STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF THE TRIENNIAL REVIEW OF STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC

WQCC No. 14-05(R)

SAN JUAN WATER COMMISSION'S NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

COMES NOW San Juan Water Commission ("SJWC"), by and through its counsel of record, Taylor & McCaleb, P.A., and in accordance with the Scheduling Order and section 303(A) of the Procedural Order filed herein, hereby files this Notice of Intent to Present Technical Testimony at the Triennial Review scheduled to begin April 14, 2015, in Santa Fe, New Mexico.

I. DIRECT TESTIMONY

SJWC intends to call the following person to present technical testimony on behalf of SJWC during the Triennial Review hearing:

Charles L. Nylander: Mr. Nylander is a Professional Water Resource Consultant with more than 40 years' experience in water quality planning, management, regulations and standards issues. A copy of Mr. Nylander's curriculum vitae is attached hereto as Exhibit "SJWC A," and a copy of his resumé is attached hereto as Exhibit "SJWC B." Mr. Nylander will provide technical testimony addressing various proposals set forth in NMED's petition and the petitions of other parties. A copy of Mr. Nylander's written direct technical testimony is attached hereto as Exhibit "SJWC C." If full oral presentation of direct technical testimony is permitted at the Triennial Review, we anticipate that Mr. Nylander's testimony will take approximately 90 minutes. If full oral presentation of direct technical testimony is not permitted,

we expect that Mr. Nylander's oral summary of his direct written testimony will take approximately 20 minutes.

The exhibits SJWC intends to submit in support of Mr. Nylander's testimony are attached to his written direct testimony filed herewith.

II. REBUTTAL TESTIMONY

This Notice is based on the petitions filed by other parties. Pursuant to the Scheduling Order, SJWC will present the written rebuttal technical testimony of Mr. Nylander no later than February 13, 2015, which will address the direct technical testimony filed by other Triennial Review participants and provide all rebuttal exhibits.

SJWC reserves the right to call any person to testify and to offer any exhibit in response to any testimony, exhibit or public comment presented in the public hearing.

Respectfully submitted,

TAYLOR & McCALEB, P.A.

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of San Juan Water Commission's Notice of Intent to Present Technical Testimony was served on the following persons by regular mail, or, where an e-mail address is specified, by e-mail, this 12th day of December, 2014:

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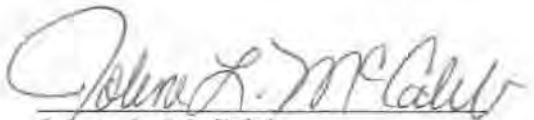

Jolene L. McCaleb

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Charles Nylander has more than 40 years of technical and management experience in water resource management. He is the President of Watermatters, LLC providing water resource consulting services since 2006. As a consultant, he facilitated the Española Basin Regional Issues Forum (EBRIF), an organization of elected officials and representatives from 14 city, county, and tribal governments in North Central New Mexico from 2006-2013. He was employed at Los Alamos National Laboratory (LANL) as a manager and environmental scientist from 1985 to 2006. During his employment, Mr. Nylander managed and completed a $70 M Hydrogeologic Characterization Project over the 40-square mile site; managed LANL's NPDES permit that included up to 141 outfalls; implemented a site-wide Spill Control and Countermeasures Plan; founded a community outreach Water Research Technical Assistance Office in Santa Fe; and produced seven educational films on water resource topics, among other accomplishments. During a break in service from LANL beginning in 1990, he worked in Denver, Colorado as a consultant with Ebasco Services, and managed a multi-firm team of environmental consultants at the DOE Rocky Flats Site. From 1973 to 1985, he was employed by the New Mexico Environmental Improvement Agency and Environmental Improvement Division as a manager and environmental scientist. He managed: surface, groundwater, and water quality surveillance programs; water supply and wastewater construction grants programs, and state-wide water quality planning. He received a Bachelor of Science degree in Agriculture with a major in Wildlife Management from New Mexico State University in 1971; and a Master of Science degree from the University of Wisconsin-Madison in Water Resource Management in 1977. He served on New Mexico Governor Richardson's Blue Ribbon Task Force on Water; served on the Board of Directors, Las Campanas Water and Sewer Cooperative; and served on the Board of Directors (and as Treasurer and President), Western Coalition of Arid States (WESTCAS). He serves as: Chair, Jemez y Sangre Regional Water Planning Council; Chair, Santa Fe County's Water Policy Advisory Committee; President, Board of Directors, Public Lands Interpretive Association; and Member, Board of Directors, Club at Las Campanas. He is a member of the New Mexico Municipal Environmental Quality Association; New Mexico Acequia Association; New Mexico Water Dialogue; and the Quivira Coalition. He was born and raised in Santa Fe, New Mexico.

Resume for
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Education

MS, Water Resources Management, University of Wisconsin-Madison, 1977
BS, Agriculture, (Wildlife Management), New Mexico State University, 1971

Professional Experience

Charles L. Nylander is the President of Watermatters, LLC. Mr. Nylander has more than 40 years of technical and management experience in water resource management, surface and groundwater characterization and monitoring, wastewater treatment, engineering review, water policy development, environmental regulations and standards, regional and strategic planning, environmental outreach, facilitation, communications, and public involvement.

WATERMATTERS, LLC, JULY 2006-Present

Mr. Nylander founded Watermatters, LLC in July, 2006, as a business specializing in water resource management issues. He served as technical consultant and facilitator for the Española Basin Regional Issues Forum which was a government-to-government advisory group focused on water and wastewater regional planning issues in the Española Basin, meeting monthly from 2004 through 2012. EBRIF members represent the 14 city, county, and tribal governments in the Española Basin, located in North Central New Mexico. He produced two EBRIF-funded educational films: "Water Sustainability in the Española Basin", and "Penasco", sustainability and self-sufficiency for small water supply systems in New Mexico. He provided services for a Water Use Inventory for Santa Fe County, funded by the Bureau of Reclamation, and assisted the City of Santa Fe in the development of a Reclaimed Water Resource Plan. He is the Chair of the Santa Fe County Water Policy Advisory Committee; Chair, Española Basin Technical Advisory Group (EBTAG) [http://geoinfo.nmt.edu/ebtag]; Chair, Jemez y Sangre Regional Water Planning Council; Board President for the Public Lands Interpretive Association (PLIA); Board Member, Club at Las Campanas; Past Board Member, Las Campanas Water and Sewer Cooperative; Past President/Board Member, Western Coalition of Arid States (WESTCAS); technical advisor to the Santa Fe Watershed Association (SFWA); and he is a member of the New Mexico Municipal Environmental Quality Association, New Mexico Acequia Association, New Mexico Water Dialogue, and the Quivira Coalition. He

was a former member of Governor Richardson's Blue Ribbon Task Force on Water in New Mexico.

Los Alamos National Laboratory, Environmental Stewardship Division, Program Manager and Project Leader, 2005 – May 31, 2006

Mr. Nylander managed the Laboratory's Water Research Technical Assistance Office (WRTAO) which was co-located with Santa Fe County's Water Resource Department. The WRTAO provided technical assistance to local governments, pueblos and tribes, and the public regarding water resource issues. He provided educational materials; managed the production of eight educational water resource films; provided technical speakers statewide; promoted collaborations and partnerships on water research and decision-making processes regarding water statewide; and provided a clearinghouse for water-related information. He served as President, Board of Directors, Western Coalition of Arid States (WESTCAS), and facilitated the organization's strategic planning process.

Los Alamos National Laboratory, Risk Reduction and Environmental Stewardship Division, Program Manager, 2002 - 2005

Mr. Nylander managed the Laboratory's Groundwater Protection Program that encompassed the Pajarito Plateau, and implemented activities including hydrogeologic characterization, monitoring, and contaminant source control. He successfully managed the completion of the $70+ million Hydrogeologic Workplan in 2005. In 2003, Mr. Nylander created and managed the Water Research Technical Assistance Office (WRTAO) in order to provide technical assistance to local governments, Pueblos, and the public in Northern New Mexico. He was actively involved in surface and groundwater quality issues in the arid West. He represented the Laboratory in rulemaking proceedings conducted by the New Mexico Water Quality Control Commission, and served on the Board of Directors, Western Coalition of Arid States (WESTCAS) [served as Treasurer and Chair of Legislative Committee].

Los Alamos National Laboratory, Environment, Safety, and Health Division, Program Manager, Project Leader 1995 - 2002

Mr. Nylander managed the Laboratory's Hydrogeologic Characterization Program, and was responsible for characterizing the hydrogeologic setting beneath the Pajarito Plateau. The seven-year program involved installation of 32 deep wells, modeling, and technical information management. He served as the Project Leader for the development of the Laboratory's Hydrogeologic Workplan. He facilitated quarterly public meetings to present project findings and status. He

was actively involved in surface and groundwater quality issues, and served as an expert witness for the Laboratory in rulemaking proceedings conducted by the New Mexico Water Quality Control Commission.

Los Alamos National Laboratory, Chemical Science and Technology Division, Program Manager, 1993 - 1995

Mr. Nylander managed the design and construction of waste management treatment facilities. His portfolio of construction projects included five line-item projects and 17 general plant projects totaling in excess of $120 million. He served as an advisor to the Program Manager for Waste Management Programs and he facilitated the Division's organizational restructuring. He co-authored the Division's business development plan, and contributed to the Division's strategic plan.

Los Alamos National Laboratory, Environmental Management Division, Deputy Division Leader, 1992 - 1993

As Deputy Division Leader, Mr. Nylander co-managed the Environmental Management Division with 500 employees organized in four groups with an annual budget exceeding $100 million. The Division was responsible for all Laboratory environmental compliance programs, waste management operations, the site-wide environmental restoration project, and environmental chemistry.

Ebasco Environmental Services, Project Leader, 1990-1992

Mr. Nylander managed Ebasco's Rocky Flats Project in Denver, Colorado. His responsibilities included the management of a multi-million dollar basic ordering agreement contract for environmental services. He provided oversight for a large team of consultants performing an average of $1.5 million in services monthly in the specialties of: biological evaluations, geologic mapping, seismic surveys, chemical waste treatment system design, project controls, and RCRA facility investigations. He served as manager for Ebasco's Environmental Regulatory Team in the Denver office.

Los Alamos National Laboratory, Environment, Safety, and Health Division, Team Leader and Staff Member, 1985 - 1990

Mr. Nylander managed the Laboratory's water quality program activities concerning NPDES permits, spill prevention control and countermeasure planning, Safe Drinking Water Act compliance, and PCB management program. He was responsible for compliance monitoring of more than 141 point source discharges. He conducted Laboratory-wide environmental compliance training

for all managers, and presented an overview of environmental compliance to over 9,000 Laboratory employees and subcontractors. He was actively involved in surface and groundwater quality issues, and served as an expert witness for the Laboratory in rulemaking proceedings conducted by the New Mexico Water Quality Control Commission.

New Mexico Environmental Improvement Division, Bureau Chief, Surface Water Quality Bureau, 1982-1985

Mr. Nylander managed the surface water quality programs including NPDES permitting, surveillance and monitoring, water and wastewater system construction grants, and §208 planning pursuant to the Clean Water Act. He served as Executive Secretary for the New Mexico Water Quality Control Commission (Commission) and served as Chairman, as required, during monthly meetings. He provided testimony before the Commission and the New Mexico State Legislature on water quality issues.

New Mexico Environmental Improvement Division, Program Manager, Water Pollution Control Bureau, 1979-1982

Mr. Nylander managed the NPDES permit program activities in New Mexico, (non-delegated state). He was responsible for the performance of compliance monitoring inspections, permit drafting, and permit certification. He initiated numerous enforcement actions pursuant to New Mexico Water Quality Control Commission Regulations and the New Mexico Water Quality Act, and participated in rulemaking hearings before the Commission.

New Mexico Environmental Improvement Agency, Environmental Scientist/Technician, Water Pollution Control Bureau, 1973-1979

Mr. Nylander worked as a staff scientist and a technician, implementing the NPDES permit program throughout New Mexico, (non-delegated state). He initiated a comprehensive compliance-monitoring program, and served as an expert witness in the development of Water Quality Control Commission surface and ground water regulations and standards. He initiated the development of the Bureau's technical library and provided testimony at public hearings and legislative committee meetings.

Seasonal and Other Employment, 1967-1973

New Mexico Department of Game and Fish; Concessionaire at National Park Service, Bandelier National Monument (New Mexico); National Park Service,

Amistad Recreation Area (Texas); Memorial General Hospital (Las Cruces, New Mexico); and National Park Service Olympic National Park (Washington).

Publications

A publication list is available on request.

References

A list of references is available on request.

Contact Information

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DIRECT TECHNICAL TESTIMONY
OF
CHARLES L. NYLANDER

FOR

THE 2014 TRIENNIAL REVIEW

December 12, 2014

Submitted by:

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STATE OF NEW MEXICO
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WQCC No. 14-05(R)

DIRECT TECHNICAL TESTIMONY OF CHARLES L. NYLANDER

Introduction

On behalf of the San Juan Water Commission ("SJWC"), I have reviewed the changes to the New Mexico Water Quality Standards for Interstate and Intrastate Surface Waters ("WQS") proposed by the New Mexico Environment Department ("NMED"), Freeport-McMoRan Chino Mines Company, Peabody Energy, and Amigos Bravos. Following is my direct technical testimony, which addresses SJWC's concerns about, objections to and/or support for various proposals set forth in the petitions filed by these other Triennial Review participants.

Pursuant to the Scheduling Order, I also intend to submit rebuttal technical testimony and exhibits on or before February 13, 2015. In my rebuttal testimony, I will address the direct technical testimony filed by others concerning the WQS changes proposed by NMED and other parties.

1. 20.6.4.10(F) NMAC—NMED's Temporary Standards Proposal

A. SJWC's Position on NMED's Proposal

The SJWC generally supports NMED's concept of temporary standards, as articulated in NMED's proposed additions of 20.6.4.10(F) and 20.6.4.12(H) NMAC to the WQS. However, as previously communicated in SJWC's written comments to NMED regarding the 2013 Public Discussion Draft of NMED's Triennial Review proposals (the

"Public Discussion Draft"), SJWC believes the Water Quality Control Commission ("WQCC") should adopt a temporary water quality standards concept via its statutory authority to grant variances. *See* NMSA 1978, § 74-6-4(H). The WQCC should label NMED's proposal what it truly is—a procedure for granting variances. Further, a petitioner for a temporary standard should not be required to submit Use Attainability Analysis ("UAA")-like information before a temporary standard can be granted. So long as the temporary standards procedure requires submission of UAA-like information and the development of work plans, as proposed by NMED, the transaction costs associated with the proposal counsel against its adoption because it provides no significant benefit to point and non-point source dischargers in New Mexico.

