal, and re-propose it to the public, so that we can meaningfully comment. As it stands, TSCRA believes it is impossible for our members to understand the impacts of the proposed rule and therefore cannot provide the agencies with educated feedback.

iii. “Through Another Water”

Under the definition for tributary as well as the exclusions for ditches the agencies have used the phrase “through another water.” (Proposed Rule at 22199). Yet, the agencies have neglected to explain what this phrase means. When an important regulatory term or phrase is left undefined the regulated community will look at the broadest logical meaning of the term or phrase to determine the scope of their liability. In this case the phrase “through another water” could mean through ground water or through a non-jurisdictional ditch. If the agency does find that a ditch lacks a surface water connection to any other jurisdictional water, but does have some groundwater connection to a jurisdictional water, that water can now fall outside the exclusions for ditches, and now is a tributary by rule.

TSCRA asserts that the agencies should have known they needed to provide a definition for such significant regulatory terms, and their failure to provide a definition prohibits TSCRA from being able to meaningfully comment on the proposed rule. The agencies must re-propose the rule with such definitions included so that the regulated public may provide comments on its scope. TSCRA asserts that including groundwater in the phrase “through another water” is inappropriate and fails to recognize that there is a limit to federal jurisdiction under the CWA.

iv. “Shallow Subsurface Flow”

The agencies have failed to adequately distinguish “shallow subsurface flow” (or “shallow subsurface connection”) from groundwater, and through its use of the phrase has raised the question whether groundwater is truly excluded from the category of “waters of the U.S.” or not (Proposed Rule at 22207). What is Shallow Subsurface Flow? How shallow is it? And how is a landowner supposed to know whether the wetland in his pasture is connected through shallow subsurface flow?

The proposed rule states, “The term neighboring, for purposes of the term “adjacent,” includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a *shallow subsurface hydrologic connection* or confined surface hydrologic connection to such a jurisdictional water.” (*Id.*, emphasis added). The agencies use of the term “or” in this definition means that even geographically isolated waters outside of a floodplain and riparian area, but that have such shallow subsurface hydrologic connection, are automatically jurisdictional. It seems this definition is in direct conflict with the Supreme Court’s decision striking down the “any hydrologic connection” rule of jurisdiction

because this definition allows automatic jurisdiction over waters that have only a hydrologic subsurface connection.

When “waters with a shallow subsurface hydrologic connection” to (a)(1) through (5) waters are jurisdictional simply by virtue of that connection, without any consideration of the significance of that connection. Because EPA and the Corps have not excluded any types of water from the term “waters” it could have the meaning of puddles, wetlands, ditches, or possibly damp depressions in a pasture. If that damp depression does have a shallow subsurface hydrologic connection it appears by the language of the proposed rule to be a jurisdictional water.

Based on the intent of Congress to only regulate surface water via the CWA, it follows that the agencies should not use shallow subsurface flow, shallow subsurface hydrologic connections or the like to serve as the basis for determining jurisdiction. Regulating the surface water that has this “groundwater” flow is the same as regulating the groundwater connection. Is it the agencies’ position that a citizen could inject pollutants into this “shallow subsurface hydrologic connection” without running afoul of the CWA? If the answer is no then the agencies are regulating groundwater, running afoul of their stated exclusion of groundwater.

There are also additional questions regarding this phrase. How deep must a landowner dig to discover whether his pond is connected to another water via “shallow subsurface flow”? At what depth must he dig to know whether it is groundwater instead of “shallow subsurface flow?” The agencies stated intent in providing this proposed rule was to provide clarity to everyone, including landowners. TSCRA asserts that the agencies’ decision to find adjacent waters with “shallow subsurface hydrologic connections” jurisdictional by rule puts an enormous burden on landowners to have surveys and analysis done on each and every “water” on their property to determine whether they have this type of connection and whether they can utilize their waters or must ask permission from the government to conduct numerous activities near these waters.

TSCRA strongly encourages the agencies to consider not looking at groundwater as the source of any connection, as there is too much confusion regarding whether it is part of the regulated water. Additionally, there is no logical way for landowners to know whether these connections exist, unfairly placing them squarely in the sites of a regulatory enforcement action without any knowledge.

v. Exclusively

The agencies have failed to provide clarity or certainty regarding livestock ponds. The proposed rule states, “Specifically, the agencies propose that the following are not “waters of the United States” notwithstanding whether they would otherwise be jurisdictional under section (a):...Artificial lakes or ponds created by excavating and/or diking dry land and **used exclusively** for such purposes as stock watering, irrigation, settling basins, or rice growing.” (Proposed Rule at 22218 (emphasis added)).

