

**TESTIMONY OF  
DON BLANKENAU,  
ATTORNEY FOR NEBRASKA ASSOCIATION OF RESOURCES DISTRICTS AND  
THE LEAGUE OF NEBRASKA MUNICIPALITIES  
BEFORE THE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
UNITED STATES SENATE  
March 14, 2015**

Good morning Senator and members of the Committee.

My name is Don Blankenau. I am an attorney based in Lincoln, Nebraska specializing in water and natural resources law. My practice has allowed me to engage in water cases in the states of Nebraska, Arizona, North Dakota, South Dakota, Missouri, Georgia, Florida and Alabama. I appear here today to offer my thoughts regarding the proposed rule concerning the Waters of the United States. Vanessa Silke, an attorney in my office, and I have previously filed formal comments to this rule on behalf of our clients which include the Nebraska Groundwater Management Coalition, the Nebraska Association of Resources Districts, the League of Nebraska Municipalities, and the Tri-Basin Natural Resources District. I've brought with me a sample of those comments and offer them into the record of this hearing. In addition to those comments, I offer some additional considerations today.

I'd like to begin with a brief anecdote that I believe highlights the philosophical perspective of the federal proponents of this rule: Four years ago I was at a meeting with an employee of the U.S. Army Corps of Engineers when we began a discussion regarding ground water management. To my surprise, this employee stated that it was time for the federal government to assert more control over ground water. I responded to that statement with the observation that the United States Supreme Court in a Nebraska case, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), determined that ground water was an article of commerce within the meaning of the Constitution. I went on to explain that as an article of commerce, any increased federal control

was the sole purview of Congress and could not be undertaken by an agency absent Congressional authorization. The Corps employee simply responded, “We can do a lot with our rules and if Congress won’t act, we will.” The proposed rule is the product of that kind of thinking.

Whether a rule is good policy is one question. Whether it is legal is another. In my view, the proposed rule is neither. Article 1, Section 8, clause 3 of the Constitution of the United States contains the “commerce clause” that authorizes Congress to make laws governing interstate commerce. Historically, the interstate trafficking in goods and services on our nation’s interstate rivers served as the legal lynchpin to Congressional control over navigable waters. It is in this context and under this authority that Congress adopted the Clean Water Act and expressly limited its reach to “navigable waters.” In the decades that have passed, the reach of the EPA and Corps has broadened, as the term “navigable waters” has been extended by those two agencies. Contrary to the assertions of its proponents, the proposed rule does not merely codify existing judicial interpretations of navigable waters; it affirmatively expands the meaning to create federal controls that go far beyond what Congress intended when it adopted the Clean Water Act.

The proposed rule defines water as “navigable” if it has a hydrologic – ground water – connection to a navigable stream. So while molecules of water in an excavation may be miles from a stream and decades from ever impacting that stream, today they are defined as navigable. In Nebraska, the ground water commonly is hydrologically connected to streamflow and can extend out many miles from the stream. The proposed rule would therefore impact many thousands of people and acres than the present requirements.

Existing permit requirements under the CWA already add a layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps’ Omaha District Office, individual permits under section 404 of the CWA (hereafter “404 Permits”)

currently take up to eighteen (18) months to process. Permitting costs typically range between \$25,000 and \$100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process. Ultimately the proposed rule stretches the definition of "navigable waters" beyond credibility, which is evidenced by the nearly 1,000,000 negative comments that have been submitted. The truth is, there is no water quality necessity that requires this kind of federal intervention. In other words, there is no real problem the rule will solve. Instead, the rule is simply another example of the ever growing federal erosion of state authority. I urge the committee to take all necessary action to ensure this proposed rule does not become law.

Thank you. I will answer any questions.

**Docket ID No. EPA-HQ-OW-2011-0880**

*Comments to the*  
*Definition of “Waters of the United States”*  
*Under the Clean Water Act,*  
**79 Fed. Reg. 22188 (April 21, 2014)**

**Submitted on behalf of the Nebraska Association of Resources Districts by:**

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## PREFACE

The Nebraska Association of Resources Districts (“NARD”) is an interlocal entity comprised of Nebraska's twenty-three Natural Resources Districts (“NRDs”), which conserve, protect, develop, and manage the natural resources of the State of Nebraska.<sup>1</sup> NARD coordinates efforts among NRDs and provides resources, services, studies, and facilities needed for NRD representation before agencies, tribunals, courts and any administrative, legislative, executive, or judicial bodies. NARD also informs and educates the public concerning the NRDs’ efforts to conserve, sustain, and improve Nebraska’s natural resources and environment.

NARD appreciates the opportunity to submit these comments on the proposed *Definition of “Waters of the United States”* (hereafter “WOTUS”) *Under the Clean Water Act*,<sup>2</sup> (“CWA”) (collectively, the “Proposed Rule”) issued by the U.S. Army Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”) (collectively, the “Agencies”).

## INTRODUCTION

NARD is comprised of all twenty-three of Nebraska’s NRDs, each of which is a political subdivision of the State of Nebraska.<sup>3</sup> Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.<sup>4</sup> The Nebraska Legislature also empowered the NRDs, along with Nebraska Department of Natural Resources (“DNR”), to apply each entity’s expertise to bring about an orderly administration and regulation of hydrologically connected surface and ground waters.<sup>5</sup> Furthermore, NRDs coordinate regulatory efforts with the Nebraska Department of Environmental Quality (“NDEQ”), which administers the NPDES permit program with oversight from EPA, as well as a number of state-based permits and programs to protect ground and surface water quality under Nebraska’s Environmental Protection Act.<sup>6</sup> NARD’s members also obtain and provide,

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<sup>1</sup> NEB. REV. STAT. §§ 2-3201 *et seq.* The jurisdictions of NARD’s member NRDs encompass the entirety of the State of Nebraska.

<sup>2</sup> 79 Fed. Reg. 22188 (April 21, 2014)

<sup>3</sup> NARD Members include: Upper Republican NRD, Upper Niobrara White NRD, Upper Loup NRD, Upper Elkhorn NRD, Upper Big Blue NRD, Twin Platte NRD, Tri-Basin NRD, South Platte NRD, Papio-Missouri River NRD, North Platte NRD, Nemaha NRD, Middle Republican NRD, Middle Niobrara NRD, Lower Republican NRD, Lower Platte South NRD, Lower Platte North NRD, Lower Niobrara NRD, Lower Loup NRD, Lower Elkhorn NRD, Lower Big Blue NRD, Little Blue NRD, Lewis & Clark NRD, and Central Platte NRD.

<sup>4</sup> NEB. REV. STAT. §§ 2-3201 *et seq.*; *See also* NEB. REV. STAT. §§ 2-3229, such purposes include: (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.

<sup>5</sup> Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106

<sup>6</sup> *See* NEB. REV. STAT. § 81-1501, *et seq.*

individually and by partnering with other state and local entities, funding for projects which are vital to the proper management of Nebraska's natural resources.<sup>7</sup> Through the implementation of statutory duties and responsibilities, nearly every use of groundwater and surface water in the State of Nebraska is regulated in some way by the NRDs. Furthermore, NRDs directly implement and manage a number flood control, drainage, and irrigation projects for which a CWA permit must be obtained if the Agencies assert federal jurisdiction.

Agricultural production and groundwater-dependent development form the backbone of Nebraska's economy.<sup>8</sup> Land values and access to water are the two major components which dictate producers' decisions to locate facilities and engage in development activities. These decisions are critical to the local tax base upon which the NRDs must rely in order to carry out statutory duties and responsibilities, including the implementation and ongoing management of flood control, drainage, and irrigation projects, through the levy of taxes, special occupation taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.<sup>9</sup>

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between \$25,000 and \$100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

NARD supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.<sup>10</sup> However, the Agencies seek to accomplish these goals through an

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<sup>7</sup> See, e.g., NEB. REV. STAT. §§ 2-1501 *et seq.*; NEB. REV. STAT. §§ 2-15,122 *et seq.*; NEB. REV. STAT. §§ 2-4201 *et seq.*

<sup>8</sup> See, eg. Spencer Parkinson, Decision Innovation Solutions, "Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012." November 26, 2012. <http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e>.

<sup>9</sup> See, e.g. NEB. REV. STAT. §§ 2-3225, 2-3226.01-.04 through .05, 61-218.

<sup>10</sup> 79 Fed. Reg. 22188

unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, the "RFA")<sup>11</sup>, which sets forth procedural steps designed to safeguard small governmental jurisdictions, such as NARD's members.

For these reasons, the Proposed Rule should be withdrawn, because it will impermissibly impact water users and state-based entities responsible for the management of ground and surface water resources. Below are detailed comments addressing the Agencies' impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

**The Agencies cannot shift the burden of proof to the regulated community by relying on undefined groundwater and non-hydrologic connections as the basis for asserting federal jurisdiction.**

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made by the Corps and NDEQ to determine whether jurisdiction will be asserted under the CWA.<sup>12</sup> Today, many of NARD's member NRDs manage water projects that are currently unpermitted by the Corps, or NDEQ pursuant to the CWA; the same is true for many of the projects and development activities undertaken by private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territory of each of NARD's member NRDs. The Agencies assert that the Proposed Rule will not require additional permits to be obtained. However, the plain language of the Proposed Rule and the Science Advisory Board's ("SAB") draft comments and letter to the EPA contradict the Agencies' claims that the Proposed Rule does not expand jurisdiction or include groundwater.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* ("SWANCC")<sup>13</sup> and *Rapanos v. U.S.*,<sup>14</sup> and their lineage, the Agencies have relied on overly broad scientific

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<sup>11</sup> 5 U.S.C. § 601 *et seq.*

<sup>12</sup> See, e.g., Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*, dated December 2, 2008 ([http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris\\_images.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf)); Title 119, NDEQ's Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System ([http://deq.ne.gov/RuleAndR.nsf/Title\\_119.xsp](http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp)).

<sup>13</sup> 121 S. Ct. 675 (2001)

<sup>14</sup> 126 S. Ct. 2208 (2006)

justifications (many tenuous at best) to convert the “significant nexus” concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies’ exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule’s expansive definitions of “neighboring,” “riparian,” and “tributary,” expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is *not insignificant*.

### **The new definitions of “Neighboring” and “Riparian Area”**

The Proposed Rule alters a current category of jurisdictional waters to include “all waters (not just wetlands) **adjacent**” to waters susceptible to use in interstate or foreign commerce, waters subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas (“Proposed 1-5 Waters”).<sup>15</sup> For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term “adjacency” is the term “neighboring” which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a “shallow subsurface hydrologic connection” to Proposed 1-5 Waters. Also included within the term “neighboring” is the term “riparian area,” which includes any area “bordering where surface or subsurface hydrology directly influence ... the animal community.”