In its May 27, 2014, comments on the aforementioned Public Discussion Draft of NMED's Triennial Review proposals, SJWC questioned the proposed requirement that a petitioner conduct a UAA to support a petition for a temporary standard. I am attaching SJWC's comments to NMED as SJWC Exhibit C-1. As articulated in NMED's previously proposed language, a petitioner would have been required to show that "attainment of the associated designated use is not feasible in the short term" because of one or more factors listed in 40 CFR 131.10(g), as demonstrated by a UAA. In response to SJWC's comments and the comments of others, NMED has modified its proposal for Section 20.6.4.10(F)(1)(a) NMAC to now authorize WQCC adoption of a proposed temporary standard if the petitioner demonstrates that "attainment of the associated designated use may not be feasible in the short term due to one or more of the factors listed in 40 CFR 131.10(g) as demonstrated by the petition and supporting work plan requirements in paragraphs (4), (5), and (6) below . . . ." Although NMED has

deleted the original reference to a UAA, NMED's proposal still requires submission of information with the petition, and a supporting work plan, that in reality is equivalent to the information provided in a request for UAA approval.

As SJWC previously noted in its comments on the Public Discussion Draft, if a petitioner must first demonstrate that attainment of the associated designated use is not feasible because of one or more of the factors listed in 40 CFR Section 131.10(g) (as demonstrated either by a UAA or the submission of equivalent information), then the designated use should be revised for that surface water segment because it is unattainable. In other words, NMED's temporary standards proposal is simply unnecessary and makes little sense from a transactional costs perspective. The term "transactional costs" refers to the costs the petitioner and the administrative authority (here, NMED) must bear *after* the UAA or UAA-like information is provided by the petitioner. Transactional costs incurred by a petitioner in preparing and implementing one or more work plans, and the transactional costs incurred by NMED in reviewing, approving and overseeing implementation of the work plan(s), likely will be significantly higher than the transactional costs associated with simply downgrading the designated use of a water body based on the petitioner's UAA or UAA-like information. Thus, if a petitioner must prepare UAA-equivalent documentation, why should the petitioner simply request approval of a temporary, or interim, water quality standard rather than request a downgrade of a designated use? Further, why would NMED support implementation of a temporary standard rather than the downgrade of a designated use when additional agency resources will be required to approve and monitor associated workplans? The transactional costs associated with WQCC adoption of new water

quality standards are borne both by the regulated community and by the regulatory agency; thus, the cost impact of temporary standards should be considered by the WQCC when deciding whether to adopt NMED's proposal. SJWC does support the concept of temporary standards (or variances), so long as they do not require a full-blown UAA and work plans of the sort proposed by NMED.

NMED essentially has proposed a new procedure by which a petitioner may ask the WQCC to adopt temporary, or interim, water quality standards applicable to all or part of a surface water of the state. The petition process requires approval by both the WQCC and the U.S. Environmental Protection Agency ("EPA"). Under NMED's proposal, a temporary standard would not change the designated use of the surface water. Instead, it would temporarily replace specific water quality criteria with criteria representing the highest degree of protection feasible in the *short term*. NMED's "Basis for Change" cites EPA Publication No. EPA-820-F-13-012 (March 2013), which is titled "Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Discharges." This publication is part of a series titled "Frequently Asked Questions" ("FAQs"). It is a guidance document with a disclaimer that states in part: "These Frequently Asked Questions (FAQs) do not impose legally binding requirements on the EPA, states, tribes or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public." It continues (at 1-2):

> The EPA is issuing these FAQs to help address questions that arise when states and tribes seek to streamline the adoption and approval of water quality standards (WQS) variances for pollutants that have an impact on multiple permittees (or dischargers). This occurs when groups of permittees are experiencing the same challenges in meeting

their water quality based effluent limits (WQBELs) for the same pollutant, regardless of whether or not the permittees are located on the same waterbody.

. . . .

A water quality standards variance is a time limited designated use and criterion (i.e., interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition during the specified time period. As such, a variance requires a public process and EPA review and approval under CWA 303(c). While the designated use and criterion reflect what is ultimately attainable, the variance reflects the highest attainable condition for a specific timeframe and is therefore less stringent. However, a state or tribe may adopt such interim requirements only if it is able to demonstrate that it is not feasible to attain the currently applicable designated use and criterion during the period of the variance due to one of the factors listed at 40 CFR 131.10(g). Where the currently applicable designated use and criterion are not being met, WQS variances that reflect a less stringent, time limited designated use and criterion allow states, tribes and stakeholders additional time to implement adaptive management approaches to improve water quality, but still retain the currently applicable designated use as a long term goal for the waterbody. States have adopted, and EPA has approved, water quality standards variances that apply to individual dischargers, variances that apply to multiple dischargers, and variances that apply to entire waterbodies or segments.

The interim requirements specified in the variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the pollutant(s), permittee(s) and/or waterbody or water body segment(s) covered by the variance. Specifically, the variance serves as the basis for WQBEL in National Pollutant Discharge Elimination System (NPDES) permits. However, the interim requirements *do not replace* the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements.

(Emphasis in original; internal references omitted.)

On behalf of SJWC, I am introducing the above-referenced EPA publication as SJWC Exhibit C-2. I have quoted the specific language of the EPA publication to clearly describe EPA's WQS variance concept and to add support for NMED's temporary standards concept. Although NMED's proposal mimics, in certain respects, the EPA variance procedure utilized since 1977, NMED has avoided using the term "variance," and its proposal does not allow modification of designated uses on a temporary basis. SJWC therefore recommends that, should the WQCC adopt a temporary standards or variance procedure, it more closely follow the EPA variance language.

Specifically, NMED has chosen to call proposed interim standards "temporary standards" in order to avoid confusion with the term "variance," which is used in the New Mexico Water Quality Act and in WQCC regulations. In its comments on the Public Discussion Draft, SJWC pointed out:

> In essence, SWQB is proposing a variance process applicable to surface water quality standards. SJWC has argued in the past that the Water Quality Act authorizes variances from water quality standards because standards may be enforced by criminal penalties, thus making standards equivalent to regulations. *See generally* §§ 74-6-4(H), 74-6-10.2 NMSA 1978. Adoption of a variance standard similar to that previously proposed by SJWC would obviate the need for SWQB's temporary criteria proposal, comport with EPA guidance, and provide greater benefit to dischargers.

SJWC Exhibit C-1 at 2. SJWC stands by this position. As background, the SJWC, through the direct testimony of its expert witness, Tom Pitts, P.E., proposed specific language for adoption of a WQCC variance from water quality standards during the 2003 Triennial Review. The proposed language offered by SJWC in 2003 was as follows:

K. Variances from Water Quality Standards

1. The commission may grant a temporary variance from a particular water quality standard for a specific water body if one of the following conditions is shown to exist:

a. the standard is not being met because of human-induced conditions and those conditions cannot be corrected, correction will cause more environmental damage, and correction will impose an unreasonable burden upon a lawful business, occupation or activity or otherwise result in substantial and widespread adverse economic and social impact;

b. the standard is not being met and naturally occurring pollutant concentrations prevent compliance with the standard without imposing an unreasonable burden upon a lawful business, occupation or activity or are deemed not correctable within three years;

c. the standard is not being met and there is significant uncertainty about the appropriateness of the standard (*e.g.*, additional information is needed about either the source of a pollutant or the water quality necessary to protect a designated use) and the granting of a variance would protect existing water quality while providing an opportunity to remove the uncertainty;

d. the standard is being met at the present time, but it is necessary to temporarily exceed the standard and introduce a pollutant for the protection of human health (*e.g.*, application of a pesticide to reduce mosquito populations);

e. the standard is being met at the present time, but it is necessary to temporarily exceed the standard and introduce a pollutant to obtain another lawful objective, such as fisheries management or reintroduction of a native aquatic species for purposes of the Endangered Species Act; or

f. for any other reason specified in 40 CFR §131.10(g).

2. Any person who seeks a variance from a water quality standard shall submit a written petition to the commission that contains the following information: (i) petitioner's name and address; (ii) the date of the petition; (iii) identification of the specific pollutant and water quality standard for which the variance is sought; (iv) identification of the specific water body for which the variance is sought; (v) identification of the facility or activity for which the

variance is sought, if applicable; (vi) the reasons why compliance with the water quality standard cannot be achieved; (vii) a discussion of the technologies that are available, if any, for achieving compliance with the water quality standard for which a variance is sought; (viii) documentation that one of the conditions set out in paragraph K(1) exists; (ix) the interim water quality standard sought by petitioner, along with evidence that the interim standard will not impair or otherwise negatively impact existing water quality; and (x) the period of time for which the variance is requested.

3. The commission shall review the petition and require a public hearing in the locality affected by the proposed variance in accordance with Adjudicatory Procedures, 20.1.3 NMAC. After public hearing, the commission may grant the petition in whole or in part, may grant the petition subject to conditions, or may deny the petition.

4. Any variance granted by the commission shall have a specific expiration date and shall be reviewed at least every three years during the State's triennial review of surface water quality standards.

5. Any variance granted by the commission shall identify the interim water quality standard for the pollutant for which the variance is granted. The interim standard may not be set at a level that would impair or otherwise negatively impact existing water quality.

6. Each variance granted by the commission shall be identified in the State's surface water quality standards by adding the words "variance granted" to the underlying numeric standard and noting the variance in a corresponding footnote or endnote reference.

7. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, among other things, the development of new information and techniques to be sufficient justification for a second petition.

In support of this proposed variance language, Mr. Pitts testified that the proposed language meets all EPA requirements in the *Water Quality Standards Handbook*, and it incorporates the requirements of 20.6.2.1210 NMAC, which establishes the procedure for obtaining a variance to WQCC regulations, as permitted by NMSA 1978, § 74-6-

4(H). SJWC also stated that as of 1990, approximately 32 states had variance policies in the standards. *See* EPA National Assessment of State Variance Procedures Report (1990). It is interesting to note the similarities between NMED's current proposal for temporary standards and the above-mentioned SJWC proposed variance language; however, SJWC's proposal did not include the onerous work plan and UAA-like information requirements found in NMED's proposal.

More recent support for WQCC adoption of a variance process applicable to water quality standards has been articulated by EPA. On September 4, 2013, EPA proposed changes to the federal WQS regulation in the *Federal Register*. 78 Fed. Reg. 54518. The proposed rulemaking requested comments on regulatory revisions in the following six key issue areas: (1) Administrator's determination that new or revised WQS are necessary; (2) designated uses; (3) triennial reviews; (4) antidegradation; (5) variances; and (6) compliance schedule authorizing procedures. On behalf of SJWC, I submit this *Federal Register* notice as SJWC Exhibit C-3.

Beginning on page 54531 of SJWC Exhibit C-3, EPA discusses the background for WQS variances. On page 54532, EPA provides a proposed regulatory definition for "WQS variance" at 40 CFR Section 131.14, as follows: "A water quality standards variance (WQS variance) is a time-limited use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period." EPA also proposes to specify "that all other applicable water quality standards not specifically addressed by the variance remain applicable," and provides the following illustration:

> Typically, states find variances that apply to a specific pollutant(s) and discharger(s) to be most useful. If a state

> believes that the designated use and criterion is unattainable for a period of time because the discharger cannot meet its WQBEL, the state may grant a discharger-specific variance so long as the variance is consistent with the CWA and implementing regulation.
>
> Similarly, if a state or tribe believes that the designated use and criterion is unattainable as it applies to multiple permittees because they are all experiencing challenges in meeting their WQBELs for the same pollutant for the same reason, regardless of whether or not they are located on the same water body, a state or tribe may streamline its variance process by granting one variance that applies to all these dischargers (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulations.

The EPA's proposed rulemaking has not been finalized, but the textual context of the *Federal Register* publication provides helpful insight regarding EPA's strong support for WQS variances or similar regulatory tools. Again, SJWC generally supports NMED's proposed temporary standards concept. However, SJWC believes that the term "variance" should be used for this concept, and the WQCC should directly reference its authority under NMSA 1978, Section 74-6-4(H) and the applicability of its variance regulation at 20.6.2.1210 NMAC. Furthermore, SJWC requests specific clarification that a petitioner does not have to perform a UAA and recommends that the work plan requirements proposed by NMED for 20.6.4.10(F)(1)(a), (5) and (6) NMAC be rejected as unnecessary and overly burdensome. Otherwise, there is no benefit to the regulated community—a petitioner would simply seek to permanently downgrade a designated use. In addition, the proposed concept of temporary standards should allow for interim standards for designated uses; temporary standards should not be limited to applicable criteria.

B. SJWC's Response to Amigos Bravos' Position

In its Proposed Amendments and Statement of Basis, Amigos Bravos opposes (at 2-5) NMED's temporary standards proposal and asks the WQCC to reject the proposed addition of 20.6.4.10(F) and 20.6.4.12(H) NMAC. SJWC disagrees with Amigos Bravos' proposal and its Basis for Changes (at 4-5). SJWC also disagrees with the Amigos Bravos contention that NMED's proposal to adopt temporary standards would result in increased discharges of pollutants into already impaired waters. There are several reasons why the WQCC should not adopt the Amigos Bravos position.

To begin, Amigos Bravos asserts (at 4) that compliance schedules should be used instead of temporary standards. The EPA addressed the comparison between a variance (or temporary standards) and a compliance schedule in its 2013 proposed WQS rulemaking. *See* SJWC Exhibit C-3. There, EPA states (at 54532):

> There are a variety of tools available to states, tribes and dischargers that can provide time to meet regulatory requirements; however, the most common regulatory tools considered are variances and permit compliance schedules. Which tool is appropriate depends upon the circumstances. Variances can be appropriate to address situations where it is known that the designated use and criterion are unattainable today (or for a limited period of time) but feasible progress could be made toward attaining the designated use and criterion. A permit compliance schedule, on the other hand, may be appropriate when the use is attainable, but the permittee needs additional time to modify or upgrade treatment facilities in order to meet its WQBEL such that a schedule and resulting milestones will lead to compliance "as soon as possible" with the WQBEL based on the currently applicable WQS.

Thus, EPA itself recognizes that a variance is a useful tool for states, tribes, and dischargers, especially where "the designated use and criterion are unattainable today (or for a limited period of time)."

Second, Amigos Bravos appears to be concerned (at 5) about the impact of a new temporary standards WQS tool on "new or increased discharges." However, EPA and NMED most likely would utilize this tool with respect to "existing discharges" to provide time to make progress towards attaining designated uses and/or criteria. EPA has explained in their proposed rulemaking (SJWC Exhibit C-3) that a variance results in a time-limited designated use or criterion that is targeted to a specific pollutant, source, and/or water body or water body segment that reflects the highest attainable condition during the specified time period. According to EPA, a variance is different from a change to a designated use and its associated criteria because it is intended as a mechanism to provide time for states, authorized tribes, and stakeholders to implement adaptive management approaches that will improve water quality where a designated use and criteria currently in place are not being met. The designated use is retained as a long term goal. Thus, when properly applied, a variance can lead to improved water quality over time, and in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the Clean Water Act ("CWA"). According to EPA, a variance provides a "more direct link to the CWA Section 101(a) goal" to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." SJWC Exhibit C-3 at 54531-32. A WQS variance is "consistent with the 'restore' aspect of the goal" because it is "intended to allow incremental environmental progress in achieving designated uses." *Id.* at 54532.