Under the exclusion for artificial ponds the agency has failed to extrapolate on and clearly define the extent of the agencies’ meaning in using the word “exclusively.” The livestock industry heavily utilizes artificial stock ponds to deliver water to our animals. The exclusion of such ponds only when they are “exclusively” used for watering of livestock raises many questions. Does the term mean for commercial purposes? Does it mean 90 percent of the time what is the purpose for which it is used? If the pond is also used as a water retention system, does it lose its excluded status. If the livestock producers’ children swim in the pond

occasionally does that mean it is sometimes used for recreation and loses its excluded status? If, as many stock ponds provide, they are used by wildlife does that negate its excluded status? TSCRA asserts the agencies should have provided an explanation about the extent of the qualification that only artificial ponds used exclusively for stock watering are excluded.

The Merriam-Webster definition of “exclusive” (root word) means “not shared: available to one person or group.”³⁸ As used in the exclusion for artificial ponds and lakes, it is apparent the only purpose that an artificial livestock pond can ever have is livestock watering. If at any time it is used for fishing, swimming, ice skating, water retention, or any other purpose it would be removed from the excluded category and make it a “water of the U.S.” TSCRA is extremely disappointed that the agencies have once again failed to adequately define what their exclusions actually mean, calling into question whether any water will actually fall into such categories. TSCRA believes that due to the subjective nature of the artificial ponds and lakes exclusion, very few livestock ponds will be excluded from the category of “waters of the U.S.” TSCRA submits that the agencies should exclude from “waters of the U.S.” “all ponds used for livestock watering.”

vi. Floodplain

The definition of “floodplain” is also addressed in Sec. I. b. above. The definition of floodplain in the proposed rule has been left overly broad by the agencies, providing maximum administrative flexibility for regulators, while leaving livestock owners guessing whether water features on their property are or are going to be within the floodplain designated by a regulator. Additionally, it is unclear from the proposed rule whether the entire floodplain itself is a “water of the U.S.”

According to the U.S. Geological Service the Mississippi River floodplain includes over 30 million acres.³⁹ The proposed rule does not prevent a regulator from determining that every open water within the 30 million acres that make up the entire Mississippi River floodplain is jurisdictional. Within those 30 million acres are numerous natural ponds, perennial ditches, isolated wetlands, and isolated prairie potholes. Based on the proposed rule, the regulator decides using their “best professional judgment” the size and scope of the floodplain.⁴⁰ The proposed rule continues that it can be the same as the FEMA 100-year floodplain, but does not have to be. (Id. at 22236).

TSCRA asserts this does not provide clarity, but expands the type and number of waters that are jurisdictional under the CWA, and flies in the face of the Supreme Court decisions that clearly stated there is a limit to federal jurisdiction.⁴¹ The definition of floodplain in the proposed rule recognizes no limit when, and with the stroke a regulator’s pen, every water within a 30 million acre plot would become federal waters. Should the agencies choose a floodplain frequency such as 100-year, 50-year, or 5-year, TSCRA would make specific comments to that frequency. Because the agencies failed to provide any sort of specificity for the regulated community, we cannot meaningfully comment on every possibility the agency might choose. Instead, the agencies should withdraw the proposed rule, fill in the many gaps that are prevalent throughout the proposal and re-propose the rule.

³⁸ Merriam-Webster Dictionary, *available at* <http://www.merriam-webster.com/dictionary/exclusive>.

³⁹ USGS, *available at* http://www.umesc.usgs.gov/reports_publications/psrs/psr_1997_02.html.

⁴⁰ Proposed rule at 22209; “When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determining which flood interval to use.”

⁴¹ SWANCC at 172; “We cannot agree that Congress’ separate definitional use of the phrase “waters of the United States” constitutes a basis for reading the term “navigable waters” out of the statute.”

The agencies' proposed rule also is unclear to the floodplain itself, leaving open the interpretation that the floodplain itself is a "water of the U.S." If every open water in a floodplain is a "water of the U.S.," then it could mean that when the water is out of its bank and covering the land in the floodplain, that is an "open water" and automatically a "water of the U.S." And of course, just like tributaries, just because the water recedes and is not present does not mean that jurisdiction ends. Can the agencies clarify this confusion for the public. We understand that the agency stated in the proposed rules, "Absolutely no uplands located in "riparian areas" and "floodplains" can ever be "waters of the United States" subject to jurisdiction of the CWA," (Proposed Rule at 22207), but if the floodplain itself is a "water of the U.S." then there is actually no "uplands" located within it. It is also unclear from the proposal what the agencies mean by "uplands," making the proposal even more perplexing. TSCRA believes that floodplains should not be "waters of the U.S." and the agencies should make that clear in a new proposed rule.