No definition is provided for the scope of “shallow subsurface hydrologic connection” or “subsurface hydrology.” The State of Nebraska has a relatively high groundwater table throughout most of the State,<sup>16</sup> and the interconnection between groundwater sources and local river systems makes it unlikely that NARD’s member NRDs, or landowners within their respective jurisdictions, could engage in development activities or implement and manage flood control, drainage, and irrigation projects without creating some form of open water that would fall within the category of “adjacent waters.”

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require **the absence of a surface hydrologic connection**. Remarkably, the Proposed Rule explicitly states that hydrologic connections are **not** necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.<sup>17</sup> Regardless of the number of species of plants or animals cited by the Agencies, this approach is

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<sup>15</sup> 40 C.F.R. 230.3(s)(6)

<sup>16</sup> See Exhibit A, image depicting depth to groundwater in Nebraska

<sup>17</sup> 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

no different than the previously-rejected Migratory Bird Rule,<sup>18</sup> which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

### **The new definition of “Tributary”**

Under the Proposed Rule, a “tributary” is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.<sup>19</sup> No meaningful exemption from this definition is provided,<sup>20</sup> and no case-by-case determination as to the status of the water will be made. Under the plain language of the Proposed Rule, this means *any* hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a “tributary.”

In Nebraska’s large river valleys, it is impossible to develop commercially-viable land, or implement flood control, irrigation, or drainage projects without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.<sup>21</sup>

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies’ expansive definitions of “neighboring,” “riparian,” and “tributary.” As plainly illustrated in the attachments, no portion of the State of Nebraska is outside of a floodplain, or lacking some form of a subsurface hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, the NRDs’ flood control, drainage, and irrigation projects (and development activities undertaken by private individuals, entities, and other governmental units within the NRDs’ territories) would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule’s expansive definitions of categorically jurisdictional water: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as

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<sup>18</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA “to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the ‘Migratory Bird Rule’ is not fairly supported by the CWA.”

<sup>19</sup> 40 CFR 230.3(u)(5) (emphasis supplied).

<sup>20</sup> *Id.* Exempt from the definition of “tributary” are ditches that “drain only uplands” and “do not contribute flow either directly or through another water” to any TNW, interstate water, interstate wetland, or territorial sea.

<sup>21</sup> See Exhibit B, image depicting drainage basins of major rivers within Nebraska; see also Exhibit C, image depicting wetlands identified by EPA Region 7.

habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.<sup>22</sup> The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

### **The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.**

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding in *Rapanos*:

[C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions.** ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of 'waters of the United States.' **It did not do that[.]'**

*Rapanos v. United States*, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied).<sup>23</sup> The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.<sup>24</sup>

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<sup>22</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA." See also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

<sup>23</sup> See also *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767-768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

<sup>24</sup> See *Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

Despite the Agencies' statements to the contrary,<sup>25</sup> the Proposed Rule **does** include groundwater, because without groundwater, there is **no** hydrologic link between many isolated waters and traditionally navigable waters.<sup>26</sup> Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.<sup>27</sup> Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.<sup>28</sup> These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state and local governmental entities, such as NARD's member NRDs, and private entities, who must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for governmental entities such as the NRDs, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.<sup>29</sup> This infringement on State and local responsibilities to control the development of localized natural resources and land uses is

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<sup>25</sup> “The agencies have never interpreted ‘waters of the United States’ to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems.” 79 Fed. Reg. 22218

<sup>26</sup> Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. See Science Advisory Board (SAB) Draft Report (4/23/14). *See also* SAB letter to EPA regarding the scientific and technical basis of the Proposed Rule regarding “waters of the U.S.” (9/30/14).

<sup>27</sup> 79 FR 22219; GAO Report – “Waters and Wetlands” (page 23) February, 2004.

<sup>28</sup> NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501, *et seq.*

<sup>29</sup> *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

not supported by the language or history of the CWA.<sup>30</sup> As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.<sup>31</sup>

### **The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.**

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that **all** existing exemptions will be maintained,<sup>32</sup> and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.<sup>33</sup> However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule.<sup>34</sup> Instead, new qualifying language replaces the exemption for ditches, and the interpretive exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.<sup>35</sup> The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, federal jurisdiction will be asserted over many ditches under the broad definition of "tributary."

Failure to explicitly affirm all existing exemptions within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

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<sup>30</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")

<sup>31</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

<sup>32</sup> See <http://www2.epa.gov/uswaters>: ("All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.")

<sup>33</sup> 79 Fed. Reg. 22218.

<sup>34</sup> The Agencies have also recently adopted an interpretive rule imposing mandatory compliance with Natural Resources Conservation Service (NRCS) standards as the basis for qualifying for a number of agricultural exemptions. NARD opposes the Agencies' efforts to limit the exemptions for agricultural activities through the interpretive rule.

<sup>35</sup> Proposed definition at 40 C.F.R. 230.3(t)(4)

**The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as NARD’s member NRDs.**

The Proposed Rule’s expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent<sup>36</sup> development activities, production capacities, and land values, all of which are factors that directly impact the tax base of NARD’s member NRDs, as well as the ability of the NRDs to implement and manage flood control, drainage, and irrigation projects.

The RFA<sup>37</sup> requires the Agencies to review the Proposed Rule to determine if it will have a “significant economic impact on a substantial number of small entities.”<sup>38</sup> Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small governmental jurisdictions, such as NRDs, and other small entities, from overzealous regulation.<sup>39</sup>

In part because so many proposed rules were subjected to meaningless “rubber stamp” certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”). The SBREFA amended section 611 of the RFA to allow small entities, such as NARD’s member NRDs, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.<sup>40</sup> The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration’s Office of Advocacy, the Office of Management and Budget’s Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a

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<sup>36</sup> *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19).

<sup>37</sup> 5 U.S.C. § 601 *et seq.*

<sup>38</sup> 5 U.S.C. § 601(6), “the term ‘small entity’ shall have the same meaning as the terms ‘small business’, ‘small organization’ and ‘small governmental jurisdiction[.]’”

<sup>39</sup> 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), “the term ‘small governmental jurisdiction’ means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]” According to 2000 US Census data, at least 15 of Nebraska’s 23 NRDs qualify as small governmental jurisdictions. See <http://www.dnr.ne.gov/population-estimates-and-census-data>; <http://www.dnr.ne.gov/census-2000-population-compared-to-1990-by-nrds>.

<sup>40</sup> 5 U.S.C. § 611

report containing recommended alternatives to the Agencies and the panel's recommendations could be incorporated into the Proposed Rule.<sup>41</sup>

These laws and policies were put in place specifically to protect small entities such as NARD's member NRDs. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining "waters of the United States"). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called "neighboring" and "riparian areas" as "adjacent" based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.<sup>42</sup> In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.<sup>43</sup> The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,<sup>44</sup> would expand the number of waters over which they assert jurisdiction. They said of that guidance:

The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of

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<sup>41</sup> The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration's Office of Advocacy's written comments on proposed rules and include a response to those comments in the final rule.

<sup>42</sup> 79 Fed. Reg. at 22219.

<sup>43</sup> See e.g., 79 Fed. Reg. at 22214.

<sup>44</sup> See [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.

The Proposed Rule, which codifies some elements of the Guidance, and expands on others, is clearly even broader in scope. Similarly, proponents of the Proposed Rule tout it for “restoring” protection to waters over which the Agencies do not presently assert jurisdiction, which is, of course, the basis of their support.<sup>45</sup>

Most importantly, the fact that more waters will be regulated under the Proposed Rule was confirmed by the Agencies in their written analysis of the potential costs and benefits associated with this action, titled “*Economic Analysis of Proposed Revised Definition of Waters of the United States*,” which states that more waters will be regulated under the Proposed Rule.

The Agencies have failed to prepare an initial regulatory flexibility analysis (“IRFA”) as required by the RFA, and make it available for public review and comment simultaneously with the Agencies’ publication of general notice of proposed rulemaking for the rule.<sup>46</sup> The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule’s impact on small entities would achieve the regulatory purpose.<sup>47</sup> The Agencies must also prepare a final regulatory flexibility analysis (“FRFA”).<sup>48</sup> The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.<sup>49</sup>

As President Clinton made clear in Executive Order 12,866, “The American people deserve a regulatory system that works for them, not against them[.]” The Order also demands: “Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives[.]”<sup>50</sup>

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs

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<sup>45</sup> See, e.g., *Advancing America’s Clean Water Legacy: Proposed Clean Water Protection Rule Will Better Protect Streams and Wetlands* available at <http://www.nrdc.org/water/files/clean-water-legacy-FS.pdf>; *The Clean Water Rule: Protecting America’s Waters* available at <http://www.nwf.org/~media/PDFs/Water/WOTUS%20Proposed%20rule%20fact%20sheet%203252014.pdf>.

<sup>46</sup> 5 U.S.C. § 603(a)

<sup>47</sup> 5 U.S.C. § 603(b-c)

<sup>48</sup> 5 U.S.C. § 604(a)

<sup>49</sup> 5 U.S.C. § 604(a)

<sup>50</sup> *Id.*, Section 1(b)(11)

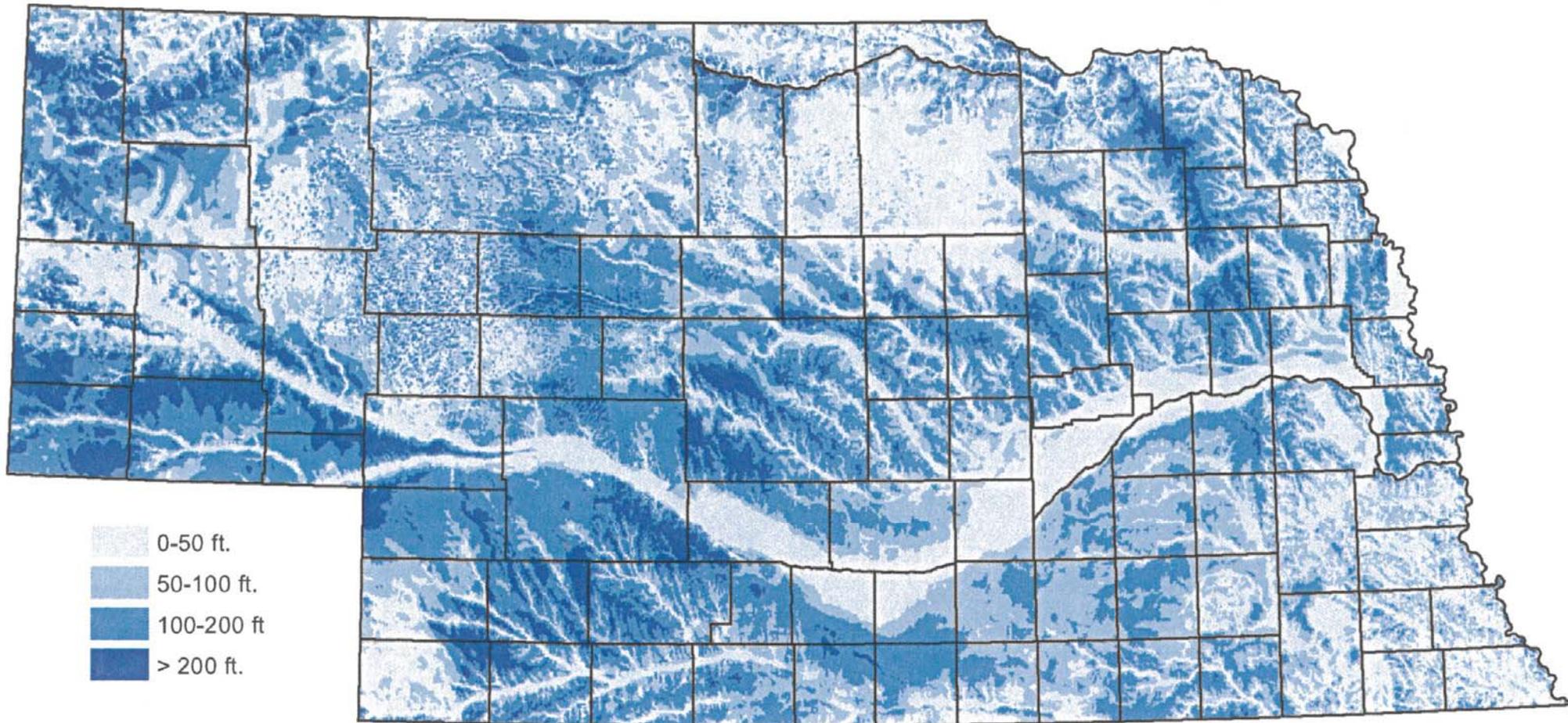
imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient.<sup>51</sup>