Amigos Bravos states (at 5) that "NMED's proposal is squarely and problematically aimed at already impaired waters" and "would condone the discharge of

increased concentrations of parameters that are causing the impairment in the first place." However, NMED's proposal, although it would provide a tool that could be applied to already impaired waters, does not condone discharge of increased pollutant concentrations. Rather, NMED's proposal is aimed at waters where attainment of a designated use may not be feasible in the short term because of one or more of the factors listed in 40 CFR Section 131.10(g). Instead of requesting that the designated use be downgraded, a petitioner may request interim standards and time to perform activities that may lead to attainment of the original designated use. Note that the petitioner will not be asking to increase the volume of discharge or concentrations in the discharge. Amigos Bravos has misconstrued NMED's intent in proposing temporary standards.

Fourth, Amigos Bravos states (at 5) that "NMED's proposal would reward polluters that have been illegally discharging." However, in New Mexico, any discharge to waters of the state must be permitted under the CWA Section 402, National Pollutant Discharge Elimination System ("NPDES") permit program. Thus, absent an unpermitted discharge, there is no "illegal[] discharging." There is nothing in NMED's proposal that "reward[s] polluters." Instead, NMED's proposal to allow temporary standards as a WQS tool allows the state greater flexibility to meet the highest attainable designated use for a water body over time, and the concept should be embraced by the WQCC.

2. <u>20.6.4.97 NMAC: NMED's Ephemeral Waters Proposal</u>

NMED proposes adding approximately 30 stream segments to the list of ephemeral waters set out in 20.6.4.97(C) NMAC based on UAA reports prepared pursuant to 20.6.4.15(C) NMAC and NMED's Hydrology Protocol for the Determination

of Uses Supported by Ephemeral, Intermittent, and Perennial Waters ("Hydrology Protocol"). If approved, these waters would be the first to be expressly designated as ephemeral in 20.6.4.97(C) NMAC out of tens of thousands of miles of ephemeral watercourses in the state. Once designated as an ephemeral water, a surface water is assigned the designated uses of livestock watering, wildlife habitat, limited aquatic life, and secondary contact recreation. Currently, undesignated ephemeral waters, not yet the subject of a UAA, are intermittent waters under 20.6.4.98 NMAC and are assigned the more stringent designated uses of primary contact and marginal warmwater aquatic life.

The New Mexico Water Quality Act at Section 74-6-4(D) states that, "[i]n making standards, the commission shall give weight it deems appropriate to all facts and circumstances," and SJWC has no objection to the designation of these stream segments as ephemeral waters. However, SJWC requests that the WQCC reflect on the transactional costs associated with the underlying WQCC-approved water quality standards for these ephemeral waters designations. During the 2009 Triennial Review, NMED proposed, and the WQCC adopted, amendments to the surface water quality standards that, by default, upgraded the designated uses for all unclassified non-perennial waters in New Mexico, which at the time were: livestock watering, wildlife habitat, secondary contact, and limited aquatic life. The 2009 amendments significantly upgraded the designated uses for an estimated 100,000+ miles of ephemeral and intermittent watercourses, which already were protective of CWA Section 101(a)(2) uses for all unclassified waters in New Mexico. All unclassified waters now are assigned the designated uses of wildlife habitat, *primary contact* and *marginal*

warmwater aquatic life, and those uses can be downgraded only through the performance of a UAA. SJWC believes this requirement places an unreasonable transactional costs burden on the state and its citizens that simply is unnecessary. The WQCC should always consider the transactional costs associated with its adoption or change of water quality standards.

The present water quality standards at 20.6.4.98 NMAC inherently re-define intermittent waters through a rebuttable presumption that all non-perennial unclassified waters of the state (which encompasses the universe of non-perennial watercourses) are intermittent, thereby requiring UAA documentation in order to designate a water as ephemeral and list it under 20.6.4.97(C) NMAC. This 2009 requirement results in a significant cost burden for New Mexico, as demonstrated by the following discussion.

EPA requires, pursuant to 40 CFR Section 131.10(j):

> A State must conduct a use attainability analysis as described in §131.3(g) whenever:
> (1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or
> (2)The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to *adopt subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria*.

(Emphasis added.) Prior to 2009, EPA-approved livestock watering, wildlife habitat, secondary contact and limited aquatic life designated uses met the CWA §101(a)(2) national goals regarding wildlife and recreation in and on the water for ephemeral waters. For example, secondary contact includes wading, which is an activity "in" the water. Also, wildlife will take advantage of any water present for any amount of time in an unclassified watercourse. However, it seems New Mexico cannot now easily go back to the pre-2009 EPA-approved designated uses of secondary contact and limited

aquatic life without the performance of a UAA. *See* 40 CFR § 131.10(j)(2). SJWC therefore encourages the WQCC to reflect on the newly imposed transactional costs associated with the WQCC's 2009 adoption of the *rebuttable presumption* concept and initiate a dialogue with EPA in an effort to mitigate this unfortunate economic burden.

EPA should be receptive to a proposal allowing New Mexico to return to the WQS that were in place for ephemeral streams prior to 2009 given recent public comments on EPA's proposed "waters of the United States" rule. *See* Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule published by the Department of Defense, Department of the Army, Corps of Engineers and EPA on April 21, 2014. 79 Fed. Reg. 22188 ("Proposed WOTUS Rule"). Numerous submitted comments demonstrate that ephemeral waters may not be classified as "waters of the United States," and thus federal jurisdiction for water quality protection purposes does not apply to such waters. For example, the Federal Water Quality Coalition ("FWQC") submitted comments on the Proposed WOTUS Rule on November 14, 2014. The FWQC is a group of industrial companies, municipal entities, property owners, and trade associations that are directly affected, or which have members that are directly affected, by regulatory and policy decisions made pursuant to the CWA. FWQC members include a wide range of interests, such as the American Chemistry Council, American Iron and Steel Institute, American Petroleum Institute, Association of Idaho Cities, General Electric Company, Mid America Crop Life Association, and Western Coalition of Arid States. SJWC also is a member through its affiliation with the Western Coalition of Arid States. I have attached the FWQC's comments to this testimony as SJWC Exhibit C-4.

In its comments on the Proposed WOTUS Rule, the FWQC stated the following:

> Since releasing the proposed rule for public comment, the agencies, particularly EPA, have been trying to defend it by asserting that the rule (1) is not an expansion of jurisdiction, (2) is supported by the statute and Supreme Court precedent, (3) is based on science, and (4) will clarify jurisdiction. These assertions do not withstand scrutiny. In fact, the proposed rule is a dramatic expansion of jurisdiction that is not supported by the statute, Supreme Court precedent, or the scientific studies referenced by the agencies. In addition, the proposed expansion has caused great uncertainty and confusion, as evidenced by the numerous requests for clarification that have been reported in the trade press. The result will be increased costs, regulatory burden, litigation, and reduced economic activity.

SJWC Exhibit C-4 at 2. The FWQC's comments go on to succinctly debunk EPA's assertions and make a strong case for excluding ephemeral waters from federal jurisdiction under the CWA. For example, as the FWQC points out, neither Kansas nor Missouri WQS apply to ephemeral waters. SJWC Exhibit C-4 at 7-8. The WQCC should consider the strong support these comments offer for a petition to EPA allowing New Mexico to return to the pre-2009 WQS for ephemeral waters without the burden of conducting individual UAAs on more than 100,000 miles of ephemeral waters in the state.

Economically, it makes more sense to replace the current designated uses for non-perennial unclassified waters with the designated uses of livestock watering, wildlife habitat, secondary contact, and limited aquatic life, and then upgrade those waters on a specific as-needed basis, rather than suffer the burden of demonstrating use unattainability everywhere. Again, those designated uses are still protective of water quality. It simply is too costly to require a UAA to demonstrate that every non-perennial unclassified watercourse in the state is, in fact, ephemeral and does not support the

designated uses of primary contact and marginal warmwater aquatic life. The rebuttable presumption that primary contact and marginal warmwater aquatic life are attainable uses in thousands of miles of unclassified watercourses (the vast majority of which are dry arroyos), adopted by the WQCC in 2009, should ultimately be scrapped.

By further example, consider that eighteen of NMED's proposed ephemeral surface water designations result from a 2012 UAA performed by NMED and its contractor, Daniel B. Stephens & Associates, pursuant to 20.6.4.15 NMAC and the Hydrology Protocol: Use Attainability Analysis for Unclassified Non-Perennial Watercourses with NPDES Permitted Facilities (June 2012). Please note that the UAA document for these waters contains the following "Background and Objectives" (at 1):

> The Clean Water Act (CWA) §101(a)(2) and Section 20.6.4.6 NMAC declares that wherever attainable, water quality shall provide for the protection of fish, shellfish and wildlife and for recreation in and on the water. In accordance with this, federal regulation at 40 CFR 131.10(j) effectively establishes a "rebuttable presumption" that CWA §101(a)(2) uses ("§101(a)(2) uses") are attainable. According to federal regulation at 40 CFR 131.10(j), to remove a §101(a)(2) use, a state must conduct a UAA. Relevant to this UAA, an aquatic life use may be removed or changed to a use with less stringent criteria if the use is unattainable due to one or more of six factors listed in 40 CFR 131.10(g).
>
> Waters that are not included in a classified Water Quality Standards segment (§20.6.4.101-899 NMAC) are considered unclassified waters of the State (§20.6.4.97-99 NMAC). Water quality standards and the appropriate use specific criteria for unclassified waters are dependent on the existing hydrologic condition (e.g., ephemeral, intermittent or perennial). In New Mexico, unclassified non-perennial waters are by default subject to § 20.6.4.98 NMAC, with designated uses of wildlife habitat, livestock watering, primary contact, and marginal warmwater aquatic life. The uses of wildlife habitat, primary contact and marginal warmwater aquatic life are consistent with the presumption that §101(a)(2) uses are attainable. New Mexico Water

> Quality Standards at §20.6.4.15 NMAC provides for a UAA process for certain ephemeral waters based on the Hydrology Protocol which can be used to change the applicable designated uses and water quality standards for unclassified streams as part of the UAA process.

Consider the costs incurred by NMED to compensate its contractor to examine the 18 non-perennial stream segments that are the subject of the eighteen UAAs supporting designation of those stream segments as ephemeral. It is estimated that tens of thousands of dollars were spent by NMED on the contractor and NMED staff to document that an arroyo is indeed an ephemeral watercourse, and thus the designated uses of primary contact and marginal warmwater aquatic life are unattainable. Imagine continuing this UAA exercise on thousands of arroyos statewide in the future to demonstrate that they are indeed ephemeral and therefore can be listed at 20.6.4.97(C) NMAC.

Secondly, as a result of the WQCC's 2009 adoption of the "rebuttable presumption" approach, and the corresponding imposition of the UAA/Hydrology Protocol requirement, certain NPDES discharges previously made into "ephemeral" waters now are made into "perennial" waters because a watercourse has been re-designated as perennial based solely on the effluent discharge. The City of Gallup is one example. When those NPDES permits are renewed, the permit conditions are more stringent in order to meet the upgraded designated uses, such as primary contact. More stringent permit conditions typically mean increased economic burdens on New Mexico dischargers. Does it really make sense for New Mexico to spend financial resources to demonstrate that an arroyo is an ephemeral watercourse, then allow a discharge into the arroyo, then re-examine the arroyo and penalize the discharger with

more stringent water quality requirements because the effluent discharge creates a perennial watercourse out of an arroyo? The City of Gallup received a cost proposal for $20,000 from an environmental consulting firm to perform a Level I Evaluation using the Hydrology Protocol Guidance on the Rio Puerco of the West. This approach places unnecessary time and costly burdens on everyone involved, including NMED.

Third, 20.6.4.15(C) NMAC elevates the Hydrology Protocol, which is a guidance document, to the status of an enforceable regulation. Although the Hydrology Protocol may indeed represent sound guidance and may establish a useful methodology, NMED-written guidance documents (*e.g.*, Hydrology Protocol, Nutrient Assessment Protocols, Synthetically Lined Lagoons-Liner Material and Site Preparation Guidelines, Monitoring Well Construction and Abandonment Guidelines, and Above Ground Use of Domestic Reclaimed Wastewater Guidance), should not be made enforceable via the documents' citation in water quality standards, in Total Maximum Daily Loads, or in regulatory permits such as NPDES and groundwater discharge permits, all of which are enforceable with penalties. SJWC urges that all guidance, protocol and criteria documents be subject to the WQCC rulemaking process if they are going to be used as *de facto* water quality standards, TMDLs, or permit limitations that will be enforced by the WQCC or EPA. Circumvention of the rulemaking process violates the due process rights of those against whom the guidance documents are applied. Simple reference to guidance documents and protocols in the New Mexico Water Quality Management Plan does not meet the requirements of the Water Quality Act regarding public hearings for adoption of regulations and standards.

Finally, the State of Arizona has a very reasonable approach to unclassified waters, particularly ephemeral waters. During previous Triennial Reviews of the state's surface water quality standards, several parties proposed that New Mexico adopt water quality standards similar to those adopted by the State of Arizona that specifically address "effluent dependent waters." The adverse economic impacts on New Mexico NPDES dischargers resulting from the state's current unclassified waters scheme could be ameliorated by incorporating the Arizona concept of effluent dependent waters into the surface water quality standards at some point in the near future.

During this Triennial Review, SJWC has not petitioned to remove the rebuttable presumption for unclassified waters adopted by the WQCC in 2009. Indeed, it is unclear whether designated uses for 100,000 miles of ephemeral waters can be downgraded without UAAs. Nor has SJWC petitioned to adopt the Arizona effluent dependent water concept. The point of my technical testimony on this subject is to encourage NMED and the WQCC to approach EPA and determine the most efficient way to undo the damage caused by the 2009 action and allow unclassified waters to be considered ephemeral unless proved to be intermittent or perennial. The current time and cost UAA burdens on the regulated community, NMED, and the state as a whole are unjustifiable, as shown by NMED's current proposal to add the first stream segments to the list of ephemeral waters set out in 20.6.4.97(C) NMAC.

3. 20.6.4.101-503 NMAC: NMED's Classified Waters Proposal

NMED proposes wide-spread upgrades of the secondary contact recreation designated use to primary contact recreation for numerous classified stream segments throughout New Mexico. Upgraded recreational use is proposed for nine stream

segments, and as with 20.6.4.103 NMAC, the following rationale is provided in NMED's Basis for Change in support of the upgraded use:

> The State shall from time to time, but at least once every three years, review applicable water quality standards and, as appropriate, modify and adopt standards. Any water body segment with water quality standards that do not include the uses specified in 40 CFR § 131.20 shall be re-examined to determine if any new information has become available. If such new information indicates that the uses specified in CWA Section 101(a)(2) are attainable, the State shall revise its standards accordingly. While swimming in this area is "at your own risk", this portion of the Rio Grande is accessible for swimming and bodily contact can occur with a risk of ingesting water. The Bureau has no evidence that this use is not attainable and primary contact use may be existing and is likely attainable. Also, to be consistent with the latest EPA recommendations for recreational contact and CWA Section 101(a) goals (77 FR71191, November 29, 2012), the designated use for secondary contact is upgraded to the primary contact use with corresponding criteria.