TSCRA encourages the agencies to re-think their proposal to make all open waters in a floodplain or riparian area jurisdictional by rule. It is limitless. The agencies must find a way to limit their jurisdiction to within the bounds set for it by *SWANCC* and *Rapanos*.

vii. Riparian Area

The proposed rule expands its "adjacent wetlands" category to include all "adjacent waters," which now wraps every water within a floodplain or riparian in as a "water of the U.S." by rule. While TSCRA disagrees that this category should be expanded as such, we also disagree with the agencies vague description of "riparian area." The agencies state,

"The term neighboring, for purposes of the term "adjacent," includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shall subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." (Proposed Rule at 22207).

TSCRA would like the agencies to explain how a livestock producer should know whether a natural pond, or puddle in his pasture lies within an area where the "surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area?"

The agencies have again failed miserably in providing any clarity to the public, its field personnel, or anyone else. All the agencies have done is provide themselves enough flexibility to find any water (however broad that term can be expanded) to be a "water of the U.S." TSCRA asserts that the agencies definition of "riparian area" is vague at best and does not articulate any discernible limit to their authority, violating both the CWA itself and the Commerce Clause of the Constitution.

viii. Similarly Situated

The agencies use of "aggregation" of "similarly situated" waters erases any limit that the agencies have claimed their proposed rule places on them. This ill-defined phrase can be used to group as many waters as a regulator can imagine together to find a "significant nexus" to an (a)(1) through (a)(3) water. (Proposed Rule at 22211).

If a water is not categorically a jurisdictional water by rule like those in categories (a)(1) through (a)(6), and even if it by itself has no significant nexus to a TNW, it *still* could be a federal water if after a regulator “aggregates” it together with “similarly situated” waters “in the region” and find a significant nexus to an (a)(1) through (a)(3) water. (Id). The proposed rule states:

“Waters are similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water. How these ‘other waters’ are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the ‘region’ or watershed.” (Id).

The proposed rule goes on to state that their landscape position within the watershed is generally the determinative factor for aggregating water in a significant nexus analysis, and the description of watershed is “the region.” (Id). It seems clear by the language in the proposed rule that a regulator has the power to aggregate all similar waters in a watershed, yet does not define the term watershed. In other words, once again, the agencies have used terms and phrases that provide the agencies with enough flexibility to find jurisdiction over any water, and provided the cattle industry with more confusion and even less clarity.

In summary, the terms and phrases in (i) through (viii) above bring TSCRA to the conclusion that the lack of clarity is an orchestrated attempt by the agencies to write the word “navigable” completely out of the CWA. The agencies cannot do this without a clear mandate from Congress, and Congress has had ample opportunities to do so and has refused. Let us be clear, TSCRA asserts that the agencies failure to clearly define anything throughout their proposed rule renders this comment period meaningless. The regulated public cannot meaningfully comment on the proposed rule until these fatal flaws are fixed, and to do that the agencies must withdraw this proposed rule, fill in the numerous gaping holes, and re-propose the rule.

ix. Significant Nexus

TSCRA is deeply disappointed in the agencies refusal to define clearly when the significant nexus test is satisfied. For a livestock producer, the vague definition provided by the agencies does not provide an adequate test that a producer can apply on the ground. According to the proposed rule significant nexus means that a water “either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of this section. For an effect to be significant it must be more than speculative or insubstantial.” (emphasis added)⁴² Unfortunately, instead of putting Justice Kennedy’s “significant nexus” test into an objective form that landowners could understand and readily apply, the agencies simply are attempting to put his words directly into the regulation, with one key exception/expansion.

It is ironic that the agencies continue to state that the decisions in *Rapanos* are unclear and confusing, and yet put those words into their proposal verbatim and argue that it is providing clarity. It was unclear when Justice Kennedy wrote them, and the agencies have not done their job of taking those words and putting them in a form that the regulated public can use in the “real world.”

⁴² Proposed Rule at 22211-13.

Our members will be directly hurt by the agencies lack of clarity with regards to their definition of “significant nexus.” Isolated waters that may or may not satisfy this ill-defined test crisscross livestock producers’ pastures and fields. There are numerous activities that take place on these lands that do not qualify for any exemptions under the CWA, and because of the proposed rule’s failure to adequately define these important terms, puts them at increased risk of violating the CWA. The agencies’ replacement of the word “or” for “and” in the significant nexus test (emphasized in the definition provided above) makes the test even more confusing than Kennedy’s own words. The agencies’ have again only provided administrative convenience at the expense of the regulated community’s liability.