## **CONCLUSION**

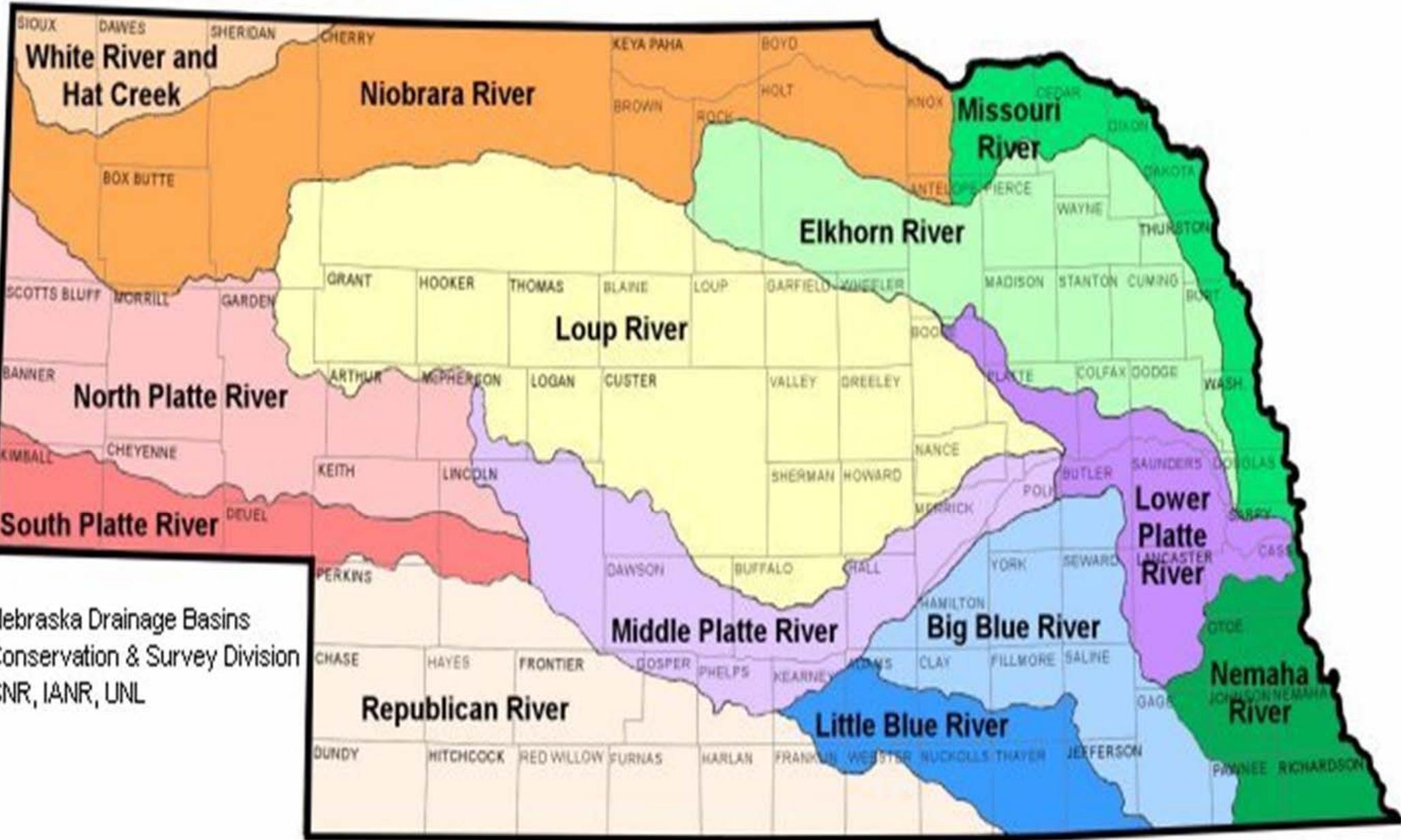
The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies' goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their effort to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements.

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<sup>51</sup> Compare April 9, 2014 letter from members of the Senate Committee on Environment and Public Works, urging the agencies to conduct a proper RFA analysis (see Exhibit D).

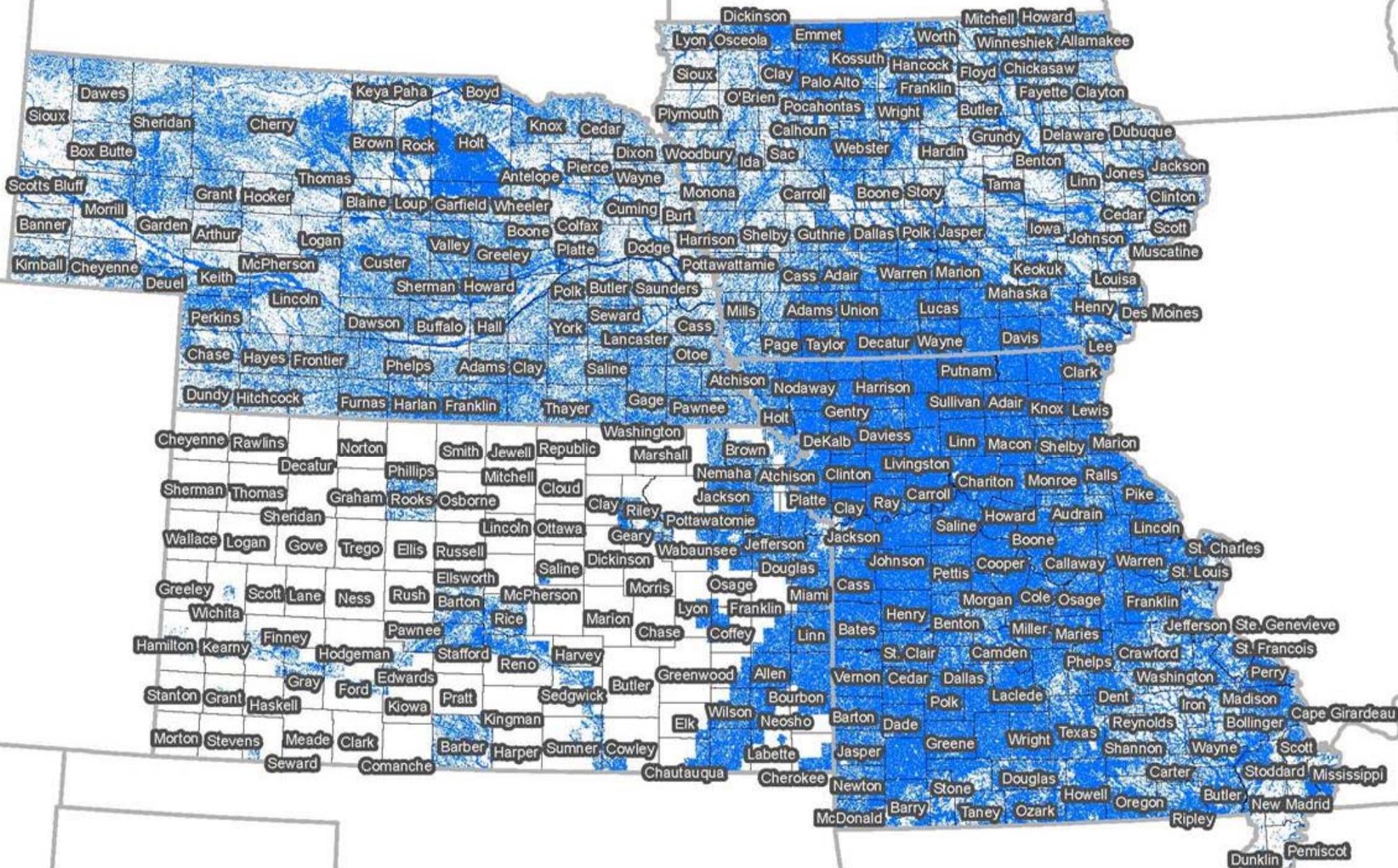


Generalized depth to groundwater. (Source: University of Nebraska, Conservation and Survey Division, 1998)



Nebraska Drainage Basins  
Conservation & Survey Division  
SNR, IANR, UNL





**Wetlands Identified by EPA Region 7**

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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-8175

BETTINA FOIRIER, MAJORITY STAFF DIRECTOR  
 ZAK BAIG, REPUBLICAN STAFF DIRECTOR

April 9, 2014

The Honorable Barack Obama  
 President of the United States  
 The White House  
 1600 Pennsylvania Avenue, NW  
 Washington, DC 20500

Dear President Obama,

As members of the Senate Environment and Public Works Committee, we write in response to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) release of their proposed rule which would expand federal jurisdiction under the Clean Water Act (CWA). After an initial review of the proposed rule, we are deeply concerned that the agencies are attempting to obtain *de facto* land use authority over the property of families, neighborhoods and communities throughout the United States. Several provisions within the proposed rule demonstrate that EPA and the Corps are unwilling to accept the meaningful limits Congress placed on the agencies' authority under the CWA, limits the Supreme Court has repeatedly recognized. These include the proposed rule's categorical regulation of irrigation and stormwater ditches, unlimited aggregation approach, and broad adjacency definition. The proposed rule would also have EPA and the Corps making case-by-case jurisdictional determinations based on the "significant nexus" test, even as they ominously assert that a "hydrologic connection is not necessary to establish a significant nexus."<sup>1</sup>

Equally important, we believe EPA and the Corps should immediately cease in their proclamations that the agencies' proposal is a justified response to various calls for a CWA rulemaking.<sup>2</sup> In fact, EPA and the Corps are using rulemaking requests as an excuse to pursue a rushed, predetermined agenda, as opposed to engaging in a deliberative, fair, and transparent regulatory process. EPA and the Corps chose to release their proposed rule despite failing to 1) sufficiently consult with affected states; 2) allow for completion of the Science Advisory Board review of the so-called "Connectivity Report"; and 3) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), among other

<sup>1</sup> See U.S.E.P.A. and Army Corps of Engineers, Proposed Rule Regarding Definition of "Waters of the U.S." Under the Clean Water Act at 100 (March 25, 2014), [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_20140325\\_prepublication.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf).