This NMED Basis for Change is by and large used as the "boiler plate" rationale for all of the proposed upgrades from secondary contact to primary contact. Please note that NMED uses very equivocal language and states that it has "*no* evidence that this use is *not* attainable and primary contact use *may* be existing and is *likely* attainable." (Emphasis added.) NMED does not offer any data, documentation, or evidence that primary contact *is* occurring and *is* attainable. NMED's artfully crafted language is an attempt to create yet another rebuttable presumption—a presumption that primary contact is an attainable use—and avoid the obligation to provide actual data and other evidence supporting the designated use upgrade. NMED is merely "presuming" that primary contact is an attainable use, and the same "Basis for Change" language is used for the following eight stream segments: 20.6.4.116, 20.6.4.124, 20.6.4.204,

20.6.4.206, 20.6.4.207, 20.6.4.213, 20.6.4.219, and 20.6.4.308 NMAC. No information specific to each individual stream segment is provided.

These nine proposed designated use upgrades, from the previously EPA-approved designated use of secondary contact recreation to primary contact recreation, will create unnecessary transactional costs and is not a wise course of action for the reasons already stated in my testimony about the cost impacts of the ephemeral waters process. The presumption that the primary contact recreation use is attainable, without any supporting evidence, will place an economic and time burden on both NMED and those discharging into these stream segments. Conceivably, the change in designated use will force dischargers either to upgrade wastewater treatment for bacteria or to technically and legally rebut the presumption that primary contact recreation is attainable with the costly performance of a UAA. Because the current designated use of secondary contact recreation, previously approved by EPA, meets the CWA Section 101(a)(2) goal of recreation in and on the water, there is no reason to impose such additional burdens on dischargers or the administrative agency. NMED presents no "new information" supporting its proposal, despite its recognition in its Basis for Change that standards should be revised based on "new information."

NMED also states in its Basis for Change: "To be consistent with the latest EPA recommendations for recreational contact and CWA Section 101(a) goals (77 FR71191, November 29, 2012), the designated use for secondary contact is upgraded to the primary contact use with corresponding criteria." However, the EPA announcement published in the November 29, 2012 *Federal Register* applies to the availability of the 2012 Recreational Water Quality Criteria, a document that contains EPA's recreational

water quality criteria recommendations for protecting human health in ambient waters that *already* are designated for *primary contact recreation*—not secondary contact. NMED's Basis for Change simply does not apply to the proposed designated use upgrades for these nine stream segments because the stream segments do not currently have a primary contact designated use. NMED's attempt to justify its upgrade proposals on an EPA recommendation that is not applicable should be rejected. The EPA recommendation does not apply *unless or until* the waters have a designated use of primary contact recreation.

Furthermore, EPA has requested comments on its proposal to amend 40 CFR Section 131.10(g) to provide that, where a state or tribe adopts new or revised water quality standards based on a UAA, it must adopt the highest attainable use (HAU). *See* SJWC Exhibit C-3 at 54518, 54522. EPA is proposing to define HAU as: "the aquatic life, wildlife, and/or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, as determined using best available data and information through a use attainability analysis defined in § 131.3(g)." *Id.* at 54522. EPA goes on to say that it recommends that states and tribes consider the HAU during a triennial review: "If new information becomes available during a triennial review to indicate that a use higher than what is currently designated is attainable, states and tribes should revise their WQS to reflect the HAU." *Id.* at 54524.

Even though EPA has requested comments on its proposed revisions to 40 CFR Section 131, and further rulemaking is still pending, the implications of EPA's proposals regarding designated uses are helpful. Furthermore, EPA's evaluation of the economic impacts on state and tribal WQS programs associated with adoption of the rulemaking

proposal illustrates the issue of transactional costs regarding the adoption of a WQS variance procedure and implementing the highest attainable use (HAU) process, adding further support to my testimony on transactional cost impacts. *See* SJWC Exhibit C-3 at 54538. NMED's proposal to upgrade nine steam segments from the secondary contact recreation to the primary contact recreation designated use rests on no substantive "new information." Moreover, it is patently obvious that upgrading a CWA Section 101(a)(2) designated use to a higher or highest categorical use, without substantial information and data justifying the upgrade, burdens New Mexico with unwarranted transactional costs. If designated uses are upgraded based on a rebuttable presumption, downgrading those designated uses in the future likely will not be feasible without the commitment of significant economic resources to perform required UAAs, amend the applicable water quality standards, and obtain EPA approval. The WQCC should not adopt more stringent water quality standards absent information and data proving a use is attainable. SJWC therefore recommends that the WQCC not adopt NMED's proposed revisions for upgrading recreational use on the aforementioned nine waterbody segments.

4. <u>20.6.4.900 NMAC: Peabody Energy's Proposed Revisions to Use-Specific Numeric Criteria</u>

Peabody Energy ("Peabody") proposes to modify the selenium standard for Wildlife Habitat in 20.6.4.900(J) NMAC by (i) assigning the use-specific criteria of 50 µg/L for dissolved selenium and (ii) deleting the use-specific criteria of 5.0 µg/L for total recoverable selenium from the standard. Peabody has made a case that the chronic aquatic life criteria of 5.0 µg/L is applicable when wildlife may be present and use water, and the criteria is already fully protective of the most sensitive water use by aquatic life.

Additionally, wildlife use the water primarily for drinking, similar to domestic livestock, and thus the 50.0 µg/L Se (dissolved) criterion applicable for livestock watering also should be used for wildlife habitat. The SJWC agrees with and supports Peabody's' proposed modification of the selenium standard.

Peabody also proposes to amend the language of 20.6.4.900(D) and (E) NMAC regarding primary contact and secondary contact recreation. Peabody's proposed language clarifies that it is not the intent of the standards to require man-made ponds or man-made wetlands built and intended to be used for treatment, livestock watering, and/or wildlife habitat purposes to meet primary and secondary human contact criteria. SJWC has reviewed Peabody's proposal and basis for change regarding the standards for primary and secondary contact, and SJWC supports Peabody's proposal.

This concludes my direct testimony on behalf of SJWC.

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City of Bloomfield
City of Farmington
San Juan County
S.J. County Rural Water Users Assoc.

May 27, 2014

Kristine Pintado
Water Quality Standards Coordinator
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Via U.S. Mail and E-mail (*Kristine.Pintado@state.nm.us*)

Re: Comments of San Juan Water Commission on the Surface Water Quality Bureau's Discussion Draft for the Triennial Review of Water Quality Standards

Dear Ms. Pintado:

Thank you for publishing, and accepting public comment on, the Surface Water Quality Bureau's ("SWQB") 2013 Triennial Review Discussion Draft, Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC (the "Discussion Draft"). SJWC appreciates the opportunity provided by SWQB to remark on the Discussion Draft. The SWQB should be commended for the thorough and detailed manner in which the Discussion Draft was prepared. SJWC has several comments and recommendations concerning SWQB's proposals for temporary criteria (20.6.4.10(F) NMAC), piscicide use (20.6.4.16 NMAC), ephemeral waters (20.6.4.97 NMAC), and classified waters (20.6.4.101-503 NMAC), as follows.

§ 20.6.4.10(F) NMAC: Temporary Criteria

SWQB's proposed additions to Section 20.6.4.10 NMAC would allow any person to petition the Water Quality Control Commission ("WQCC") to adopt a temporary water quality criterion applicable to all or part of a surface water of the state. Although presumably well-intentioned, the proposed new language beginning on page 5 provides no significant benefit to point and non-point source dischargers in New Mexico. As currently proposed, a petitioner for a temporary criterion must demonstrate:

1. "attainment of the associated designated use is not feasible in the *short term*" because of one or more of the factors listed in 40 CFR 131.10(g), as demonstrated by a Use Attainability Analysis ("UAA") (emphasis added);

2. "the proposed temporary criterion represents the highest degree of protection feasible in the *short term* and adoption will not cause loss or impairment of an existing use" (emphasis added); and

3. "existing or proposed discharge control technologies will comply with applicable technology-based limitations and feasible technological controls and other management alternatives, such as a pollution prevention program."

SJWC believes that SWQB's temporary criteria proposal is unnecessary because, if a petitioner must first demonstrate that attainment of the associated designated use is not feasible due to one or more factors listed in 40 CFR 131.10(g) as demonstrated by means of a UAA performed by the petitioner, then the designated use should be revised for that segment of the surface water given the UAA justification for an unattainable designated use. SWQB's reference to "short term" infeasibility presupposes future feasibility of attainment and does not benefit a petitioner who already has proven, through a UAA, that a designated use is not attainable.

Next, the Discussion Draft language states that a temporary criterion shall apply to a specific pollutant or to a specific water body segment, and it does not allow the temporary modification of a designated use. Although the EPA defines an interim or temporary water quality criterion as a "time limited designated use [or] criteria" (EPA Publication No. EPA-820-F-13-012, March 2013), the SWQB proposal does not similarly allow temporary modification of a designated use. Thus, there is no demonstrable benefit for point and non-point source dischargers.

Finally, the proposed new language states that a petition for a temporary criterion must present a plan and timetable for achieving compliance with the original criterion and, unless renewed, a temporary criterion shall expire no later than the effective date of the next Triennial Review. In essence, SWQB is proposing a variance process applicable to surface water quality standards. SJWC has argued in the past that the Water Quality Act authorizes variances from water quality standards because standards may be enforced by criminal penalties, thus making standards equivalent to regulations. *See generally* §§ 74-6-4(H), 74-6-10.2 NMSA 1978. Adoption of a variance standard similar to that previously proposed by SJWC would obviate the need for SWQB's temporary criteria proposal, comport with EPA guidance, and provide greater benefit to dischargers.

§ 20.6.4.16 NMAC: PLANNED USE OF A PISCICIDE

Beginning on page 8 of the Discussion Draft, SWQB proposes to exempt piscicide users who have a National Pollutant Discharge Elimination System ("NPDES") permit for piscicide application from further review and approval by the WQCC. SJWC believes relief from WQCC approval for piscicide application is warranted to relieve NPDES permit holders from duplicative federal and state permitting requirements.

However, SJWC disagrees that the WQCC should retain authority to authorize piscicide use in the absence of an NPDES permit because applicable federal regulations require that any person proposing to use (discharge) a piscicide in waters of the U.S. obtain an NPDES permit. The WQCC, therefore, should require an NPDES permit rather than provide an alternative process for approval of piscicide use in contradiction to federal law. If SWQB is concerned that EPA's NPDES Pesticide General Permit may be revoked, and therefore a state "back-up plan" is warranted, SJWC urges SWQB to modify its proposal to clarify that WQCC approval of piscicide use can occur only if EPA's General Permit is revoked.

§ 20.6.4.97 NMAC: EPHEMERAL WATERS

SWQB proposes adding approximately 30 new stream segments to the list of ephemeral waters set out in section 20.6.4.97(C) NMAC based on UAA's conducted pursuant to 20.6.4.15(C) NMAC and the New Mexico Environment Department's ("NMED") Hydrology Protocol for the Determination of Uses Supported by Ephemeral, Intermittent, and Perennial Waters (the "Hydrology Protocol"). These waters are the first to be expressly classified as ephemeral out of thousands of miles of ephemeral watercourses in the state. Once classified as ephemeral, a surface water is assigned the designated uses of livestock watering, wildlife habitat, limited aquatic life and secondary contact. Unclassified ephemeral waters not yet the subject of a UAA, on the other hand, are presumed to be intermittent waters and are assigned the more stringent designated uses of primary contact and marginal warmwater aquatic life. 20.6.4.98 NMAC.

SJWC has no objection to the classification of these stream segments as ephemeral waters. However, SJWC believes a UAA should not be required before an unclassified stream segment can be classified as ephemeral. For the reasons set forth in the following discussion of unclassified non-perennial waters, SJWC urges SWQB to request that the WQCC amend the water quality standards to replace the designated uses for all unclassified waters with wildlife habitat, secondary contact and limited aquatic life.

Eighteen of SWQB's proposed ephemeral surface water classifications result from a 2012 UAA performed by NMED and its contractor, Daniel B. Stephens & Associates, pursuant to section 20.6.4.15 NMAC and the Hydrology Protocol: Use Attainability Analysis for Unclassified Non-Perennial Watercourses with NPDES Permitted Facilities (June 2012). That UAA contains the following "Background and Objectives" (at 1):

> The Clean Water Act (CWA) §101(a)(2) and Section 20.6.4.6 NMAC declares that wherever attainable, water quality shall provide for the protection of fish, shellfish and wildlife and for recreation in and on the water. In accordance with this,

> federal regulation at 40 CFR 131.10(j) effectively establishes a "rebuttable presumption" that CWA §101(a)(2) uses ("§101(a)(2) uses") are attainable. According to federal regulation at 40 CFR 131.10(j), to remove a §101(a)(2) use, a state must conduct a UAA. Relevant to this UAA, an aquatic life use may be removed or changed to a use with less stringent criteria if the use is unattainable due to one or more of six factors listed in 40 CFR 131.10(g).
>
> Waters that are not included in a classified Water Quality Standards segment (§20.6.4.101-899 NMAC) are considered unclassified waters of the State (§20.6.4.97-99 NMAC). Water quality standards and the appropriate use specific criteria for unclassified waters are dependent on the existing hydrologic condition (e.g., ephemeral, intermittent or perennial). In New Mexico, unclassified non-perennial waters are by default subject to §20.6.4.98 NMAC, with designated uses of wildlife habitat, livestock watering, primary contact, and marginal warmwater aquatic life. The uses of wildlife habitat, primary contact and marginal warmwater aquatic life are consistent with the presumption that §101(a)(2) uses are attainable. New Mexico Water Quality Standards at §20.6.4.15 NMAC provides for an UAA process for certain ephemeral waters based on the Hydrology Protocol which can be used to change the applicable designated uses and water quality standards for unclassified streams as part of the UAA process.

During the 2009 Triennial Review, NMED proposed, and the WQCC adopted, amendments to the surface water quality standards that, by default, apply Clean Water Act ("CWA") section 101(a)(2) uses (a/k/a "fishable swimmable uses") to all unclassified waters in New Mexico—an estimated 110,000 miles of ephemeral and intermittent watercourses. In other words, all unclassified waters are assigned the designated uses of wildlife habitat, primary contact and marginal warmwater aquatic life, and those uses can be altered only through the performance of a UAA. SJWC believes this requirement places an unreasonable economic burden on the state and its citizens that is simply unnecessary.

First, under 40 CFR 131.10(j):

> A State must conduct a use attainability analysis as described in §131.3(g) whenever:

> (1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or
>
> (2)The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to adopt subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria.