Justice Kennedy required a significant impact on the “chemical, physical, *and* biological integrity” of a TNW, but the agencies have provided themselves with a test that allows only one of the three connections to be satisfied. Justice Kennedy’s test is much narrower than the agencies have defined, and as such, TSCRA believes the test goes beyond the agencies’ authority under the CWA. Our members would suggest the agencies look to the plurality opinion in *Rapanos* for more clarity.

As it stands, TSCRA requests the agency remove the following words from their definition of significant nexus: “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 (a)(3) of this section.”

To make the definition reflect the plurality decision and provide clarity the definition should recognize that the water needs a physical connection, which makes the feature indistinguishable from a water identified in paragraphs (a)(1) through (3).⁴³ For analysis purposes, additional clarity can also be realized by clarifying where a water feature begins and ends. We would suggest that a water feature is a discreet area that conveys or contains water, which starts and stops each time the conveyance intersects with a tributary of the conveyance or merges with another conveyance, wetland, or impoundment.

TSCRA believes this definition is a key term that the agencies were charged to further define, and their lack of completion of this task renders this proposed rulemaking useless. The agencies should withdraw the proposed rule, work with the regulated public on providing a definition that is clear, understandable, and also comports with the Supreme Court decisions. Then, and only then, should the agencies re-propose such a rule for public comment.

e. The exclusions are unclear and/or undefined

i. Ditches

The agencies exclusions under (b)(3) and (b)(4) are unclear and not adequate for the livestock industry. It is impossible to determine how many ditches would even fall into these categories because, like so many other times throughout this proposed rule, the agencies have failed to carry out their duty to define key legal terms. Central to this point are the definitions of “ditches,” “uplands” and “through another water.” Neither of these important terms are even attempted to be explained in the proposed rule. Extraneous documents placed on the agencies’ website outside of the proposed rule attempting to define uplands are not adequate nor legally

⁴³ *Rapanos*, at 37 (J. Scalia, wetlands are waters of the United States if they bear the “significant nexus” of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.”).

binding. Any definitions the agencies create should be put out for public comment, before they are finalized. To not do so would be a violation of the APA.⁴⁴

First, the agency has failed in the first instance of providing the public with a clear description of a “ditch.” Considering that some ditches will be jurisdictional while “gullies” and “rills,” along with (b)(3) and (4) ditches are excluded, it is of utmost importance to have a clear indication of what the agencies would categorize a water feature as. At present, the proposed rule fails to provide such descriptions. The discussion of gullies and rills in the preamble is inadequate for a landowner to be capable of distinguishing the features.

Second, the agencies have claimed through the comment period that this proposed rule does not claim jurisdiction over any more ditches than previously asserted. TSCRA disagrees with this assertion. But even if that were true, livestock producers across the country have been under a false impression over the past 40 years. The backlash the agency has experienced over this proposed rule from the farming and ranching community is a direct result of making it clear to our industry that the proposed rule will claim jurisdiction over almost every ditch across farm country. As the proposal currently stands, TSCRA is not confident that any ditch can meet the current categories under (b)(3) and (b)(4).

For example, the term upland can mean very different things to different people. In most farmer and ranchers’ minds it means up in the hills, far removed or of higher elevation than the nearest floodplains. Merriam-Webster dictionary provides a very similar definition, “ground elevated above the lowlands along rivers or between hills.”⁴⁵ EPA officials have asserted that the term means any area not in the “water of the U.S.” itself (i.e. everything outside the streambed or wetland is upland). This definition of upland clearly deviates from the common understanding, but the agencies have failed to provide it in the regulation. What was the reason for this? TSCRA asserts that the agencies should withdraw the proposed rule and propose a rule that includes the definition of such an important legal term, then allow public comment.

The livestock industry faces the same dilemma with the scope of the phrase “through another water.” The agencies use the phrase both with regard to the definition of “tributary” as well as with regard to excluded ditches under (b) (3) and (4). (Proposed Rule at 22201, (“The proposed rule defines “tributary” as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or *through another water*, to a water identified in paragraphs (a)(1) through (4).” *emphasis added*); (Proposed Rule at 22218). TSCRA strongly suggests the agency withdraw the proposed rule, fill in the large gaps left in the proposed rule, and re-propose the rule to allow the public to comment on the definitions the agency has selected.