<sup>2</sup> See Nancy Stoner, *Input Critical to Rule on Waters of the U.S.*, EPA Connect (March 25, 2014) ("In large part, it was public input that led us to propose a rule. Since 2008, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public."), <http://blog.epa.gov/epaconnect/2014/03/input-critical-to-rule-on-waters-of-the-u-s/>.

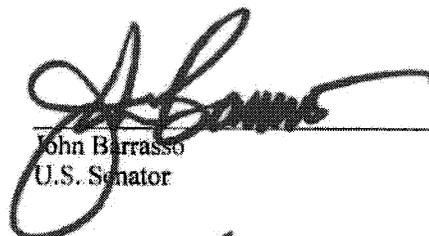
The Honorable Barack Obama  
April 9, 2014  
Page 2 of 2

mandatory procedures. EPA and the Corps' decision to proceed despite the numerous concerns identified by lawmakers and stakeholders is incredibly disappointing.

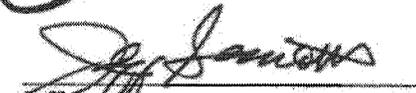
The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today. Although EPA and the Corps may have a role in clarifying and limiting CWA jurisdiction, unfortunately the agencies' rule proposal was a significant step in the wrong direction. The decision to move forward with this proposal is a clear breach of your promise to cut through red tape.<sup>3</sup> In light of other recent CWA permitting decisions that have occurred during your administration, moving forward with the proposed rule will exponentially frustrate economic activity and further undermine notions of certainty in the federal permitting process.

Sincerely,

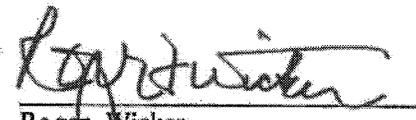
  
\_\_\_\_\_  
David Vitter  
U.S. Senator

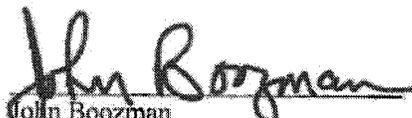
  
\_\_\_\_\_  
John Barrasso  
U.S. Senator

  
\_\_\_\_\_  
James M. Inhofe  
U.S. Senator

  
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Jeff Sessions  
U.S. Senator

  
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Mike Crapo  
U.S. Senator

  
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Roger Wicker  
U.S. Senator

  
\_\_\_\_\_  
John Boozman  
U.S. Senator

  
\_\_\_\_\_  
Deb Fischer  
U.S. Senator

<sup>3</sup> Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

**Docket ID No. EPA-HQ-OW-2011-0880**

*Comments to the  
Definition of “Waters of the United States”  
Under the Clean Water Act,  
79 Fed. Reg. 22188 (April 21, 2014)*

**Submitted on behalf of the League of Nebraska Municipalities by:**

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## PREFACE

Since 1909, the League of Nebraska Municipalities (the “League”) has served as a voice for Nebraska municipalities in proceedings before state and federal agencies, tribunals, courts, and legislative and executive branches of government. The mission of the League and its member cities and villages is to preserve local control and empower municipal officials to provide effective leadership and improve the quality of life for their citizens.

The League appreciates the opportunity to submit these comments on the proposed *Definition of “Waters of the United States”* (hereafter “WOTUS”) *Under the Clean Water Act*,<sup>1</sup> (“CWA”) (collectively, the “Proposed Rule”) issued by the U.S. Army Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”) (collectively, the “Agencies”).

## INTRODUCTION

The League’s members face the ongoing challenge of planning, managing and financing the necessary infrastructure to handle wastewater, stormwater, and flood control systems, as well as provide drinking water, electricity, and natural gas<sup>2</sup> to 98% of Nebraskans living in municipalities. Each of these systems and utilities is subject to layers of state-based permitting programs and regulatory measures administered by the Nebraska Department of Environmental Quality (“NDEQ”)<sup>3</sup>, the Nebraska Department of Natural Resources (“DNR”)<sup>4</sup>, and Natural Resources Districts (“NRDs”)<sup>5</sup>, in addition to federal CWA permitting requirements under section 404 (administered by the Corps), and sections 303, 305, 311, 401, and 402 (administered by NDEQ with oversight from EPA).

Land values and access to water are two major components which dictate decisions by agricultural producers and private industry to locate facilities and engage in development activities.<sup>6</sup> These decisions are not only critical to creating and retaining jobs within Nebraska’s 530 municipalities, but also bolster the local tax base upon which the League’s members must rely in order to carry out statutory duties and responsibilities, which include the construction and maintenance of roads and wastewater, stormwater, and flood control systems, through the levy of

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<sup>1</sup> 79 Fed. Reg. 22188 (April 21, 2014)

<sup>2</sup> The League’s members not only provide general governmental services, but also operate and manage publicly-owned utility systems. Of 530 municipalities in Nebraska, 463 own and operate water distribution systems, 122 own and operate electric distribution systems, 13 own and operate natural gas distribution systems, and over 400 own and operate wastewater collection and treatment systems.

<sup>3</sup> Nebraska Environmental Protection Act, NEB. REV. STAT. 81-1501, *et seq.*

<sup>4</sup> Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106.

<sup>5</sup> NEB. REV. STAT. §§ 2-3201 *et seq.* Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.

<sup>6</sup> Agricultural production and groundwater-dependent development form the backbone of Nebraska’s economy. *See, e.g.,* Spencer Parkinson, Decision Innovation Solutions, “Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012.” November 26, 2012.

<http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e>.

taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between \$25,000 and \$100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, section 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

The League supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.<sup>7</sup> However, the Agencies seek to accomplish these goals through an unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community and ignore the impacts to numerous permit programs which incorporate the WOTUS definition. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, the "RFA")<sup>8</sup>, which sets forth procedural steps designed to safeguard small governmental jurisdictions, which include all but two of Nebraska's 530 municipalities.

For these reasons, the Proposed Rule should be withdrawn. Below are detailed comments addressing the Agencies' impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

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<sup>7</sup> 79 Fed. Reg. 22188

<sup>8</sup> 5 U.S.C. §§ 601 *et seq.*

## **I. The Proposed Rule impermissibly expands the scope of CWA jurisdiction and effectively shifts the Agencies' burden of proof to the regulated community.**

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made by the Corps and NDEQ to determine whether jurisdiction will be asserted under the CWA.<sup>9</sup> Therefore, many of the projects and development activities undertaken by the League's members, as well as private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territories of the League's members are unpermitted by the Corps, or NDEQ, pursuant to the CWA.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* ("SWANCC")<sup>10</sup> and *Rapanos v. U.S.*,<sup>11</sup> and their lineage, the Agencies have relied on overly broad scientific justifications (many tenuous at best) to convert the "significant nexus" concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies' exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule's expansive definitions of "neighboring," "riparian," and "tributary" expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is not insignificant.

### **A. The new definitions of "neighboring" and "riparian area"**

The Proposed Rule alters a current category of jurisdictional waters to include "**all waters** (not just wetlands) **adjacent**" to waters susceptible to use in interstate or foreign commerce, waters subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas ("Proposed 1-5 Waters").<sup>12</sup> For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term "adjacency" is the term "neighboring" which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a "shallow subsurface hydrologic connection" to Proposed 1-5 Waters. Also included within the term "neighboring" is the term "riparian area," which includes any area "bordering where surface or subsurface hydrology directly influence ... the animal community."

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<sup>9</sup> See, e.g., Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*, dated December 2, 2008 ([http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris\\_images.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf)); Title 119, NDEQ's Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System ([http://deq.ne.gov/RuleAndR.nsf/Title\\_119.xsp](http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp)).

<sup>10</sup> 121 S. Ct. 675 (2001)

<sup>11</sup> 126 S. Ct. 2208 (2006)

<sup>12</sup> 40 C.F.R. 230.3(s)(6)

No definition is provided for the scope of “shallow subsurface hydrologic connection” or “subsurface hydrology.” Much of Nebraska has a relatively high groundwater table,<sup>13</sup> and the interconnection between groundwater sources and local river systems makes it unlikely that the League’s member municipalities, or landowners within their respective jurisdictions, could engage in development activities or construct and maintain wastewater, stormwater, and flood control systems without creating some form of open water that would fall within the category of “adjacent waters.”

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require **the absence of a surface hydrologic connection**. Remarkably, the Proposed Rule explicitly states that hydrologic connections are **not** necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.<sup>14</sup> Regardless of the number of species of plants or animals cited by the Agencies, this approach is no different than the previously-rejected Migratory Bird Rule,<sup>15</sup> which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

## **B. The new definition of “tributary”**

Under the Proposed Rule, a “tributary” is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.<sup>16</sup> No meaningful exemption from this definition is provided,<sup>17</sup> and no case-by-case determination as to the jurisdictional status of the water will be made. Under the plain language of the Proposed Rule, this means **any** hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a “tributary.”

In Nebraska’s large river valleys, it is impossible to engage in development or construction activities without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.<sup>18</sup> Moreover, decades of development have also resulted in an extensive network of ditches throughout communities and along roads and agricultural properties, which terminate, at some point, in a

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<sup>13</sup> See Exhibit A, image depicting depth to groundwater in Nebraska

<sup>14</sup> 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

<sup>15</sup> *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA “to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the ‘Migratory Bird Rule’ is not fairly supported by the CWA.”

<sup>16</sup> 40 CFR 230.3(u)(5) (emphasis supplied).

<sup>17</sup> *Id.* Exempt from the definition of “tributary” are ditches that “drain only uplands” and “do not contribute flow either directly or through another water” to any traditionally navigable water, interstate water, interstate wetland, or territorial sea.

<sup>18</sup> See Exhibit B, image depicting drainage basins of major rivers within Nebraska; *see also* Exhibit C, image depicting wetlands identified by EPA Region 7.

conveyance to a traditionally navigable water, interstate water, interstate wetland, or territorial sea. Under the Proposed Rule, every segment of these conveyances would qualify as a “tributary” and federal jurisdiction under the CWA would be presumed.