Wildlife habitat, secondary contact and limited aquatic life designated uses meet the CWA §101(a)(2) national goals regarding wildlife and recreation in and on the water and should therefore be deemed to meet the federal requirements in 40 CFR 131.10(j)(1). For example, secondary contact includes wading, which is an activity "in" the water. Also, wildlife will take advantage of any water present for any amount of time in an unclassified watercourse. SJWC therefore encourages SWQB to propose, or at least support, amending the water quality standards to replace the current designated uses for unclassified waters with wildlife habitat, secondary contact, and limited aquatic life. It is simply too costly to require a UAA to demonstrate that a watercourse is, in fact, ephemeral and does not support the designated uses of primary contact and marginal warmwater aquatic life. The rebuttable presumption that primary contact and marginal warmwater aquatic life are attainable uses in thousands of miles of unclassified watercourses (many of which usually are dry arroyos), which was adopted by the WQCC in 2009, should be scrapped. Just consider the costs incurred by NMED to secure a contractor to examine the 18 non-perennial stream segments that are the subject of the 2012 UAA and the Discussion Draft.

Second, section 20.6.4.15(C) NMAC has elevated the Hydrology Protocol, which is nothing more than a guidance document, to the status of an enforceable regulation. Although the Hydrology Protocol may indeed represent good guidance and may establish a sound methodology, NMED-written guidance documents (*e.g.*, Hydrology Protocol, Assessment Protocol, Nutrient Criteria, Above Ground Use of Domestic Reclaimed Wastewater, etc.), should not be made enforceable via their citation in the water quality standards, in Total Maximum Daily Loads (leading to enforceable NPDES permits), or in regulatory permits such as groundwater discharge permits. SJWC urges that all guidance, protocol and criteria documents be subject to the WQCC rulemaking process if they are going to be used as *de facto* water quality standards, TMDLs, or permit limitations that will be enforced by the WQCC or EPA. Circumvention of the rulemaking process violates the due process rights of those against whom the guidance documents are applied. Simple reference to guidance documents, protocols, and criteria in the New Mexico Water Quality Management Plan does not meet the public hearing requirements of the Water Quality Act regarding the adoption of regulations and standards.

Finally, as a result of the WQCC's adoption of the "rebuttable presumption"/ CWA §101(a)(2) uses approach, and the corresponding UAA/Hydrology Protocol requirement, certain NPDES discharges previously made into "ephemeral" waters now are made into "perennial" waters because a watercourse has been redesignated as perennial based solely on the discharge. When those NPDES permits are renewed, the permit conditions are more stringent in order to meet the upgraded designated uses, such as primary contact. More stringent permit conditions typically mean increased economic burdens on the discharger.

Arizona has a very reasonable approach to unclassified waters, particularly ephemeral waters. During previous Triennial Reviews of the state's surface water quality standards, several parties have proposed that New Mexico adopt water quality standards similar to those adopted by the State of Arizona that specifically address "effluent dependent waters." The adverse economic impacts on New Mexico NPDES dischargers resulting from the state's current unclassified waters scheme could be ameliorated by incorporating the Arizona concept of effluent dependent waters into the surface water quality standards. The following Arizona Water Quality Standards illustrate this point and provide a foundation for development of similar standards in New Mexico:

R18-11-101. Definitions

17. "Effluent-dependent water (EDW)" means a surface water, classified under R18-11-113, that consists of a point source discharge of wastewater. An effluent-dependent water is a surface water that, without the point source discharge of wastewater, would be an ephemeral water.
18. "Ephemeral water" means a surface water that has a channel that is at all times above the water table and flows only in direct response to precipitation.

R18-11-105. Tributaries; Designated Uses

The following water quality standards apply to a surface water that is not listed in Appendix B but that is a tributary to a listed surface water.

1. The aquatic and wildlife (ephemeral) and partial-body contact standards apply to an unlisted tributary that is an ephemeral water.
2. The aquatic and wildlife (cold water), full-body contact, and fish consumption standards apply to an unlisted tributary that is a perennial or intermittent surface water and is above 5000 feet in elevation.
3. The aquatic and wildlife (warm water), full-body contact, and fish consumption standards apply to an unlisted tributary that is a perennial or intermittent surface water and is below 5000 feet in elevation.

R18-11-113. Effluent-Dependent Waters

A. The Director shall classify a surface water as an effluent-dependent water by rule.

B. The Director may adopt, under R18-11-115, a site-specific water quality standard for an effluent-dependent water.
C. Any person may submit a petition for rule adoption requesting that the Director classify a surface water as an effluent-dependent water. The petition shall include:
   1. A map and a description of the surface water;
   2. Information that demonstrates that the surface water consists of a point source discharge of wastewater; and
   3. Information that demonstrates that, without a point source discharge of a wastewater, the receiving water is an ephemeral water.
D. The Director shall use the water quality standards that apply to an effluent-dependent water to derive water quality-based effluent limits for a point source discharge of wastewater to an ephemeral water.
E. The Director may use aquatic and wildlife (edw) acute standards only to derive water quality based effluent limits for a sporadic, infrequent, or emergency point source discharge to an ephemeral water or to an effluent-dependent water. The Director shall consider the following factors when deciding whether to apply A&Wedw (acute) standards:
   1. The amount, frequency, and duration of the discharge;
   2. The length of time water may be present in the receiving water;
   3. The distance to a downstream water with aquatic and wildlife chronic standards; and
   4. The likelihood of chronic exposure to pollutants.
F. The Director may establish alternative water quality-based effluent limits in an AZPDES permit based on seasonal differences in the discharge.

§ 20.6.4.101-503 NMAC: CLASSIFIED WATERS

SWQB proposes upgrading the secondary contact recreation designated use to primary contact recreation for numerous classified stream segments throughout New Mexico. In many instances, the rationale for the upgraded designated use is attributed to observations that primary contact recreation is indeed an existing use. However, in most instances, the following rationale is provided in the Discussion Draft to support the upgraded use:

> The State is required, from time to time or at least every three years such as during the Triennial Review, to regularly conduct an evaluation of all water bodies with uses not consistent with CWA Section 101(a) goals and if new information indicates the goals are attainable, revise its standards to reflect those uses (40 CFR 131.20). The Department has no evidence that this use is not attainable and information provided above would indicate that primary contact use is existing and likely attainable. To be consistent

with the latest EPA recommendations for recreational contact and CWA 101(a) goals (77 FR71191, November 29, 2012), the designated use for secondary contact is upgraded to the primary contact use with corresponding criteria.

The number of wholesale upgrades from the designated use of secondary contact recreation to primary contact recreation without evidence that primary contact use is an existing use is over-reaching. For years, EPA has approved the secondary contact use for these classified waters. The presumption that the primary contact recreation use is attainable, without any supporting evidence, will place a burden on dischargers to either upgrade wastewater treatment for bacteria or technically and legally rebut the presumption that primary contact recreation is attainable. Because the current designated use of secondary contact recreation meets the CWA § 101(a)(2) goals, *i.e.*, recreation in and on the water, there is no reason to impose such additional burdens on dischargers.

§ 20.6.4.404 NMAC: SAN JUAN RIVER BASIN

This classified stream segment, at page 22 of the Discussion Draft, includes a proposed downgrade in designated use from marginal warmwater to coolwater based on a November 2013 Public Discussion Draft UAA Aquatic Life Uses for the Animas River in New Mexico. For the reasons set forth in SJWC's comments on that draft UAA, SJWC supports this proposal.

Thank you for your consideration of these comments. If you have any questions about SJWC's position, or would like to discuss these issues in more detail, please do not hesitate to call me. SJWC looks forward to receiving your response to these comments and to participating in the upcoming Triennial Review.

Sincerely,

L. Randy Kirkpatrick
Executive Director
San Juan Water Commission

EPA United States Environmental Protection Agency | Office of Water Mail Code 4305T | EPA-820-F-13-012 March 2013

Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers

Frequently Asked Questions

DISCLAIMER

These Frequently Asked Questions (FAQs) do not impose legally binding requirements on the EPA, states, tribes or the regulated community, nor do they confer legal rights or impose legal obligations upon any member of the public. The Clean Water Act (CWA) provisions and the EPA regulations described in this document contain legally binding requirements. These FAQs do not constitute a regulation, nor do they change or substitute for any CWA provision or the EPA regulations.

The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of these FAQs and the appropriateness of their application to a particular situation. The EPA retains the discretion to adopt approaches on a case-by-case basis that differ from those described in these FAQs where appropriate. These FAQs are a living document and may be revised periodically without public notice. The EPA welcomes public input on these FAQs at any time.

1. Why is the EPA issuing these FAQs?

The EPA is issuing these FAQs to help address questions that arise when states and tribes[1] seek to streamline the adoption and approval of water quality standards (WQS) variances for pollutants that have an impact on multiple permittees (or dischargers). This occurs when groups of permittees are experiencing the same challenges in meeting their water quality based effluent limits (WQBELs) for the same pollutant, regardless of whether or not the permittees are located on the same waterbody. States and tribes that want to find ways to both improve the efficiency of their WQS adoption and approval process, and provide permittees with as much certainty as possible regarding their ultimate discharge requirements, may find these FAQs particularly helpful. While the EPA realizes there may be further questions about the implementation of multiple discharger variances, these FAQs

[1] "Tribal" and "tribes" refers to tribes authorized for treatment in a manner similar to a state (TAS) under section 518 of the Clean Water Act (CWA) for purposes of CWA section 303(c) water quality standards (WQS).

are designed to help states and tribes evaluate the appropriateness of using a multiple discharger variance approach.

The federal water quality standards regulations at 40 CFR 131 and the federal permitting regulations at 40 CFR 122 provide for a number of tools for states and tribes that offer regulatory flexibility when implementing water quality management programs. These tools include site-specific criteria, revisions to designated uses, dilution allowances, permit compliance schedules, and WQS variances. Which regulatory tool is appropriate depends upon the circumstances.

2. What is a water quality standards variance?

A water quality standards variance is a time limited designated use and criterion (i.e., interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition[2] during the specified time period. As such, a variance requires a public process and EPA review and approval under CWA 303(c). While the designated use and criterion reflect what is ultimately attainable, the variance reflects the highest attainable condition for a specific timeframe and is therefore less stringent.[3] However, a state or tribe may adopt such interim requirements only if it is able to demonstrate that it is not feasible to attain the currently applicable designated use and criterion during the period of the variance due to one of the factors listed at 40 CFR 131.10(g).[4] Where the currently applicable designated use and criterion are not being met, WQS variances that reflect a less stringent, time limited designated use and criterion allow states, tribes and stakeholders additional time to implement adaptive management approaches to improve water quality, but still retain the currently applicable designated use as a long term goal for the waterbody. States have adopted, and EPA has approved, water quality standards variances that apply to individual dischargers, variances that apply to multiple dischargers, and variances that apply to entire waterbodies or segments.

The interim requirements specified in the variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the pollutant(s), permittee(s) and /or waterbody or water body segment(s) covered by the variance. Specifically, the variance serves as the basis for the WQBEL in National Pollutant Discharge Elimination System (NPDES) permits. However, the interim requirements *do not replace* the designated use and criteria for the water body as a whole, therefore, any implementation of CWA section 303(d) to list impaired waters must continue to be based on the designated uses and criteria for the waterbody rather than the interim requirements.

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[2] The highest attainable condition is the condition that is both feasible to attain and is closest to the protection afforded by the designated use and criteria.

[3] While variances are described as "time limited" and designated uses are implied to be "permanent," 40 CFR 131.20 requires that states and tribes hold public hearings for the purpose of reviewing the applicable water quality standards, including designated uses, and modifying them as appropriate.

[4] See Section 5.3 of the *Water Quality Standards Handbook EPA 823 B 94 005a, August 1994; Advanced Notice of Proposed Rule Making, Water Quality Standards Regulation, July 7, 1998 63 FR 36759.*

3. When might a state or tribe want to adopt a WQS variance?

Many states and tribes have found that WQS variances are useful to consider when there is a new or more stringent effluent limit[5] as long as the state or tribe can also provide a demonstration that attaining the designated use and criterion is not feasible for the term of the variance, but the designated use and criterion may be attainable in the longer term. Example situations of when a variance may be appropriate include when:

- Attaining the designated use and criterion is not feasible under the current conditions (e.g., water quality-based controls required to meet the numeric nutrient criterion would result in substantial and widespread social and economic impact) but could be feasible should circumstances related to the attainability determination change (e.g., development of less expensive pollution control technology or a change in local economic conditions); or
- The state or tribe does not know whether the designated use and criterion may ultimately be attainable, but feasible progress toward attaining the designated use and criterion can still be made by implementing known controls and tracking environmental improvements (e.g., complex use attainability challenges involving legacy pollutants).

Properly applied, a WQS variance can lead to improved water quality over the duration of the variance and, in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA.

4. What is the legal basis for a WQS variance?

The CWA specifies an interim goal that, "wherever attainable," water quality provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water. In implementing the CWA, the regulation at 40 CFR 131.10 establishes how a state or tribe may demonstrate that uses specified in CWA section 101(a)(2) or subcategories of such uses are not feasible to attain. In 1977, an EPA Office of General Counsel legal opinion considered the practice of temporarily downgrading the WQS as it applies to a specific permittee rather than permanently downgrading an entire water body or waterbody segment(s) and determined that such a practice is acceptable as long as it is adopted consistent with the substantive requirements for permanently downgrading a designated use. In other words, a state or tribe may change the standard in a more targeted way than a designated use change, so long as the state or tribe is able to show that achieving the standard is "unattainable" for the term of the variance. The state practice described in the Office of General Counsel legal opinion became known as adopting a "variance" to a water quality standard.

The EPA's regulation at 40 CFR 131.13 provides that variance policies are general policies affecting the application and implementation of WQS and that states and tribes may include variance policies in their state and tribal standards, at their discretion.[6] The EPA interprets its

[5] For example, when dischargers are faced with new or revised criteria, and/or when a reasonable potential analysis shows the need for a water quality based effluent limit.

[6] Section 40 CFR 131.13 further provides that such policies are subject to EPA review and approval.

regulation to authorize the use of a WQS variance where a state or tribe meets the same procedural and substantive requirements as removing a designated use. Therefore, variances can be granted based on any one of the six factors listed at 40 CFR 131.10(g).

5. What are the factors a state or tribe can use to justify the need for a water quality standards variance?

As provided in §131.10(g), states and tribes "may remove a designated use which is *not* an existing use, as defined in 40 CFR 131.3, or establish sub-categories of a use if the state or tribe can demonstrate that attaining the designated use is not feasible because:

(1) Naturally occurring pollutant concentrations prevent the attainment of the use; or

(2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or

(3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

(4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or

(5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact."

6. What is a Multiple Discharger Variance?

If a state or tribe believes that the designated use and criterion are unattainable as they apply to multiple permittees because they are all experiencing challenges in meeting their WQBELs for the same pollutant(s) for the same reason, regardless of whether or not they are located on the same waterbody, a state or tribe may streamline its WQS variance process. To do so, the state or tribe would adopt one variance that applies to all of these permittees (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulation at 40 CFR 131.10 (for example, all the dischargers in the group cannot meet the required WQBEL to protect aquatic life for a period of time due to substantial and widespread economic and social impact).

The EPA recognized the utility of a multiple discharger variance, and its distinction from an individual discharger WQS variance in the "Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID; EPA–820–B–95–001; March 1995, p.

238). The EPA also spoke to the use of multiple discharger variances in the "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule." 75 Fed. Reg. 75762, 75790 (December 6, 2010). It is important to note that multiple discharger variances may not be appropriate or practical for all situations, and may be highly dependent on the parameters considered and the number of affected permittees.