In aiding the agencies’ development of such key terms, TSCRA suggests the agencies consider an exclusion for “ditches” that includes “Ditches, whether natural or man-made, that do not contribute perennial flow, directly to a water identified in paragraphs (a)(1) through (4) of this section.” This definition, along with a definition of the term “ditches” itself, would provide the needed clarity for the livestock industry while also allow the agencies to focus resources on waters more likely to have the requisite significant nexus to larger downstream waters.

⁴⁴ Supra Note 2.

⁴⁵ “Upland,” Merriam-Webster Dictionary, *available at* <http://www.merriam-webster.com/dictionary/upland> (July 14, 2014).

ii. Gullies/Rills

The gullies and rills exclusion is not adequately defined for livestock producers to determine the type of features on their properties, or to determine whether those features are jurisdiction or not excluded. The agencies specifically asked for comments on “how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.

While TSCRA generally agrees that gullies and rills are the types of features that are far beyond the jurisdiction of the CWA and therefore the agencies should make clear they are not “waters of the U.S.,” the agencies should include in the exclusion water features that have a bed and bank and in which water flows only briefly during and following a period of rainfall in the immediate locality. The inclusion of the features would do exactly what the agencies requested. If landowners cannot distinguish these features than they should all be treated the same way, and because they do not meet the standard articulated by Justice Scalia in *Rapanos*, they should be excluded.⁴⁶

The addition of these ephemeral features (those that only hold water during and immediately following a rainfall event) would alleviate much of the confusion and anger the agriculture community has with the proposed rule. The exclusion of more features under the “gullies” definition would allow the agencies to focus on those features that more clearly have a significant nexus to larger bodies of water. It would provide clarity to the livestock industry that producers’ dry washes and dry ditches are clearly not jurisdiction, without being dependent on the definition or an analysis of “uplands.” And it would allow the agencies to focus their resources on those bodies of water that have a better chance of having a significant nexus with larger downstream waters.

iii. Ponds

The agencies’ exclusion of “artificial ponds excavated wholly in uplands,...used exclusively for livestock watering...” is both unclear and not encompassing of many ponds used by the livestock industry. The agencies, once again, have simply forgotten to define key terms. What does the word “exclusively” mean in terms of uses? Does this mean that a cost-shared pond that has been stocked with fish for the occasional recreational fishing use is now outside the exclusion? If a farmer or rancher’s children swim occasionally in the pond, is it now outside the exclusion?

Ranchers utilize both natural ponds and artificial ponds for watering their livestock. Both natural and artificial ponds are maintained by farmers and ranchers, which benefits not only the livestock but also the wildlife in the area. Our industry’s preservation of such ponds, whether natural or artificial, benefits everyone. The proposed rule will create a disincentive from maintaining and creating such beneficial ponds. Although Sec. 404(f)(1)(C) exempts construction and maintenance from Sec. 404 permitting, it does not protect farmers and ranchers from Sec. 402 NPDES permits, or from 404 permits for activities outside the scope of “construction and maintenance” or “normal” under both the (C) and (A) exemptions. Calling all natural ponds a “water of the U.S.” and perhaps including many artificial ponds that might not be exclusively used for stock watering is inappropriate. These isolated waters are beyond the scope of “navigable waters” and the agencies should recognize them as such.

⁴⁶ Supra Note 21.

TSCRA asserts that all stock ponds should be excluded from the category of “waters of the U.S.” because they are not navigable in-fact and they lack a significant connection to any TNWs. We also assert that it is ludicrous that all natural ponds in a region or floodplain can be aggregated under the agencies “similarly situated” criteria to find a significant nexus where one does not exist individually. Additionally, the burden on livestock producers to determine whether their ponds meet the criteria for exclusion is extremely high, and opens their operations up to citizen suit litigation, where the farmer or rancher himself will need to defend his stock pond use in court.

iv. Groundwater

The agencies’ proposed rule leaves open the question whether they will assert jurisdiction over groundwater through contradictory statements and ill-defined terms and phrases. While under Section I. the agencies have specifically excluded “Groundwater, including groundwater drained through subsurface drainage systems” they turn around and find that connection through “shallow subsurface” flows can make a water an “adjacent water” and therefore jurisdictional. (Proposed Rule at 22207). It is hard for a reasonable person to see how “groundwater” is different than “shallow subsurface” flow. It appears that “groundwater” includes “shallow subsurface” flow, and the agencies have failed to distinguish the two from each other. It is also unclear how a landowner could dig up some ground, and seeing water, whether they would know whether they are obstructing “shallow subsurface” flow or are at groundwater. EPA official Robert Perciascepe stated at a Congressional hearing before the House Science Committee on July 9, 2014 that the “shallow subsurface” flow is not jurisdictional. If true, could a landowner not cut off the “shallow subsurface flow” and prevent their natural pond from being a “water of the U.S.?”