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies’ expansive definitions of “neighboring,” “riparian,” and “tributary.” As plainly illustrated in the attachments, no portion of Nebraska is outside of a floodplain, or lacking some form of a subsurface or remote hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, any ditch, wastewater, stormwater, or flood control system, or development activities undertaken by private individuals, entities, and other governmental units within the municipalities’ jurisdictions would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule’s expansive definitions of categorically jurisdictional waters: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.<sup>19</sup> The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

## **II. The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.**

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies’ authority under the Clean Water Act, holding in *Rapanos*:

[C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions.** ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that ‘significantly affect the chemical, physical, and biological integrity of ‘waters of the United States.’ **It did not do that[.]**”

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<sup>19</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA “to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the ‘Migratory Bird Rule’ is not fairly supported by the CWA.” *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

*Rapanos v. United States*, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied).<sup>20</sup> The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.<sup>21</sup>

Despite the Agencies' statements to the contrary,<sup>22</sup> the Proposed Rule **does** include groundwater, because without groundwater, there is **no** hydrologic link between many isolated waters and traditionally navigable waters.<sup>23</sup> Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.<sup>24</sup> Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.<sup>25</sup> These meaningful regulatory measures will only be hampered by another layer of federal interference,

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<sup>20</sup> See also *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767-768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

<sup>21</sup> See *Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

<sup>22</sup> "The agencies have never interpreted 'waters of the United States' to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. 22218.

<sup>23</sup> Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. See Science Advisory Board (SAB) Draft Report (4/23/14).

<sup>24</sup> 79 FR 22219; GAO Report – "Waters and Wetlands" (page 23) February, 2004.

<sup>25</sup> NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, NEB. REV. STAT. §§ 81-1501, *et seq.*

and will directly impact land use decisions made by state and local governmental entities, such as the League’s member municipalities, and private entities, which must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for Nebraska’s municipalities, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.<sup>26</sup> This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.<sup>27</sup> As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.<sup>28</sup>

### **III. The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.**

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that **all** existing exemptions will be maintained,<sup>29</sup> and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.<sup>30</sup> However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule. Instead, new qualifying language effectively negates the exemption for ditches, and the interpretive exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule’s exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.<sup>31</sup> The Agencies’ overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, most ditches will be swept into the

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<sup>26</sup> *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

<sup>27</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) (“Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]”)

<sup>28</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

<sup>29</sup> See <http://www2.epa.gov/uswaters>: (“All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.”)

<sup>30</sup> 79 Fed. Reg. 22218.

<sup>31</sup> Proposed definition at 40 C.F.R. 230.3(t)(4)

Proposed Rule's broad definition of "tributary" and countless activities, which are currently unpermitted, will become subject to federal jurisdiction.

Furthermore, the exemption for waste treatment systems is limited to those systems "designed to meet the requirements of the Clean Water Act." This exemption will be meaningless for any waste treatment system that does not account for impacts to the increased number of bodies and conveyances of water falling within the scope of the proposed WOTUS definition.

Failure to explicitly affirm all existing exemptions, including current EPA-approved state-specific exemptions from NPDES permitting requirements, within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

#### **IV. The Agencies have failed to account for the impacts of the expansion of the definition of WOTUS on existing CWA permits administered by the States.**

Despite the Agencies' inexplicable assertions, the Proposed Rule will expand the scope of federal jurisdiction under the CWA. By refusing to recognize the obvious, the Agencies have also neglected to analyze the impact of a new federal definition of WOTUS, and its limitation and omission of exemptions, on State-administered CWA permit programs.

NPDES permits for municipal, commercial, industrial wastewater, industrial discharges to public wastewater treatment systems, industrial and municipal storm water, municipal combined sanitary and storm sewer overflows and discharges, and livestock waste control, Water Quality Standards, and stormwater management plans for Municipal Separate Storm Sewer Systems (MS4), among others, are all tied to the requirements of the CWA, which include the federal definition of WOTUS. Changes to the federal rule will impact the time and resources required to ensure State-based statutes, procedures, and rules and regulations meet federal requirements under the CWA. The costs associated with the administration of increased jurisdiction, and the additional time and resources which must be committed to ensure CWA duties are met, translate into an unfunded mandate on State agencies. The League's members will also be required to commit considerable time and resources to review current permits, obtain new permits, and adjust current infrastructure to adapt to changes which may be required for currently-permitted activities. These efforts will also translate into tax and rate increases to support the ongoing management of wastewater, stormwater, and flood control systems, as well as for the delivery of drinking water, electricity, and natural gas services.

Changes to fundamental definitions of CWA terms should not be proposed unless and until the Agencies have taken into account the administrative and financial implications of expanding the scope of federal jurisdiction.

**V. The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as the League’s member municipalities.**

The RFA requires the Agencies to review the Proposed Rule to determine if it will have a “significant economic impact on a substantial number of small entities.”<sup>32</sup> All but two of Nebraska’s 530 municipalities qualify as “small entities” under the RFA. The Proposed Rule’s expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent<sup>33</sup> development activities, production capacities, and land values, all of which are factors that directly impact the tax base of the League’s member municipalities. The cost and timeframe for municipalities to construct and maintain wastewater, stormwater, and flood control systems, and to provide utility services will also be affected if the Proposed Rule is adopted.

Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small governmental jurisdictions, such as Nebraska’s municipalities, and other small entities, from overzealous regulation.<sup>34</sup>

In part because so many proposed rules were subjected to meaningless “rubber stamp” certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”). The SBREFA amended section 611 of the RFA to allow small entities, such as the League’s member municipalities, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.<sup>35</sup> The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration’s Office of Advocacy, the Office of Management and Budget’s Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a report containing recommended alternatives to the Agencies and the panel’s recommendations could be incorporated into the Proposed Rule.<sup>36</sup>

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<sup>32</sup> 5 U.S.C. §§ 601 *et seq.*; 5 U.S.C. § 601(6), “the term ‘small entity’ shall have the same meaning as the terms ‘small business’, ‘small organization’ and ‘small governmental jurisdiction[.]’”

<sup>33</sup> *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19).

<sup>34</sup> 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), “the term ‘small governmental jurisdiction’ means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]”

<sup>35</sup> 5 U.S.C. § 611

<sup>36</sup> The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration’s Office of Advocacy’s written comments on proposed rules and include a response to those comments in the final rule.

These laws and policies were put in place specifically to protect small entities such as the League's member municipalities. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. *See* 40 CFR 122.2 (defining "waters of the United States"). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called "neighboring" and "riparian areas" as "adjacent" based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.<sup>37</sup> In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.<sup>38</sup> The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,<sup>39</sup> would expand the number of waters over which they assert jurisdiction. They said of that guidance:

The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.

The Proposed Rule, which codifies some elements of the Guidance, and expands on others, is clearly even broader in scope. Similarly, proponents of the Proposed Rule tout it for "restoring" protection to waters over which the Agencies do not presently assert jurisdiction, which is, of course, the basis of their support.<sup>40</sup>

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<sup>37</sup> 79 Fed. Reg. at 22219.

<sup>38</sup> *See e.g.*, 79 Fed. Reg. at 22214.

<sup>39</sup> *See* [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

<sup>40</sup> *See, e.g., Advancing America's Clean Water Legacy: Proposed Clean Water Protection Rule Will Better Protect Streams and Wetlands* available at <http://www.nrdc.org/water/files/clean-water-legacy-FS.pdf>; *The Clean Water*

Most importantly, the fact that more waters will be regulated under the Proposed Rule was confirmed by the Agencies in their written analysis of the potential costs and benefits associated with this action, titled “*Economic Analysis of Proposed Revised Definition of Waters of the United States*,” which states that more waters will be regulated under the Proposed Rule.

The Agencies have failed to prepare an initial regulatory flexibility analysis (“IRFA”) as required by the RFA, and make it available for public review and comment simultaneously with the Agencies’ publication of general notice of proposed rulemaking for the rule.<sup>41</sup> The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule’s impact on small entities would achieve the regulatory purpose.<sup>42</sup> The Agencies must also prepare a final regulatory flexibility analysis (“FRFA”).<sup>43</sup> The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.<sup>44</sup>

As President Clinton made clear in Executive Order 12,866, “The American people deserve a regulatory system that works for them, not against them[.]” The Order also demands: “Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives[.]”<sup>45</sup>

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient.

## CONCLUSION

The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies’ goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their efforts to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements.

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*Rule: Protecting America’s Waters* available at <http://www.nwf.org/~media/PDFs/Water/WOTUS%20Proposed%20rule%20fact%20sheet%203252014.pdf>.

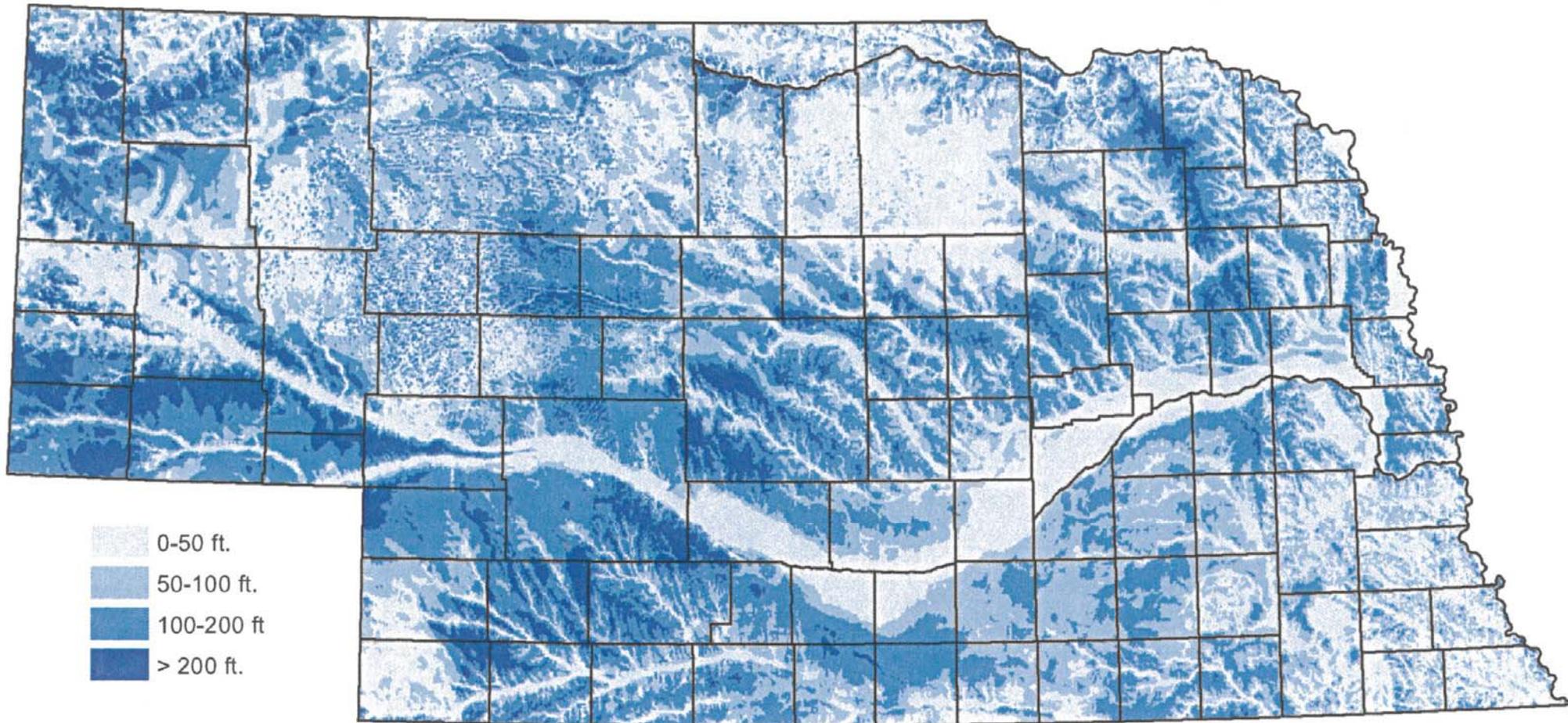
<sup>41</sup> 5 U.S.C. § 603(a)