7. What should a state or tribe keep in mind when justifying the need for a multiple discharger variance?

In developing an analysis to justify the need for a multiple discharger variance, states and tribes should consider the following three principles. The variance and the justification:

(1) Must meet the same 40 CFR 131 regulatory requirements as an individual discharger WQS variance, and should consider any EPA guidance. Specifically, the state or tribe must fully demonstrate that a factor listed in 40 CFR 131.10(g) precludes attainment of a use specified in CWA 101(a)(2) for the entire variance period. When using 40 CFR 131.10(g)(6), this means that the documentation provided to support the variance must address both the substantial AND widespread components of the economic and social impacts of attaining the designated use and criterion.

(2) Should ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible. A permittee that could not qualify for an individual WQS variance should not qualify for a multiple discharger variance. The demonstration should:

- Apply only to permittees experiencing the same challenges in meeting WQBELs for the same pollutant(s), criteria and designated uses.
- Group permittees based on specific characteristics or technical and economic scenarios that the permittees share (e.g., type of discharger (public or private), industrial classification, permittee size and/or effluent quality, treatment train (existing or needed), pollutant treatability, available revenue, whether or not the permittee can achieve a level of effluent quality comparable to the other permittees in the group, and/or waterbody or watershed characteristics) and conduct a separate analysis for each group.[7] The more homogeneous a group is in terms of factors affecting attainability of the designated use and criterion, the more credible the multiple discharger variance will be.
- Collect sufficient information for each individual permittee, including engineering analyses and financial information, to adequately support the specification of permittee groups for each individual permittee to be covered by the variance (e.g. estimated costs that each permittee may experience, permittee specific revenue).

[7] The EPA recommends that the state or tribe develop a separate variance for each group (even when going through the same rulemaking procedure) so that if questions arise for one group, it does not jeopardize approval for the others.

(3) Should consider an individual variance for a particular permittee if it does not fit with any of the group characteristics (e.g., private vs. public dischargers, large vs. small permittee, or permittees with a parent company vs. those without).

8. What should a state or tribe keep in mind when adopting a multiple discharger variance pursuant to state/tribal law?

Any multiple discharger variance should:

(1) Include a justifiable expiration date, consistent with the analysis provided, for each permittee or group of permittees covered by the variance. After the expiration date, each permittee in the group will be subject to the applicable water quality standards, or obtain EPA approval on a variance renewal. If the variance will expire during the permit term, the permitting authority must either include an appropriate WQBEL that will apply at the expiration of the variance or include a reopener clause such that the WQBEL may be revised in order for that permit to derive from and comply with WQS the entire permit term.

(2) Provide that any renewal of a multiple discharger variance includes a new demonstration that the designated use and criterion are not feasible to attain during the term of the renewed variance, and documentation of the feasible progress that has been made by each permittee covered by the renewal. In addition, individual permittees will be reevaluated to determine if they continue to qualify under their group designation. Permittees that no longer qualify will cease to be covered by the multiple discharger variance.

It is important to note that even though the duration of a variance may be longer than 3 years, a variance is a water quality standard that must be reviewed every 3 years, consistent with 40 CFR 131.20 (a).

9. What must a state or tribe keep in mind when determining the appropriate interim requirements for a multiple discharger variance?

As with any WQS variance, the interim requirements will need to reflect the highest attainable condition during the term of the variance. The highest attainable condition may be expressed as the highest attainable interim use and criterion[8] or highest attainable effluent

[8] Section 131.6(a) requires that each state's water quality standards submitted to EPA for review must include "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." CWA section 101(a)(2) establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water," wherever attainable. Section 303(c)(2)(A) requires state water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act]." EPA's regulations at 40 CFR part 131 interpret and implement these CWA provisions as creating a "rebuttable presumption" that requires state water quality standards to provide for all of the uses specified in Section 101(a)(2) of the Act, unless those uses are shown by a use attainability analysis to be unattainable. Section 131.10(g) and 131.10(j) authorizes a state to remove protection for a use specified in 101(a)(2) (or subcategory of such a use) if the state can demonstrate that one of the attainability factors is met. Once the presumption is rebutted, the state must still adopt, under 131.6(a), "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." In order to comply with this provision, states will

condition for a permittee(s) during the term of the variance. For example, this could be accomplished by specifying in the variance a numeric value that reflects the highest water quality that a discharger could achieve (beyond their technology-based effluent limits) during the term of the variance.[9] In general, interim requirements should be established on a permittee specific basis (particularly when demonstrating that the applicable designated use is unattainable based on 40 CFR 131.10(g)(6)), but there may be instances where establishing requirements for a group of permittees may be appropriate (e.g., with "legacy pollutants", or when hydrologic conditions have been modified). EPA notes that some states have included additional interim requirements, such as requirements to research advances in wastewater treatment or improved management practices, to conduct wastewater treatability studies, to define demonstrated performance of wastewater treatment or other control methods.

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need to adopt designated uses that continue to serve the 101(a)(2) goal by protecting for the highest attainable use unless the state has shown that no use specified in 101(a)(2) or no subcategory of such uses are attainable.

[9] This is a reasonable alternative to adopting an interim designated use and criterion because the resulting instream concentration reflects the highest attainable interim use and interim criterion.

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Part II

Environmental Protection Agency

40 CFR Part 131
Water Quality Standards Regulatory Clarifications; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2010–0606; FRL–9839–7]

RIN 2040–AF 16

Water Quality Standards Regulatory Clarifications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing changes to the federal water quality standards (WQS) regulation which helps implement the Clean Water Act. The changes will improve the regulation's effectiveness in restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The EPA is seeking comments from interested parties on these proposed revisions. The core of the current regulation has been in place since 1983; since then, a number of issues have been raised by states, tribes, or stakeholders or identified by the EPA in the implementation process that will benefit from clarification and greater specificity. The proposed rule addresses the following key program areas: Administrator's determinations that new or revised WQS are necessary, designated uses, triennial reviews, antidegradation, variances to WQS, and compliance schedule authorizing provisions.

DATES: Comments must be received on or before December 3, 2013.

ADDRESSES: Submit your comments, identified by Docket identification (ID) No. EPA–HQ–OW–2010–0606, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: ow-docket@epa.gov.*
- *Mail:* Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Attention: Docket ID No. EPA–HQ–OW–2010–0606.
- *Hand Delivery:* EPA Docket Center, EPA West Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004, Attention: Docket ID No. EPA–HQ–OW–2010–0606. Such deliveries are only accepted during the Docket Center's normal hours of operation. Special arrangements should be made for deliveries of boxed information by calling 202–566–2426.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2010–0606. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disc you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other materials, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Office of Water Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744; the telephone number for the Office of Water Docket Center is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Janita Aguirre, Standards and Health Protection Division, Office of Science and Technology (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: 202–566–1860; fax number: 202–566–0409; email address: *WQSRegulatoryClarifications@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

Table of Contents

I. General Information

A. Does this action apply to me?

State and tribal governments responsible for administering or overseeing water quality programs may be directly affected by this rulemaking, as states and authorized tribes[1] may

[1] Hereafter referred to as "states and authorized tribes" or "states and tribes." "State" in the Clean

need to consider and implement new provisions, or revise existing provisions, in their water quality standards (WQS or standards). Entities such as industrial dischargers or publicly owned treatment works that discharge pollutants to waters of the United States may be indirectly affected by this rulemaking because WQS may be used in determining permit limits under the National Pollutant Discharge Elimination System (NPDES) or in implementing other Clean Water Act (CWA or the Act) regulatory programs. Citizens concerned with water quality and WQS implementation may also be interested in this rulemaking, although they might not be directly impacted. Categories and entities that may potentially be affected include the following:

Category	Examples of potentially affected entities
States and Tribes	States and authorized tribes (tribes eligible to administer WQS under the CWA).
Industry	Industries discharging pollutants to waters of the United States.
Municipalities	Publicly owned treatment works or other facilities discharging pollutants to waters of the United States.

This table is not intended to be exhaustive, but rather provides a guide for entities that may be directly or indirectly affected by this action. It lists the types of entities of which the EPA is aware could be potentially affected by this action. Other types of entities not listed in the table might be affected through implementation of WQS that are revised as a result of this rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments for the EPA?

1. Resubmitting Relevant Comments From 2010 Stakeholder and Public Listening Sessions

From August through December 2010, the EPA held multiple listening sessions with stakeholders and the public, as well as consultation sessions with states, tribes, and representatives of state and local elected officials, concerning the general directions of this proposed rule. The EPA considered the views and comments received from these sessions in developing this proposal. The proposal published today has evolved substantially from the materials the EPA shared at that time. If you submitted comments in response to any of those sessions and wish for these comments to be considered during the public comment period for this proposed rulemaking, you must resubmit such comments to the EPA in accordance with the instructions outlined in this document.

2. Submitting Confidential Business Information (CBI)

Do not submit this information to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disc that you mail to the EPA, mark the outside of the disc as CBI and then identify electronically within the disc the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

3. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions. The agency may ask you to respond to specific questions or organize comments by referencing a CFR part or section number.
- Submit any and all comments on any portion of the rulemaking that you wish to be considered.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you provide an estimate of potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What is the statutory and regulatory history of the WQS regulation and program?

The CWA—initially enacted as the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92–500) and subsequent amendments—establishes the basic structure in place today for regulating pollutant discharges into the waters of the United States. In the Act, Congress established the national objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to achieve "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water" (sections 101(a) and 101(a)(2)).

The CWA establishes the basis for the current WQS regulation and program. Section 301 of the Act provides that "the discharge of any pollutant by any person shall be unlawful" except in compliance with specific requirements of Title III and IV of the Act, including industrial and municipal effluent limitations specified under section 304 and "any more stringent limitation, including those necessary to meet WQS, treatment standards or schedule of compliance established pursuant to any State law or regulation." Section 303(c) of the Act addresses the development of state and authorized tribal WQS and provides for the following:

(1) WQS shall consist of designated uses and water quality criteria based upon such uses;

(2) States and authorized tribes shall establish WQS considering the following possible uses for their waters—propagation of fish, shellfish and wildlife, recreational purposes, public water supply, agricultural and

Water Act and this document refers to a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

industrial water supplies, navigation, and other uses;

(3) State and tribal standards must protect public health or welfare, enhance the quality of water, and serve the purposes of the Act;

(4) States and tribes must review their standards at least once every 3 years; and

(5) The EPA is required to review any new or revised state and tribal standards, and is also required to promulgate federal standards where the EPA finds that new or revised state or tribal standards are not consistent with applicable requirements of the Act or in situations where the Administrator determines that federal standards are necessary to meet the requirements of the Act.

The EPA established the core of the current WQS regulation in a final rule issued in 1983.[2] This rule strengthened previous provisions that had been in place since 1977 and moved them to a new 40 CFR part 131 (54 FR 51400, November 8, 1983). The resulting regulation describes how the WQS envisioned in the CWA are to be administered. It clarifies the content of standards and establishes more detailed provisions for implementing the provisions of the Act. The following are examples of how the regulation has interpreted and implemented the CWA provisions regarding standards:

- Establishes procedures to recognize the importance of designating beneficial uses to achieve the CWA section 101(a)(2) interim goal with regard to protecting aquatic life and recreational uses, and to provide states and tribes the option of establishing sub-categories of uses, such as cold water and warm water aquatic life designations (§ 131.10).
- Provides detail concerning the adoption of numeric water quality criteria, including authorizing the modification of the EPA's national recommended criteria to reflect site-specific conditions, the use of criteria methodologies different from the EPA's recommendations so long as they are scientifically defensible, and the use of narrative criteria where numeric criteria cannot be derived or to supplement numeric criteria (§ 131.11).
- Incorporates and clarifies the Act's emphasis on the importance of preserving existing uses and identifying and preserving high quality and outstanding resource waters through longstanding antidegradation provisions. These provisions are designed to protect existing uses and the level of water quality necessary to support these uses; to protect high quality waters and provide a transparent analytic process for states and tribes to determine whether limited degradation of such waters is appropriate and necessary (§ 131.12).

In support of the 1983 regulation, the EPA has issued a number of guidance documents, such as the "Water Quality Standards Handbook" (WQS Handbook),[3] that have provided guidance on the interpretation and implementation of the WQS regulation, and on scientific and technical analyses that are used in making decisions that would impact WQS. The EPA also developed the "Technical Support Document for Water Quality-Based Toxics Control"[4] (TSD) that provided additional guidance for implementing state and tribal WQS.

The part 131 regulation has been modified twice since 1983. First, in 1991 the EPA added §§ 131.7 and 131.8 regarding tribes, pursuant to section 518 of the CWA (56 FR 64893, December 12, 1991). Section 518, which was enacted in 1987, included provisions extending the ability to participate in the WQS program to Indian tribes. Second, in 2000 the EPA promulgated § 131.21(c), commonly known as the "Alaska Rule," to clarify that new and revised standards adopted by states and tribes and submitted to the EPA after May 30, 2000 become applicable standards for CWA purposes only when approved by the EPA (65 FR 24641, April 27, 2000).

B. How has the public provided EPA input on the national WQS Program in the past?

The EPA received comments, data, and information from over 6,000 commenters in developing "Final Water Quality Guidance for the Great Lakes System" in 1995 (60 FR 15366, March 23, 1995). The final Guidance represented more than six years of intensive, cooperative efforts that included participation by the eight Great Lakes states, the EPA, and other Federal agencies in open dialogue with citizens, local governments, municipalities, academia, the environmental community, and industries located in the Great Lakes ecosystem. This process entailed a thorough review and analysis of the federal water quality program and opportunities for greater clarity, focus, and improved implementation. The final Guidance is codified in 40 CFR part 132 and helps establish consistent, enforceable, and long-term protections from all types of pollutants, with short-term emphasis on the types of bio-accumulative contaminants that accumulate in the food web and pose a threat to the Great Lakes System. While not all provisions of the Final Guidance may be necessary or appropriate for the national Water Quality Standards Program, the EPA considered the input received from the public through the development of the Final Guidance during the preparation of this proposed rule.

In 1998, the EPA issued an Advance Notice of Proposed Rulemaking (ANPRM) to discuss and invite comment on over 130 aspects of the federal WQS regulation and program, with a goal of identifying specific changes that might strengthen water quality protection and restoration, facilitate watershed management initiatives, and incorporate evolving water quality criteria and assessment science into state and tribal WQS programs. (63 FR 36742, July 7, 1998). In response, the EPA received over 3,200 specific written comments from over 150 comment letters. The EPA also held three public meetings during the 180-day comment period where additional comments were received and discussed.