The federal government cannot divert or otherwise control water for its own uses regardless of the authority cited without a reserved water right or a state-adjudicated water right. Never has it been suggested that the scope of the CWA extends to the regulation of groundwater.⁴⁷

States have their own system of water law that governs public and private water rights within their borders. The western states in particular have adopted some form of the prior appropriation doctrine (prior appropriation), or “first in time, first in right,” regarding surface water and many have, to some degree, integrated this approach into their system of ground water law. Under the prior appropriation doctrine, water rights are obtained by diverting water for “beneficial use”, which can include a wide variety of uses such as domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, agriculture, recreation, fish and wildlife, among others, depending on state law. The extent of the water right is determined by the amount of water diverted and put to beneficial use.

Any imposition by the federal government that infringes on property rights based on settled state water law would constitute takings under the Fifth Amendment to the United States Constitution and would require just compensation.

TSCRA asserts that the agencies’ properly excluded groundwater from jurisdiction under the CWA, and similarly, have no jurisdiction over “shallow subsurface flow.” This should not be a valid consideration under the “adjacent waters” analysis. (Proposed Rule at 22207). Similarly, it

⁴⁷ *Rapanos*, J. Scalia, at 24 (“First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional inter- state navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.)

should not be a consideration under the significant nexus determination under the “other waters” or any other category.

v. Waste Treatment System Exclusion

The proposed rule excludes waste treatment systems from “waters of the U.S.” (Proposed Rule at 22193). Cattle producers across the country utilize waste treatment systems as part of the Sec. 402 NPDES regulations for Concentrated Animal Feeding Operations (CAFOs). Most CAFOs utilize man-made earthen retention structures that are designed to retain the necessary quantity of water to meet the required effluent guidelines, but a small percentage were originally permitted to utilize naturally existing topographic impoundments or structures (such as playas) to retain wastewater. These impoundments or structures have been used by some CAFOs for this purpose since prior to the CWA’s inception. For clarity and consistency purposes, TSCRA requests that the agencies remove language that has been stayed since 1980 that would remove natural features from inclusion in the waste treatment system exclusion only for Sec. 402. We also request that the agencies include a statement that further clarifies currently authorized facilities utilizing these features qualify for the exclusion.

TSCRA generally supports the agencies’ decision to maintain this exclusion. However, the exclusion under Sec. 402 includes the language “[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.” (Proposed Rule at 22268). While this language has been suspended since 1980, TSCRA requests that it be permanently deleted from the regulation. It has resulted in confusion.

Removing this language from the definition is a logical change considering the agencies’ stated intent to provide clarity and consistency. In the other sections of the CWA the Waste Treatment System exclusion does not include this additional language limiting it to manmade features. And considering it has been stayed or suspended for so long, it would just be common sense to get rid of language that has no effect. Doing so would leave a definition that is consistent throughout the CWA. And, given that the provision has been stayed for 34 years, decisions too numerous count have been made by EPA, the Corps, other federal agencies, state agencies and businesses across the U.S. – decisions that were made in compliance with the CWA, under the understanding that the provision for waste treatment systems was not limited to manmade features. While the agencies did not seek comment on this regulatory language because it was not a change to the definition, TSCRA sees this as an opportunity for the agencies to provide some clarity and certainty to the cattle industry and other industries that have made decisions based on this understanding.

Additionally, TSCRA asserts that the agencies include in the definition for “waste treatment systems” exclusion the following statement, “For purposes of this exclusion, existing facilities that have been authorized to operate under the CWA are deemed to meet the requirements of the Act.” This statement would relieve confusion for facilities that have been authorized and operating on these isolated water features for more than four decades.

A number of facilities were constructed and placed into operation prior to adoption of the CWA, and as stated above, a number of decisions had been made by a variety of agencies and businesses in accordance with the stayed provision on waste treatment systems. At the same time, the cattle industry has worked to comply with permit provisions adopted by EPA over the past decade, especially as it relates to Concentrated Animal Feeding Operations (CAFOs). One such requirement has focused on a CAFO’s ability to retain rainfall runoff from a 25-year, 24-hour storm event. For the most part, these site-specific rainfall and retention capacity

evaluations have been conducted by USDA-NRCS engineers or licensed professional engineers working as consultants for CAFO owners/operators. The resulting, documented engineering analysis forms the basis for the CAFO's ability to meet the requirements for CAFO permit/CWA requirements for either manmade or natural impoundments.