<sup>42</sup> 5 U.S.C. § 603(b-c)

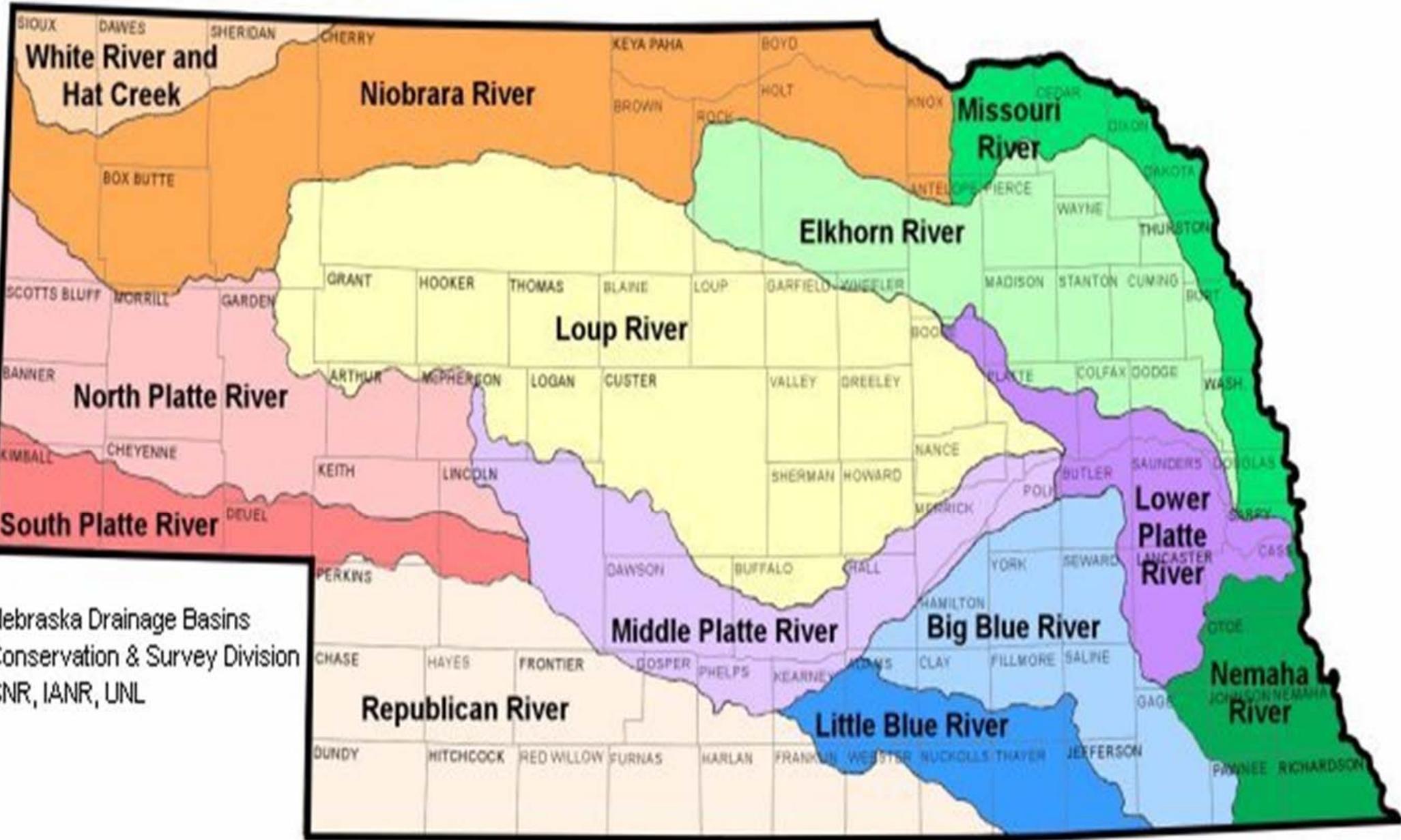
<sup>43</sup> 5 U.S.C. § 604(a)

<sup>44</sup> 5 U.S.C. § 604(a)

<sup>45</sup> *Id.*, Section 1(b)(11)



Generalized depth to groundwater. (Source: University of Nebraska, Conservation and Survey Division, 1998)



Nebraska Drainage Basins  
Conservation & Survey Division  
SNR, IANR, UNL





**Docket ID No. EPA-HQ-OW-2011-0880**

*Comments to the*  
*Definition of “Waters of the United States”*  
*Under the Clean Water Act,*  
**79 Fed. Reg. 22188 (April 21, 2014)**

**Submitted on behalf of the Nebraska Groundwater Management Coalition by:**

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## PREFACE

The purpose of the Nebraska Groundwater Management Coalition (“Coalition”) is to provide the authority, resources, services, studies, and facilities needed for the representation of the interests of its members in proceedings before all agencies, tribunals, courts and any administrative, legislative, executive, or judicial bodies concerning or affecting Nebraska’s groundwater, its use, its regulation, and its relationship to surface water, and to inform and educate the public concerning groundwater and the affects and impacts of any proposed regulatory changes on the people and resources of the State of Nebraska.

The Coalition appreciates the opportunity to submit these comments on the proposed *Definition of “Waters of the United States”* (hereafter “WOTUS”) *Under the Clean Water Act*,<sup>1</sup> (“CWA”) (collectively, the “Proposed Rule”) issued by the U.S. Army Corps of Engineers (“Corps”) and the U.S. Environmental Protection Agency (“EPA”) (collectively, the “Agencies”).

## INTRODUCTION

The Coalition is comprised of seventeen Natural Resources Districts (“NRDs”), all political subdivisions from across the State of Nebraska,<sup>2</sup> as well as the Nebraska Association of Resources Districts. Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.<sup>3</sup> The Nebraska Legislature also empowered the NRDs, along with Nebraska Department of Natural Resources (“DNR”), to apply each entity’s expertise to bring about an orderly administration and regulation of hydrologically connected surface and ground waters.<sup>4</sup> NRDs also coordinate regulatory efforts with the Nebraska Department of Environmental Quality (“NDEQ”), which administers the NPDES permit program with oversight from EPA, as well as a number of state-based permits and programs to protect ground and surface water quality.<sup>5</sup> Through the implementation of statutory duties and responsibilities, nearly every use of groundwater and surface water in the State of Nebraska is regulated in some way by the NRDs. Furthermore, NRDs directly

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<sup>1</sup> 79 Fed. Reg. 22188 (April 21, 2014)

<sup>2</sup> The Coalition Members include: Upper Republican NRD, Upper Niobrara White NRD, Upper Elkhorn NRD, Upper Big Blue NRD, Twin Platte NRD, Tri-Basin NRD, South Platte NRD, Middle Republican NRD, Middle Niobrara NRD, Lower Platte North NRD, Lower Niobrara NRD, Lower Loup NRD, Lower Elkhorn NRD, Lower Big Blue NRD, Little Blue NRD, Lewis & Clark NRD, and Central Platte NRD.

<sup>3</sup> NEB. REV. STAT. §§ 2-3201 *et seq.*; *See also* NEB. REV. STAT. §§ 2-3229, such purposes include: (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.

<sup>4</sup> Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106

<sup>5</sup> *See* Nebraska’s Environmental Protection Act, NEB. REV. STAT. § 81-1501, *et seq.*

implement and manage a number flood control, drainage, and irrigation projects for which a CWA permit must be obtained if the Agencies assert federal jurisdiction.

Agricultural production and groundwater-dependent development form the backbone of Nebraska's economy.<sup>6</sup> Land values and access to water are the two major components which dictate producers' decisions to locate facilities and engage in development activities. These decisions are critical to the local tax base upon which the NRDs must rely in order to carry out statutory duties and responsibilities, including the implementation and ongoing management of flood control, drainage, and irrigation projects, through the levy of taxes, special occupation taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.<sup>7</sup>

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between \$25,000 and \$100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Agencies in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

The Coalition supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.<sup>8</sup> However, the Agencies seek to accomplish these goals through an unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act

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<sup>6</sup> See, eg. Spencer Parkinson, Decision Innovation Solutions, "Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012." November 26, 2012. <http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e>.

<sup>7</sup> See, e.g. NEB. REV. STAT. §§ 2-3225, 2-3226.01-.04 through .05, 61-218.

<sup>8</sup> 79 Fed. Reg. 22188

(collectively, the “RFA”)<sup>9</sup>, which sets forth procedural steps designed to safeguard small governmental jurisdictions, such as the Coalition’s members. For these reasons, the Proposed Rule should be withdrawn, because it will impermissibly impact water users and state and local entities responsible for the management of ground and surface water resources. Below are detailed comments addressing the Agencies’ impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

**The Agencies cannot shift the burden of proof to the regulated community by relying on undefined groundwater and non-hydrologic connections as the basis for asserting federal jurisdiction.**

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made to determine whether jurisdiction will be asserted under the CWA.<sup>10</sup> Today, many of the Coalition’s member NRDs manage water projects that are currently unpermitted by the Corps, or NDEQ pursuant to the CWA; the same is true for many of the projects and development activities undertaken by private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territory of each of the Coalition’s member NRDs.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* (“SWANCC”)<sup>11</sup> and *Rapanos v. U.S.*,<sup>12</sup> and their lineage, the Agencies have relied on overly broad scientific justifications (many tenuous at best) to convert the “significant nexus” concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies’ exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule’s expansive definitions of “neighboring,” “riparian,” and “tributary,” expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is *not insignificant*.

**The new definitions of “Neighboring” and “Riparian Area”**

The Proposed Rule alters a current category of jurisdictional waters to include “all waters (not just wetlands) **adjacent**” to waters susceptible to use in interstate or foreign commerce, waters

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<sup>9</sup> 5 U.S.C. § 601 *et seq.*

<sup>10</sup> See, e.g. Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* – December 2, 2008 ([http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris\\_images.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf)); Title 119, NDEQ’s Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System ([http://deq.ne.gov/RuleAndR.nsf/Title\\_119.xsp](http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp)).