Although the EPA chose not to move forward with a rulemaking after the ANRPM, as a result of the input received, the EPA identified a number of high priority issue areas for which the Agency has developed guidance, provided technical assistance and continued further discussion and dialogue to assure more effective program implementation. For example, many ANPRM commenters expressed the need for additional assistance on establishing designated uses of water bodies and the process to follow when making designated uses more or less protective. In order to receive input from a broad set of stakeholders on these topics, the EPA held a follow-up national symposium on designated uses on June 3–4, 2002 in Washington, DC. Approximately 200 interested citizens, government officials, and regulated parties attended this open meeting, which included presentations from a variety of stakeholders and an expert panel representing different

[2] In this preamble, the EPA uses the term "water quality standards regulation" to mean subparts A, B, and C of part 131. These three subparts, comprising §§ 131.1 through 131.22, contain general provisions, requirements for establishing standards, and procedures for review and revision of standards, respectively. Part 131 also includes a subpart D that contains the text of WQS the EPA has promulgated to replace or augment state and tribal standards.

[3] First edition, December 1983; second edition, EPA 823–B–94–005a, August 1994.

[4] First edition, EPA 440/4–85–032, September 1985; revised edition, EPA 505/2–90–001, March 1991.

viewpoints.[5] In addition, the EPA held four co-regulator workshops between February 2005 and April 2006 with state, interstate, and tribal partners, and gathered further input and feedback on the establishment, adjustment, and implementation of designated uses.[6]

C. Why is the EPA proposing changes to the Federal WQS regulation?

The core requirements of the current WQS regulation have been in place for over 30 years. These requirements have provided a strong foundation for water quality-based controls, including water quality assessments, impaired waters lists, and total maximum daily loads (TMDLs) under CWA section 303(d), as well as for water quality-based effluent limits (WQBELs) in NPDES discharge permits under CWA section 402. As with the development and operation of any program, however, a number of policy and technical issues have recurred over the past 30 years in individual standards reviews, stakeholder comments, and litigation that the EPA believes would be addressed and resolved more efficiently by clarifying, updating and revising the federal WQS regulation to assure greater public transparency, better stakeholder information, and more effective implementation.

From 2008 through 2010, the EPA held ongoing discussions with state and tribal partners and other stakeholders. These discussions addressed a wide-range of issues, from which a subset has been identified as significant areas of continuing concern. In 2010, the EPA held listening sessions with the public, states and tribes to obtain feedback on this subset of issues. The agenda, background material, list of participants and the public transcripts may be viewed at *http://water.epa.gov/lawsregs/lawsguidance/wqs_listening.cfm#records*. Section III of the EPA's proposal describes the key areas the EPA has chosen to address based on input received and the EPA's proposed regulatory approaches. The EPA believes that states, tribes, other stakeholders, and the public will benefit from clarification in these key areas to better understand and make proper use of available CWA tools and flexibilities, while maintaining open and transparent public participation. Clear regulatory requirements and improved implementation will provide a more transparent and well-defined pathway for restoring and maintaining the biological, chemical, and physical integrity of the nation's waters. The changes the EPA is proposing today add or modify specific regulatory provisions to address key areas described below.

III. Program Areas for Proposed Regulatory Clarifications

A. Introduction

As discussed in section II.C, the EPA has had ongoing dialogue with states, tribes and stakeholders on key issues that are central to assuring effective implementation of the WQS program. As part of this process, the Agency has considered several fundamental questions in evaluating opportunities to improve implementation of the WQS program including which recurring implementation issues would benefit most from a regulatory clarification or update, whether there are emerging issues that could be more effectively addressed through regulatory revisions, whether the regulation continues to have the appropriate balance of consistency and flexibility for states and tribes, and whether the resulting program effectively facilitates public participation in standards decisions.

As a result of this evaluation and consideration of continuing input from states, tribes and stakeholders, the EPA is proposing changes to key program areas of its WQS regulation at 40 CFR part 131 that the Agency believes will result in improved regulatory clarity and more effective program implementation, and lead to environmental improvements in water quality. This proposed rulemaking requests comment on regulatory revisions in the following six key issue areas: (1) Administrator's determination that new or revised WQS are necessary, (2) designated uses, (3) triennial reviews, (4) antidegradation, (5) WQS variances, and (6) compliance schedule authorizing provisions.

B. Administrator's Determinations That New or Revised WQS Are Necessary

1. The EPA Proposal

The EPA is proposing to amend paragraph (b) of § 131.22 to add a requirement that an Administrator's determination must be signed by the Administrator or his or her duly authorized delegate, and must include a statement that the document is a determination for purposes of section 303(c)(4)(B) of the Act.

2. Background and Rationale for Revision

Section 303(c)(4)(B) of the CWA provides the EPA Administrator with authority to determine that a new or revised WQS is necessary to meet the CWA requirements, typically in those situations where a state or tribe fails or is unable to act in a manner consistent with the CWA. Such a determination is made at the Administrator's discretion, after evaluating all relevant factors. An Administrator's determination triggers the requirement for the EPA to promptly prepare and publish proposed regulations setting forth a revised or new WQS for the waters of the United States involved, and for the EPA to promulgate such WQS unless the state or tribe adopts and the EPA approves such WQS before the EPA promulgation.

The EPA is concerned that the process whereby the Administrator determines that new or revised standards are necessary is not always clearly understood or interpreted by the public and stakeholders. In some instances, this lack of understanding has led to a mistaken conclusion that the EPA has made a CWA 303(c)(4)(B) determination when, in fact, the EPA did not make nor intend to make a determination. For example, Agency memoranda or documents articulating areas where states' WQS may need improvements have sometimes been construed or alleged by stakeholders to be official Administrator determinations that obligate the EPA to propose and promulgate federal WQS for such states. In order to ensure effective implementation of the national WQS program, to provide direct, clear, and transparent feedback on state and tribal actions, and to maintain an open and constructive dialogue with states, tribes and stakeholders on important water quality issues, it is essential that the EPA have the ability to provide feedback, and states and tribes have the opportunity to consider and evaluate the Agency's views, without fear of litigation triggering a duty on the part of the EPA to propose and promulgate WQS before either a state, tribe or the Agency believes such a course is appropriate or necessary.

The EPA believes that this revision would establish a more transparent process for the Administrator to announce any determination made under section 303(c)(4)(B) of the Act. Such a revision will allow the EPA to effectively provide direct and specific written recommendations to states and tribes on areas where WQS improvements should be considered,

[5] Proceedings from the national symposium on designated uses can be found at *http://water.epa.gov/scitech/swguidance/standards/uses/symposium_index.cfm*.

[6] A summary of the co-regulator workshops and a link to the use attainability analysis (UAA) case studies can be found at *http://water.epa.gov/scitech/swguidance/standards/uses/uaa/info.cfm*.

without the possibility that such recommendations will be construed as a determination that obligates the EPA to propose and promulgate new or revised standards.

The public's ability under Section 553(e) of the Administrative Procedure Act (5 U.S.C. 553(e)) to petition the EPA to issue, amend, or repeal a rule, would not be affected by this proposed revision.

The EPA invites comments on the proposed amendment to paragraph (b) of § 131.22. The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

C. Designated Uses

1. The EPA Proposal

First, the EPA is proposing to amend paragraph (g) at § 131.10 to provide that where a state or tribe adopts new or revised water quality standards based on a use attainability analysis (UAA), it must adopt the highest attainable use (HAU). States and tribes must also adopt criteria, as specified in § 131.11(a), to protect that use. The EPA is also proposing to add a definition of HAU at § 131.3(m). Specifically, the EPA is proposing to define HAU as "the aquatic life, wildlife, and/or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, as determined using best available data and information through a use attainability analysis defined in § 131.3(g)."

Second, the EPA is making appropriate edits to § 131.10(g) to be clear that the factors listed in § 131.10(g) must be used when a UAA is required by § 131.10(j), and is restructuring § 131.10(k) to clearly articulate when a UAA is not required.

2. Background

Designated uses communicate a state's or tribe's environmental management objectives for its waters and drive on-the-ground water quality decision-making and improvements. To establish appropriate WQS, states and tribes define the water quality goals of a water body first by designating the use(s) and second by setting criteria that protect those uses. WQS are the foundation for other CWA requirements applicable to a water body, such as WQBELs for point source dischargers, as well as assessment of waters and establishment of TMDLs for waters not meeting applicable WQS. Designated uses play such an important role in the effective implementation of the CWA. The EPA believes it is essential to provide clear and concise regulatory requirements for states and tribes to follow (1) when adopting a use specified in section 101(a)(2) or sub-categories of such uses for a water body for the first time, or (2) when removing or revising a currently adopted use specified in section 101(a)(2) of the Act, or a sub-category of such a use. This is particularly important in light of recurring input and questions on this issue and the potential for conflicting interpretations and inconsistent case-by-case WQS program implementation.

Under section 303 (33 U.S.C. 1313) of the CWA, states and authorized tribes are required to develop WQS for waters of the United States within their state. WQS shall include designated use or uses to be made of the water and criteria to protect those uses. Such standards shall be established taking into consideration the use and value of waters for public water supplies, propagation of fish and wildlife, recreation, agricultural uses, industrial uses, navigation and other purposes (CWA 303(c)(2)(A)). Designated uses are defined at 40 CFR 131.3(f) as the "uses specified in water quality standards for each water body or segment whether or not they are being attained." A "use" is a particular function of, or activity in, a particular water body that requires a specific level of water quality.

Section 101(a)(2) of the CWA establishes the national goal that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" be achieved by July 1, 1983. CWA section 303(c)(2)(A) requires state and tribal WQS to "protect the public health or welfare, enhance the quality of the water and serve the purposes of this [Act]." The WQS regulation at 40 CFR part 131 interprets and implements these provisions through requirements that WQS protect the uses specified in section 101(a)(2) of the Act unless those uses are shown to be unattainable, effectively creating a rebuttable presumption of attainability.[7] Thus, it has been the EPA's interpretation that the uses specified in section 101(a)(2) of the Act are presumed attainable unless a state or tribe affirmatively demonstrates through a UAA[8] that 101(a)(2) uses are not attainable as provided by one of six regulatory factors at § 131.10(g).[9]

The current WQS regulation at 40 CFR 131.10 requires states and tribes to specify appropriate uses to be achieved and protected; requires that WQS ensure attainment and maintenance of WQS of downstream waters; allows for sub-categories of uses (e.g., to differentiate between cold water and warm water fisheries) and seasonal uses; describes when uses are attainable; lists six factors of which at least one must be satisfied to justify removal of uses specified in Section 101(a)(2) that are not existing uses; prohibits removal of existing uses; requires states and authorized tribes to revise WQS to reflect uses that are presently being attained but not designated; and establishes when a state or tribe is or is not required to conduct a UAA. States and tribes have flexibility when managing their designated uses consistent with the CWA and implementing regulation.

More specifically, the current WQS regulation requires a UAA when designating uses that do not include the uses specified in section 101(a)(2) of the CWA, when removing a designated use specified in section 101(a)(2) of the Act, or when adopting sub-categories of such uses that require less stringent criteria. The phrase "uses specified in section 101(a)(2) of the Act" refers to uses that provide for the protection and propagation of fish (including aquatic invertebrates), shellfish, and wildlife, and recreation in and on the water, as well as for the protection of human health when consuming fish, shellfish, and other aquatic life.[10] "Sub-category of a use specified in section 101(a)(2) of the Act" refers to any use that reflects the subdivision of uses specified in section 101(a)(2) of the Act into smaller, more homogenous groups of waters with the intent of reducing variability within the group. 40 CFR 131.10(c) provides that states and authorized tribes may adopt sub-categories of a use and set the appropriate criteria to reflect varying needs of such sub-categories of uses. States and tribes have broad discretion to determine the appropriate level of specificity to use in identifying and defining designated uses, and nothing in this proposal is intended to narrow that discretion. However, the EPA has found that the clearer, more accurate, and

[7] *See* 40 CFR 131.2; 131.5(a)(4); 131.6(a),(f); 131.10(g), (j), (k).

[8] *See* 40 CFR 131.3(g). A UAA is a structured scientific assessment of the factors affecting the attainment of the use that may include physical, chemical, biological, and economic factors as described in § 131.10(g).

[9] EPA's "rebuttable presumption" that the uses specified in CWA section 101(a)(2) are presumed attainable, unless demonstrated to be unattainable through a UAA, has been upheld in *Idaho Mining Association v. Browner*, 90 F. Supp. 2d 1078 (D. Idaho 2000).

[10] *http://water.epa.gov/scitech/swguidance/standards/upload/2000_10_31_standards_shellfish.pdf.*

refined the designated uses are in describing the state's or tribe's objective for a water body, the more effective those use designations can be in driving the management actions necessary to restore and protect water quality.[11]

The current regulation at § 131.10(g) and (h)(1) provides that states and tribes may not remove a designated use if it would also remove an existing use unless a use requiring more stringent criteria is added. Existing uses are "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Existing uses are known to be "attained" when both the use *and* the water quality necessary to support the use has been achieved.[12] The EPA recognizes, however, that all the necessary data may not be available. Where data may be limited, inconclusive, or not available, states and tribes have discretion to determine whether an existing use has been attained, based on either the use or the water quality. It is important to note that the prohibition on removing an existing use is not intended to apply to a situation where the state or tribe wishes to remove a use where removal would result in improving the condition of a water body. The intent of the regulation is to further the objective in CWA section 101(a) to "restore and maintain the chemical, physical, and biological integrity" of the nation's waters, not to prevent actions that make the water body more like its minimally impacted condition. For example, if a warm water fishery exists behind a dam, the existing use provision would not prevent the state from removing that dam because doing so would likely restore the natural cold water aquatic ecosystem.

3. Rationale for Revision

Adoption of Highest Attainable Use

As discussed above, states and tribes have flexibility to designate and revise uses in accordance with the provisions of § 131.10 which implements the requirement in 303(c)(2)(A) that standards shall be set to serve the purposes of the Act as set forth in Section) 101(a)(2) and 303(c)(2)(A). However, the EPA believes that it may be appropriate to provide greater clarity in the regulations implementing this requirement. For example, as part of the UAA process, a state or tribe may be able to demonstrate that a use supporting a particular class of aquatic life is not attainable. However, if some less sensitive aquatic organisms are able to survive at the site under current or attainable future conditions, the goals of the CWA are not served by simply removing the aquatic life use designation and applicable criteria without determining whether there is some alternate 101(a)(2) use or subcategory of such a use that is feasible to attain. The UAA process can be used to identify the highest aquatic life use that is attainable (i.e., highest attainable use). Under this proposal, the state or tribe would be required to designate that highest attainable use. However, as noted above, states and tribes have broad discretion to determine the appropriate level of specificity to use in identifying and defining designated uses, and nothing in this proposal is intended to narrow that discretion. To further clarify this in rule text, the proposal would add the following language to 131.10(g): "To meet this requirement, States may, at their discretion, utilize their current use categories or subcategories, develop new use categories or subcategories, or adopt another use which may include a location-specific use." Thus, while a state or tribe may wish to establish a new or revised use category or subcategory to meet the proposed HAU requirement, the state or tribe could also comply with this requirement by adopting the highest attainable use from its currently established use categories or subcategories or by adopting a location-specific use, or another defensible approach.