To provide additional clarity regarding the word "designed," TSCRA would suggest the following definition for "designed": "For purposes of this section, designed to meet the requirements of the act can be satisfied through a documented engineering analysis showing the waste treatment system's capability to meet or exceed the requirements of a 402 NPDES permit."

TSCRA believes these suggested changes to the Waste Treatment System Exclusion would alleviate long-standing confusion, would provide the regulatory certainty needed by currently authorized facilities, and are in line with the agencies' intent to provide clarity to the regulated community.

f. Agencies should exclude playa lakes from Waters of the United States

TSCRA requests that the agencies create an exclusion for playa lakes from the category "waters of the United States." The proposed rule requests comment on the exclusion or inclusion of playa lakes within "waters of the United States,"⁴⁸ (Proposed Rule at 22216), and TSCRA has concluded that due to their isolated nature, these waters fall squarely in the realm of those isolated ponds that were found to be beyond the Corps' authority in *SWANCC* and as such should be specifically excluded in the regulation.⁴⁹

Due to the fact that these waters are geographically isolated and fall outside the jurisdiction of the CWA, we would also submit that a specific exclusion not include a caveat wrapping playas back into the category of regulated waters through the "interstate waters," "adjacent waters," or any other category as suggested in the proposed rule.⁵⁰ Not only would this subcategory exclusion be in line with Supreme Court rulings, it would provide much needed clarity to the regulated public.

The reports cited by EPA conclude that playas are "geographically isolated wetlands" that "...represent the lowest points on the landscape in closed watersheds" and "derive water from rainfall and local runoff (including irrigation water), while very few receive ground-water inputs (Haukos and Smith 1994)."⁵¹ Another report describes them as "shallow depressional recharge wetland occurring primarily in the High Plains region of the western Great Plains. Each occurs within a closed watershed and, as the term recharge implies, only receives water naturally from precipitation and its associated runoff."⁵² These characteristics clearly resemble

⁴⁸ Proposed Rule at 22216, ("In addition, the agencies could determine that other subcategories of waters are not jurisdictional and lack a significant nexus to an (a)(1) through (a)(3) water. Under this option the agencies could conclude that "other waters" such as playa lakes in the Great Plains, even in combination with other playa lakes in a single point of entry watershed, lack a significant nexus and therefore are not jurisdictional.")

⁴⁹ *SWANCC*, at 163, 168 (describing the waters in question as "seasonal ponds of varying sizes;" and noting that to "rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water").

⁵⁰ Proposed Rule at 22216 ("Under this approach, where a playa lake, or other excluded category of water, would be within a category established by paragraphs (a)(1) through (a)(6) of the proposed rule (e.g., the playa is an interstate water or the playa is adjacent to an (a)(1) through (a)(5) water), the playas would be jurisdictional.")

⁵¹ Tiner, *Geographically Isolated Wetlands of the United States*, *Wetlands* 23(3): 494-516, 496 & 500 (2003).

⁵² Haukos & Smith, *Playa Wetland Regulation*, *Wetlands* 23(3): 577-589, 577 (Sept. 2003).

those of the isolated ponds that were considered to be beyond the Corps' jurisdiction in SWANCC, therefore making it appropriate for clarity and legal purposes for the agencies to specifically exclude playas from the "waters of the U.S." regulation.

The agencies also seek comment, data, and information on whether there are subcategories of "other waters" or specific combinations of characteristics that are "likely, in the majority of cases, to perform important functions for an aquatic ecosystem incorporating navigable waters," and, thus, should be *per se* jurisdictional (page 22252). Again, the reports cited by EPA provide support for demonstrating that there is separation between playas and navigable waters and that a majority of playas do not meet the criteria to be considered jurisdictional "waters of the U.S.":

There is a clear distinction between geographically isolated wetlands, such as playas, and adjacent wetlands, where the reports specifically state, "The closed watersheds and isolated environmental events (e.g., precipitation, runoff) defining playas contributes to spatial and temporal difference in the importance of ecosystem functions even among adjacent wetlands,"⁵³ and

EPA suggests that a key criterion for jurisdiction should include "specific combinations of characteristics" that would include or be applicable to "...the majority of cases..." The reports cited by EPA state, "The remaining requirements for declaration of jurisdiction under the CWA apply to just a few playas. Indeed, we believe that <1% of the playas could meet the remaining jurisdictional criteria: interstate location, adjacent or connected to navigable waters, or a significant nexus to interstate commerce." Clearly <1% is not indicative of "...the majority of cases..." and as such provides strong support for EPA to determine that playas are not be jurisdictional.⁵⁴