<sup>11</sup> 121 S. Ct. 675 (2001)

<sup>12</sup> 126 S. Ct. 2208 (2006)

subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas (“Proposed 1-5 Waters”).<sup>13</sup> For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term “adjacency” is the term “neighboring” which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a “shallow subsurface hydrologic connection” to Proposed 1-5 Waters. Also included within the term “neighboring” is the term “riparian area,” which includes any area “bordering where surface or subsurface hydrology directly influence ... the animal community.”

No definition is provided for the scope of “shallow subsurface hydrologic connection” or “subsurface hydrology.” The State of Nebraska has a relatively high groundwater table throughout most of the State,<sup>14</sup> and the interconnection between groundwater sources and local river systems makes it unlikely that the Coalition’s member NRDs, or landowners within their respective jurisdictions, could engage in development activities or implement and manage flood control, drainage, and irrigation projects without creating some form of open water that would fall within the category of “adjacent waters.”

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require the *absence of a surface hydrologic connection*. Remarkably, the Proposed Rule explicitly states that hydrologic connections are *not* necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.<sup>15</sup> Regardless of the number of species of plants or animals cited by the Agencies, this approach is no different than the previously-rejected Migratory Bird Rule<sup>16</sup>, which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

### **The new definition of “Tributary”**

Under the Proposed Rule, a “tributary” is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.<sup>17</sup> No meaningful exemption from this definition is provided,<sup>18</sup> and no

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<sup>13</sup> 40 C.F.R. 230.3(s)(6)

<sup>14</sup> See Exhibit A, image depicting depth to groundwater in Nebraska.

<sup>15</sup> 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

<sup>16</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA “to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the ‘Migratory Bird Rule’ is not fairly supported by the CWA.”)

<sup>17</sup> 40 CFR 230.3(u)(5) (emphasis supplied).

<sup>18</sup> *Id.* Exempt from the definition of “tributary” are ditches that “drain only uplands” and “do not contribute flow either directly or through another water” to any TNW, interstate water, interstate wetland, or territorial sea.

case-by-case determination as to the status of the water will be made. Under the plain language of the Proposed Rule, this means *any* hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a “tributary.”

In Nebraska’s large river valleys, it is impossible to develop commercially-viable land, or implement flood control, irrigation, or drainage projects without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.<sup>19</sup>

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies’ expansive definitions of “neighboring,” “riparian,” and “tributary.” As plainly illustrated in the attachments, no portion of the State of Nebraska is outside of a floodplain, or lacking some form of a subsurface hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, the NRDs’ flood control, drainage, and irrigation projects (and development activities undertaken by private individuals, entities, and other governmental units within the NRDs’ territories) would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule’s expansive definitions of categorically jurisdictional water: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.<sup>20</sup> The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

### **The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.**

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies’ authority under the Clean Water Act, holding in *Rapanos*:

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<sup>19</sup> See Exhibit B, image depicting drainage basins of major rivers within Nebraska; see also Exhibit C, image depicting wetlands identified by EPA Region 7.

<sup>20</sup> *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA “to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the ‘Migratory Bird Rule’ is not fairly supported by the CWA.” See also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

[C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions.** ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that ‘significantly affect the chemical, physical, and biological integrity of ‘waters of the United States.’ **It did not do that[.]’**

*Rapanos v. United States*, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied).<sup>21</sup> The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... ‘Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.’

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.<sup>22</sup>

Despite the Agencies’ statements to the contrary,<sup>23</sup> the Proposed Rule *does* include groundwater, because without groundwater, there is *no* hydrologic link between many isolated waters and traditionally navigable waters.<sup>24</sup> Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.<sup>25</sup> Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

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<sup>21</sup> See also *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767-768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

<sup>22</sup> See *Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

<sup>23</sup> “The agencies have never interpreted ‘waters of the United States’ to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems.” 79 Fed. Reg. 22218

<sup>24</sup> Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. See Science Advisory Board (SAB) Draft Report (4/23/14). See also SAB letter to EPA regarding the scientific and technical basis of the Proposed Rule regarding “waters of the U.S.” (9/30/14).

<sup>25</sup> 79 FR 22219; GAO Report – “Waters and Wetlands” (page 23) February, 2004.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.<sup>26</sup> These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state and local governmental entities, such as the Coalition's member NRDs, and private entities, who must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for governmental entities such as the NRDs, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.<sup>27</sup> This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.<sup>28</sup> As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.<sup>29</sup>

### **The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.**

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that *all* existing exemptions will be maintained,<sup>30</sup> and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.<sup>31</sup> However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule.<sup>32</sup> Instead, new qualifying language replaces the exemption for ditches, and the interpretive

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<sup>26</sup> NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501, *et seq.*

<sup>27</sup> *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

<sup>28</sup> *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) (“Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]”)

<sup>29</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

<sup>30</sup> See <http://www2.epa.gov/uswaters>: (“All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.”)

<sup>31</sup> 79 Fed. Reg. 22218.

<sup>32</sup> The Agencies have also recently adopted an interpretive rule imposing mandatory compliance with Natural Resources Conservation Service (NRCS) standards as the basis for qualifying for a number of agricultural

exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.<sup>33</sup> The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, federal jurisdiction will be asserted over many ditches under the broad definition of "tributary."

Failure to explicitly affirm all existing exemptions within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

**The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as the Coalition's member NRDs.**

The Proposed Rule's expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent<sup>34</sup> development activities, production capacities, and land values, all of which are factors that directly impact the tax base of the Coalition's member NRDs, as well as the ability of the NRDs to implement and manage flood control, drainage, and irrigation projects.

The RFA<sup>35</sup> requires the Agencies to review the Proposed Rule to determine if it will have a "significant economic impact on a substantial number of small entities."<sup>36</sup> Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small

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exemptions. The Coalition opposes the Agencies' efforts to limit the exemptions for agricultural activities through the interpretive rule.

<sup>33</sup> Proposed definition at 40 C.F.R. 230.3(t)(4)

<sup>34</sup> *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19)..

<sup>35</sup> 5 U.S.C. § 601 *et seq.*

<sup>36</sup> 5 U.S.C. § 601(6), "the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction[.]'"

governmental jurisdictions, such as NRDs, and other small entities, from overzealous regulation.<sup>37</sup>

In part because so many proposed rules were subjected to meaningless “rubber stamp” certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”). The SBREFA amended section 611 of the RFA to allow small entities, such as the Coalition’s member NRDs, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.<sup>38</sup> The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration’s Office of Advocacy, the Office of Management and Budget’s Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a report containing recommended alternatives to the Agencies and the panel’s recommendations could be incorporated into the Proposed Rule.<sup>39</sup>

These laws and policies were put in place specifically to protect small entities such as the Coalition’s member NRDs. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining “waters of the United States”). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called “neighboring” and “riparian areas” as “adjacent” based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal

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<sup>37</sup> 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), “the term ‘small governmental jurisdiction’ means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]” According to 2000 US Census data, at least 15 of Nebraska’s 23 NRDs qualify as small governmental jurisdictions. See <http://www.dnr.ne.gov/population-estimates-and-census-data>; <http://www.dnr.ne.gov/census-2000-population-compared-to-1990-by-nrds>.

<sup>38</sup> 5 U.S.C. § 611

<sup>39</sup> The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration’s Office of Advocacy’s written comments on proposed rules and include a response to those comments in the final rule.

jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.<sup>40</sup> In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.<sup>41</sup> The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,<sup>42</sup> would expand the number of waters over which they assert jurisdiction. They said of that guidance:

The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.

The Proposed Rule, which codifies some elements of the Guidance, and expands on others, is clearly even broader in scope. Similarly, proponents of the Proposed Rule tout it for “restoring” protection to waters over which the Agencies do not presently assert jurisdiction, which is, of course, the basis of their support.<sup>43</sup>

Most importantly, the fact that more waters will be regulated under the Proposed Rule was confirmed by the Agencies in their written analysis of the potential costs and benefits associated with this action, titled “*Economic Analysis of Proposed Revised Definition of Waters of the United States*,” which states that more waters will be regulated under the Proposed Rule.

The Agencies have failed to prepare an initial regulatory flexibility analysis (“IRFA”) as required by the RFA, and make it available for public review and comment simultaneously with the Agencies’ publication of general notice of proposed rulemaking for the rule.<sup>44</sup> The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule’s impact on small entities would achieve the regulatory purpose.<sup>45</sup> The Agencies must also prepare a final regulatory

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<sup>40</sup> 79 Fed. Reg. at 22219.

<sup>41</sup> See e.g., 79 Fed. Reg. at 22214.

<sup>42</sup> See [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

<sup>43</sup> See, e.g., *Advancing America’s Clean Water Legacy: Proposed Clean Water Protection Rule Will Better Protect Streams and Wetlands* available at <http://www.nrdc.org/water/files/clean-water-legacy-FS.pdf>; *The Clean Water Rule: Protecting America’s Waters* available at <http://www.nwf.org/~media/PDFs/Water/WOTUS%20Proposed%20rule%20fact%20sheet%203252014.pdf>.

<sup>44</sup> 5 U.S.C. § 603(a)

<sup>45</sup> 5 U.S.C. § 603(b-c)

flexibility analysis (“FRFA”).<sup>46</sup> The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.<sup>47</sup>

As President Clinton made clear in Executive Order 12,866, “The American people deserve a regulatory system that works for them, not against them[.]” The Order also demands: “Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives[.]”<sup>48</sup>

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient.<sup>49</sup>

## CONCLUSION

The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies’ goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their effort to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements.