It is clear from the science and the Supreme Court's holding in SWANCC that playa lakes are the closed, isolated watersheds that are the prime candidates for exclusion under the "waters of the U.S." rule. To provide the needed certainty and clarity to the ranchers utilizing these features, TSCRA requests the agencies categorically exclude playa lakes from the category of "waters of the U.S."

g. EPA/Corps interpretive rule on agriculture conservation practices under the "Normal Farming, Silviculture and Ranching" activities exemption has narrowed the exemption for ranchers

In summary, the Interpretive Rule would limit the "normal farming" exemption, discourage voluntary conservation, and ultimately hurt water quality. TSCRA requests the agencies immediately withdraw the Interpretive Rule and make it clear in such withdrawal that the agencies have always interpreted conservation activities to be "normal farming" activities.

IV. The proposed rule obliterates the federal-state partnership underlying the CWA

The CWA begins by saying it is the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this Act."⁵⁵ This important statement of policy by Congress when

⁵³ Playa Wetland Regulations, at 579.

⁵⁴ *Id.* at 585.

⁵⁵ 33 U.S.C. § 1251.

it passed the CWA indicates the important role that the states are to play in protecting the quality of our nation's water. Unfortunately, the agencies' proposal completely and utterly obliterates this federal-state partnership by declaring that all waters are federal.

For all the reasons described in these comments above, EPA and the Corps have made it clear that the federal government has jurisdiction over any and all waters. There are no clear limits to their jurisdiction articulated in the proposed rule, violating the words and spirit of the CWA itself. If all waters are now under the jurisdiction of the federal government, what is left for the states? And if nothing is left then why would Congress take it upon themselves to include language specifically reserving "primary responsibilities" for protecting water quality to the states?

While TSCRA asserts that the absence of a limit to federal jurisdiction under the proposed rule usurps the federalism principle that underpins the entirety of the CWA, we are extremely concerned about the lack of outreach and involvement of the states, as co-regulators, prior to the proposed rule being published. The agencies have failed to articulate why the proposed rule needed to be proposed in such a rush that the states and the regulated community had zero involvement in its development. TSCRA asserts that the agencies should withdraw the proposed rule and begin anew with crafting a rule that begins with heavy stakeholder engagement. TSCRA further asserts that any rule proposed by the agency should recognize and respect the important role that state agencies play in regulating our nation's water quality. That recognition is woefully lacking in this proposed rule.

V. The proposed rule encroaches on private property rights

Not only would the proposed rule obliterate the rights of the states under the CWA and the Constitution, it similarly tramples on the private property rights of livestock producers. The vast expansion of the CWA to cover every wet and dry depression in the United States will create a great expansion of federal regulatory oversight into land-use activity. TSCRA believes this proposed rule goes so far as to cover virtually every piece of dry land across the country through one way or another, depriving landowners of the use and enjoyment of their land and severely impacting their ability to make a living off of it.

The Fifth Amendment of the U.S. Constitution provides two important rights to landowners in this context: the right of due process before life, liberty or property are taken from him and the right of just compensation for any taking of private property for public use.⁵⁶ The takings clause is of utmost importance because this proposed rule has the potential to condemn vast swaths of land across the country, preventing beneficial activity from taking place. One regulatory action such as pronouncing all prairie potholes to be "similarly situated" and found to have the requisite "significant nexus" could condemn activity in a region of more than 300,000 square miles. With farms and ranches dominating much of the landscape, our members will feel a significant direct negative impact by preventing the use of their land for farming and ranching. As demonstrated throughout these comments, the agricultural exemptions and exclusions do not protect our industry from the reach of this regulation and as such the agencies should include a discussion of how they will compensate for a taking and impairment of private property.

⁵⁶ U.S. Const. amend V, art. IV § 3 ("...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

VI. Conclusion

The proposed rule places no discernible limit on the federal government's authority over water, violating the CWA as articulated by the Supreme Court in *SWANCC* and *Rapanos*. The exclusions and exemptions in the proposal are unclear and provide the livestock industry with zero certainty, making the proposed rule a real threat to our industry's continued viability. TSCRA strongly urges the agencies to reconsider their proposed rule redefining "waters of the U.S." TSCRA strongly urges the agencies to withdraw the proposed rule.

If you should have any questions or need any further information please contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Bonds", written in a cursive style.

Pete Bonds
President