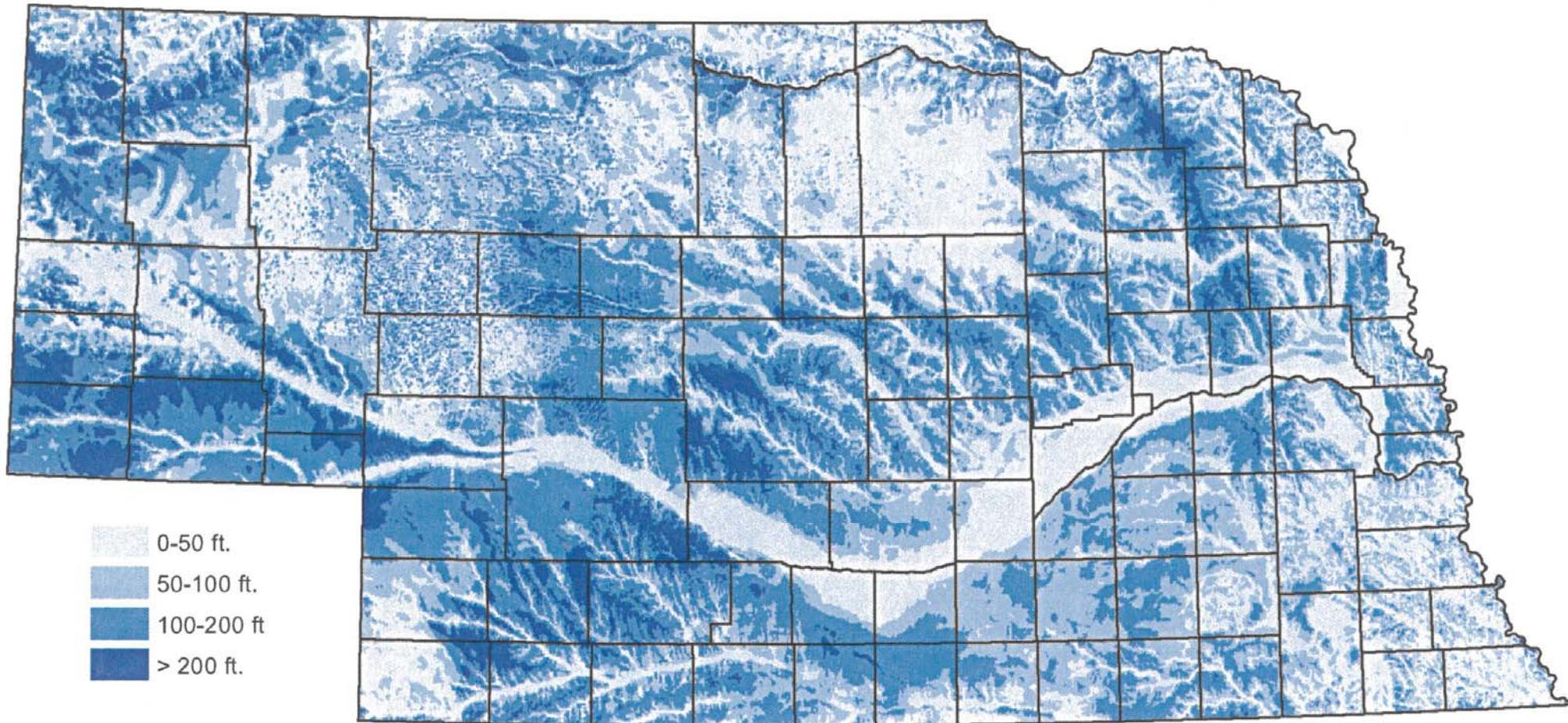
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<sup>46</sup> 5 U.S.C. § 604(a)

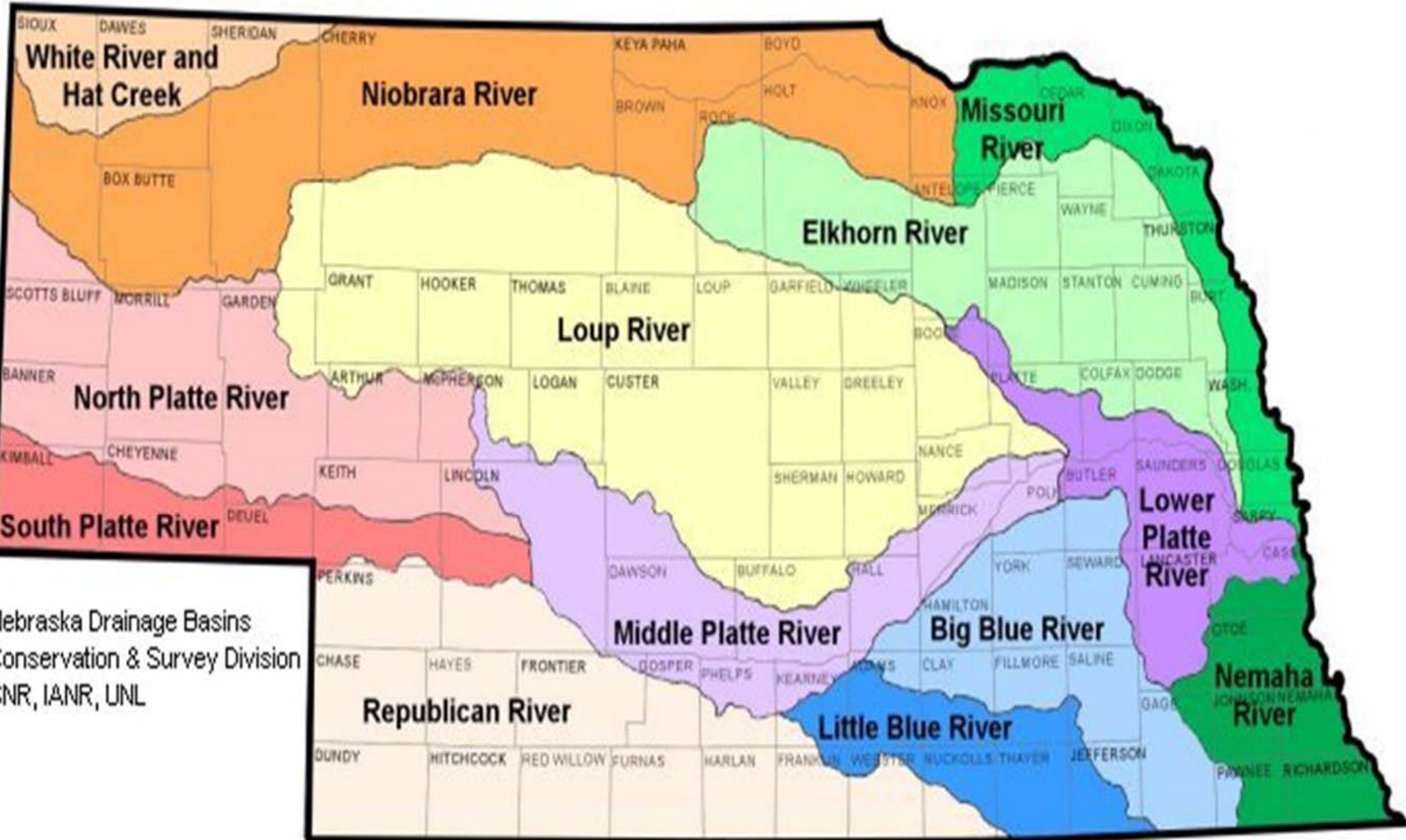
<sup>47</sup> 5 U.S.C. § 604(a)

<sup>48</sup> *Id.*, Section 1(b)(11)

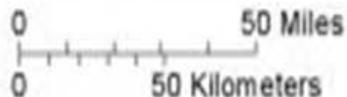
<sup>49</sup> Compare April 9, 2014 letter from members of the Senate Committee on Environment and Public Works, urging the agencies to conduct a proper RFA analysis (see Exhibit D).



Generalized depth to groundwater. (Source: University of Nebraska, Conservation and Survey Division, 1998)



Nebraska Drainage Basins  
Conservation & Survey Division  
SNR, IANR, UNL





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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-8175

BETTINA FOIRIER, MAJORITY STAFF DIRECTOR  
 ZAK BAIG, REPUBLICAN STAFF DIRECTOR

April 9, 2014

The Honorable Barack Obama  
 President of the United States  
 The White House  
 1600 Pennsylvania Avenue, NW  
 Washington, DC 20500

Dear President Obama,

As members of the Senate Environment and Public Works Committee, we write in response to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) release of their proposed rule which would expand federal jurisdiction under the Clean Water Act (CWA). After an initial review of the proposed rule, we are deeply concerned that the agencies are attempting to obtain *de facto* land use authority over the property of families, neighborhoods and communities throughout the United States. Several provisions within the proposed rule demonstrate that EPA and the Corps are unwilling to accept the meaningful limits Congress placed on the agencies' authority under the CWA, limits the Supreme Court has repeatedly recognized. These include the proposed rule's categorical regulation of irrigation and stormwater ditches, unlimited aggregation approach, and broad adjacency definition. The proposed rule would also have EPA and the Corps making case-by-case jurisdictional determinations based on the "significant nexus" test, even as they ominously assert that a "hydrologic connection is not necessary to establish a significant nexus."<sup>1</sup>

Equally important, we believe EPA and the Corps should immediately cease in their proclamations that the agencies' proposal is a justified response to various calls for a CWA rulemaking.<sup>2</sup> In fact, EPA and the Corps are using rulemaking requests as an excuse to pursue a rushed, predetermined agenda, as opposed to engaging in a deliberative, fair, and transparent regulatory process. EPA and the Corps chose to release their proposed rule despite failing to 1) sufficiently consult with affected states; 2) allow for completion of the Science Advisory Board review of the so-called "Connectivity Report"; and 3) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), among other

<sup>1</sup> See U.S.E.P.A. and Army Corps of Engineers, Proposed Rule Regarding Definition of "Waters of the U.S." Under the Clean Water Act at 100 (March 25, 2014), [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_20140325\\_prepublication.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf).

<sup>2</sup> See Nancy Stoner, *Input Critical to Rule on Waters of the U.S.*, EPA Connect (March 25, 2014) ("In large part, it was public input that led us to propose a rule. Since 2008, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public."), <http://blog.epa.gov/epaconnect/2014/03/input-critical-to-rule-on-waters-of-the-u-s/>.

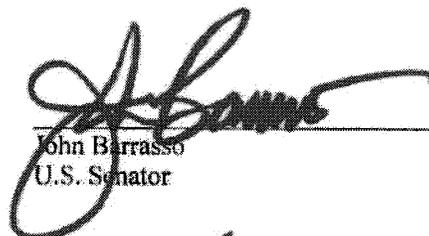
The Honorable Barack Obama  
April 9, 2014  
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mandatory procedures. EPA and the Corps' decision to proceed despite the numerous concerns identified by lawmakers and stakeholders is incredibly disappointing.

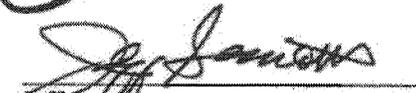
The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today. Although EPA and the Corps may have a role in clarifying and limiting CWA jurisdiction, unfortunately the agencies' rule proposal was a significant step in the wrong direction. The decision to move forward with this proposal is a clear breach of your promise to cut through red tape.<sup>3</sup> In light of other recent CWA permitting decisions that have occurred during your administration, moving forward with the proposed rule will exponentially frustrate economic activity and further undermine notions of certainty in the federal permitting process.

Sincerely,

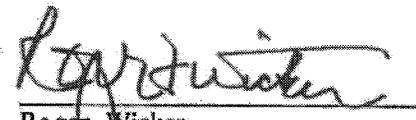
  
David Vitter  
U.S. Senator

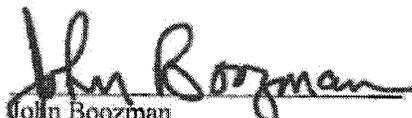
  
John Barrasso  
U.S. Senator

  
James M. Inhofe  
U.S. Senator

  
Jeff Sessions  
U.S. Senator

  
Mike Crapo  
U.S. Senator

  
Roger Wicker  
U.S. Senator

  
John Boozman  
U.S. Senator

  
Deb Fischer  
U.S. Senator

<sup>3</sup> Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).