The EPA's current regulation at 40 CFR 131.6(a) requires that each state's or tribe's water quality standards submitted to the EPA for review must include "use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act." Sections 131.10(g) and 131.10(j) implement the CWA by authorizing a state or tribe to designate uses that do not include the uses specified in section 101(a)(2) or to remove protection for a use specified in section 101(a)(2) (or subcategory of such a use) only through a UAA. If the state or tribe demonstrates through a UAA that a 101(a)(2) use, or a subcategory of such a use, is not attainable, then in order to comply with this regulatory requirement, the state or tribe will need to adopt use designations that continue to serve the 101(a)(2) goal by protecting the highest attainable use unless the state or tribe has shown that no use specified in section 101(a)(2) is attainable.

This proposal is intended to clearly articulate a requirement to adopt the HAU in the EPA's regulation. HAU is defined in this proposal as "the aquatic life, wildlife, and/or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, as determined using best available data and information through a use attainability analysis defined in § 131.3(g)." With this definition, the EPA recognizes and affirms the primary role accorded to states and tribes under the CWA in establishing categories of designated uses and assigning those uses to specific water bodies within their jurisdiction. The EPA intends for states and tribes to use their existing use classification scheme to meet the HAU requirement whenever the state or tribe determines that it is appropriate to do so. The EPA is not requiring states and tribes to revise their use categorization scheme by developing new use categories or subcategories, although states and tribes are encouraged to develop them if they find it practical and appropriate to do so. While the EPA believes that there is often value in specifying more narrowly targeted aquatic life uses (e.g., warm water or cold water fishery), the EPA also recognizes that it may not be practical for states or tribes to adopt fine gradations of aquatic life uses in many cases. The proposed rule would thus not affect a state or tribe's discretion to determine the appropriate level of specificity in establishing designated uses.

When adopting the HAU, states and tribes must also adopt criteria to protect that use, as specified in § 131.11(a). Requiring the HAU to be adopted as an essential part of the UAA process is important to adequately implement both CWA sections 101(a)(2) and 303(c)(2)(A). Where uses specified in section 101(a)(2) are unattainable, it is important that states and tribes still strive to attain uses that continue to serve the purposes of the Act and also enhance the quality of the water.

In determining the HAU to adopt in place of an unattainable aquatic life, wildlife, and/or recreation use, states and tribes should use the same regulatory factors (at 40 CFR 131.10(g)) and data analysis that were used to evaluate attainability. When conducting this review and soliciting input from the public, states and tribes should consider not only what is currently attained, but also what is attainable in the future after achievable gains in water quality are

[11] EPA notes that a use may meet the description of a "sub-category of a use specified in section 101(a)(2) of the Act," but not provide an equal level of protection as a use specified in section 101(a)(2) of the Act. If a state wishes to designate such a sub-category, a UAA would be required, consistent with § 131.10(j).

[12] *See http://water.epa.gov/scitech/swguidance/standards/upload/Smithee-existing-uses-2008-09-23.pdf.*

realized. Such a prospective analysis may involve the following:

- Identifying the current and expected condition for a water body;
- Evaluating the effectiveness of best management practices (BMPs) and associated water quality improvements;
- Examining the efficacy of treatment technology from engineering studies; and
- Using water quality models, loading calculations, and other predictive tools.

Once a state or tribe has determined the HAU, there are several different approaches it may wish to consider for articulating the designated use in the relevant water quality standards regulations. The EPA's intent is for a state or tribe to have the flexibility to choose its preferred approach for articulating the HAU in regulation. The EPA provides the following example approaches, but does not intend states and tribes to be limited to only these approaches. The EPA invites comments on other approaches or examples that states and tribes could use when articulating the HAU, or examples of scenarios where the following approaches may not be appropriate. The EPA emphasizes that states and tribes are not required to develop new use categories or subcategories to meet the HAU requirement.

1. Use a refined designated use structure that is already adopted into state or tribal regulation: Where a state or tribe already has a refined designated use structure adopted into state regulations, they could consider adopting the "next best" attainable use that already exists in the use structure as the HAU. For example, consider a state with the following four aquatic life uses: exceptional, high, modified, and limited aquatic life use—each with associated dissolved oxygen criteria that protect the use. The state determines through a UAA (based on a factor at § 131.10(g)) that a particular stream cannot attain the designated "high aquatic life use" and associated dissolved oxygen criterion due to a low head dam and resulting impoundment. Because the dam cannot be removed or operated in such a way as to attain the dissolved oxygen criteria needed to protect the expected biological community at the site, the state adopts the "modified aquatic life use" and dissolved oxygen criterion to protect the revised use. The UAA documents that the "modified aquatic life use" reflects the HAU despite the disturbed condition of the water body.

2. Revise the current designated use structure to include more refined uses and/or sub-categories of uses: Some states or authorized tribes may not have a refined designated use structure adopted into their state or tribal regulations, but rather have a general use category expressed as a "general aquatic life use," "fish and wildlife use," "recreation use," and so on. If a state or tribe finds that its only option upon determining that such a general use category is not attainable is to remove it altogether, a state or tribe may wish to consider revising its current designated use framework to include more refined uses and/or sub-categories, and adopt criteria to protect those uses.

For example, a state or tribe may be able to adequately demonstrate (consistent with 40 CFR 131.10(g)(2)) that natural conditions or water levels preclude the attainment of a use and associated water quality criteria. The state or tribe may document that it is infeasible to attain an aquatic life use associated with fish because the water is naturally intermittent. However, intermittent streams provide essential habitat for different types of aquatic life (e.g., aquatic invertebrates). Such an aquatic life use is likely attainable if not already attained. Therefore, in this scenario the state or tribe may wish to adopt a refined "intermittent aquatic life use" and criteria to protect that use in its statewide designated use framework because such a use category reflects the naturally expected aquatic life use for intermittent streams that could be applied to multiple streams in the state.

As another example, some states have chosen to refine their use categories to reflect the various biological communities that might be expected in a water body. If a state is interested in revising its current designated use structure, it may wish to define its uses based on the composition and structure of the aquatic life expected for each use with associated biological and dissolved oxygen criteria adopted into regulation. Incorporating such refinements into designated uses allows the state to tailor its use designations to reflect the actual biological community expected.

3. Designate a location-specific use and adopt criteria to protect that use: A state or tribe may determine that a use is unattainable for one particular parameter (e.g., altered pH due to highly mineralized geology, or a combined sewer overflow (CSO)-impacted use) or suite of parameters in a specific location. In such situations, the state or tribe may choose to adopt a use that more accurately reflects the location-specific expectations, such as a "pH limited aquatic life use," a "habitat limited aquatic life use," or a "minerals limited aquatic life use." The state or tribe would then adopt a new set of criteria to protect that use, but could adopt all the same criteria levels as were protective of the original use, except for the parameter or parameters limiting the location-specific use. Such an approach would not require a state or tribe to add the location-specific use in its framework, but it could do so if later if it finds that other waters will fall into the same category.

The concept of HAU should not to be confused with "site-specific criteria." A site-specific criterion is designed to protect the current unchanged designated use, but the criterion value may be different from the statewide or otherwise applicable criterion because it is tailored to account for site-specific conditions that may cause a given chemical concentration to have a different effect on one site than on another. By contrast, the criterion supporting a newly established highest attainable use is designed to protect the revised use associated with a different aquatic community expected in the water body.

In addition to this proposal requiring states and tribes to adopt the HAU, the EPA recommends that states and tribes consider the HAU during a triennial review. If new information becomes available during a triennial review to indicate that a use higher than what is currently designated is attainable, states and tribes should revise their WQS to reflect the HAU. As with the HAU requirement, states and tribes are not required to revise their currently established use categories during triennial review to allow for more refined designation of higher uses, though they may wish to consider doing so.

Revisions To Clarify When a UAA Is and Is Not Required

The EPA's proposal also revises § 131.10(g) to clarify that the factors at § 131.10(g) are only required to be considered when § 131.10(j) requires a UAA. The current language in § 131.10(g) is ambiguous on this point and thus has led to confusion as to whether § 131.10(g) applies to all use revisions or only those actions addressed in § 131.10(j). The EPA's 1998 ANPRM stated that the EPA's position, at the time, was that a UAA is not limited to actions addressed in § 131.10(j). However, the EPA has implemented the CWA to focus on uses specified in § 101(a)(2) and now believes that the better interpretation of its regulations is that the factors in 131.10(g) are only required to be considered when a state or tribe is demonstrating that a use specified in § 101(a)(2) or a subcategory of such a use is not attainable through a UAA.

The EPA's interpretation is supported by § 131.10(j), that explains when a UAA is required, and § 131.3(g) that defines a UAA as "a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g)." When §§ 131.3(g), 131.10(g) and (j) are read together, it is clear that the factors at § 131.10(g) are only required to be considered when the state or tribe must do a UAA under § 131.10(j). This proposal adds language to §§ 131.10(g) and 131.10(j) to clarify the relationship between these two provisions and the intent of these provisions to implement CWA sections 101(a)(2) and 303(c)(2)(A). For all other designated uses, this proposal uses the term "uses not specified in section 101(a)(2)" to refer to uses discussed in section 303(c)(2)(A) but not included in section 101(a)(2). Section 303(c)(2)(A) and the EPA's regulation at § 131.10(a) requires the state or authorized tribe to take into consideration the "use and value" of water for public water supplies, propagation of fish and wildlife, recreational purposes, agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation. The UAA demonstration satisfies this requirement for uses specified in 101(a)(2). And while states and authorized tribes are not required by regulation to conduct a UAA using factors at § 131.10(g) when designating and removing a use not specified in 101(a)(2), the EPA recognizes that UAAs may provide valuable information to a state or authorized tribe when deciding how to manage their waters and demonstrate consideration of a water's "use and value."

Finally, the EPA is proposing to clarify § 131.10(k) to state when a UAA is *not* required. Specifically, § 131.10(k) is revised to articulate that a UAA is not required when a state or authorized tribe designates or has designated uses specified in section 101(a)(2) of the Act for a water body for the first time, removes a designated use that is not specified in section 101(a)(2) of the Act, or adopts a subcategory that requires criteria as stringent as the previously applicable criteria. The current structure of 131.10(j)(2) and 131.10(k) could result in situations where a UAA is not required by 131.10(k) but is required by 131.10(j)(2) thus leading to confusion. The EPA intends to eliminate this confusion by restructuring 131.10(k) as proposed.

The EPA invites comments on the proposed addition of 40 CFR 131.3(m), and the proposed amendments to § 131.10(g), § 131.10(j) and § 131.10(k). The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

D. Requirements of Triennial Reviews

1. The EPA Proposal

The EPA is proposing to amend the triennial review requirements of paragraph (a) of § 131.20 to clarify that a state or tribe shall re-examine its water quality criteria during its triennial review to determine if any criteria should be revised in light of any new or updated CWA section 304(a) criteria recommendations to assure that designated uses continue to be protected.

2. Rationale for Revision

Sections 303(a) through (c) of the CWA require that states and tribes adopt WQS applicable to their interstate and intrastate waters and that the EPA review and approve or disapprove these standards based on whether they are consistent with the Act. Section 303(c)(1) further requires states and tribes to hold public hearings at least once every 3 years for the purpose of reviewing applicable WQS and, as appropriate, modifying and adopting standards. The state or tribe decides whether and how to modify or adopt its WQS; however, any new or revised standards shall be submitted to the EPA for review and approval or disapproval.

The EPA adopted regulations in 1983 implementing these provisions at 40 CFR 131.20. This regulation requires that states and tribes hold a public hearing to review applicable WQS at least once every 3 years (i.e., a "triennial review") and, as appropriate, modify and adopt standards. Public hearings on WQS provide an essential opportunity for stakeholders and the general public to participate in the WQS-setting process to provide input and raise issues to appropriate officials. In addition, the regulation requires states and tribes to consider whether any new information has become available that indicates if uses specified in CWA section 101(a)(2) that were previously unattainable are now attainable. 40 CFR 131.20(c) provides that the results of these reviews be submitted to the EPA (see also § 131.6(f)).

Stakeholders have expressed concern that states and tribes may retain criteria in their WQS that are no longer protective of designated uses for multiple triennial review cycles, despite the availability of new or updated EPA CWA section 304(a) criteria recommendations. While states and tribes are not required to use EPA's 304(a) criteria recommendations, the EPA agrees that it is important for states and tribes to consider any new or updated 304(a) criteria as part of their triennial review, in order to ensure that state or tribal water quality criteria reflect current science and protect applicable designated uses. In this regard, 40 CFR 131.20(a) requires that any waterbody segment with WQS that does not include the uses specified in CWA section 101(a)(2) be re-examined and updated if new information becomes available to indicate that previously unattainable CWA section 101(a)(2) uses are now attainable. However, because 40 CFR 131.20(a) does not include a parallel statement regarding criteria that support these uses, states and tribes may not re-evaluate their existing criteria to ensure that the criteria continue to be protective of the designated uses when new or updated 304(a) criteria recommendations become available. As a result, the EPA is proposing to include an explicit reference to 304(a) recommended criteria at 131.20(a), to ensure that new or updated 304(a) criteria are considered during triennial review.

The EPA invites comments on the proposed amendments to paragraph (a) of § 131.20. The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

E. Antidegradation Implementation

The EPA is proposing to amend several provisions of § 131.12 related to implementing the antidegradation requirements. These include (1) clarifying the options available to states and tribes when identifying Tier 2 high quality waters, (2) clarifying that states and tribes must conduct an alternatives analysis in order to support state and tribal decision-making on whether to authorize limited degradation of high quality water, and (3) specifying that states and tribes must develop and make available to the public implementation methods for their antidegradation policies. The EPA is also proposing to add language to § 131.5(a) describing the EPA's authority to review and approve or disapprove state-adopted or tribal-adopted antidegradation policies. The language at § 131.5(a) will further specify that if a state or tribe has chosen to formally adopt implementation methods as water quality standards, the EPA would review whether those implementation methods are consistent with 131.12.

Background

Section 101(a) of the CWA emphasizes the prevention of water pollution and expressly includes the objective "to restore and *maintain* the chemical, physical and biological integrity of the Nation's waters (33 U.S.C. 1251) (emphasis added). The antidegradation requirements that the EPA incorporated by regulation in 1983 into 40 CFR 131.12 implement the maintenance aspect of CWA section 101(a) and are an essential component of the overall WQS program. Although designated uses and criteria are the primary tools states and tribes use to achieve the CWA 101(a) goals, antidegradation complements these by providing a framework for maintaining existing uses, for protecting waters that are either attaining or are of a higher quality than necessary to support the CWA 101(a)(2) goals, and for protecting state/tribal identified Outstanding National Resource Waters (ONRWs). Antidegradation plays a critical role in allowing states and tribes to maintain and protect the valuable resource of high quality water by ensuring that decisions to allow a lowering of high quality water are made in a transparent public manner and are based on a sound technical record.

In the Water Quality Act of 1987, Congress expressly affirmed the principle of antidegradation that is reflected in section 101 of the Act. In those amendments to the CWA, Congress incorporated a reference to antidegradation policies in section 303(d)(4)(B) of the Act (33 U.S.C. 1313(d)(4)(B)): "Standard Attained—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable WQS, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any WQS established under this section, or any permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section" (emphasis added). This provision not only confirms that an antidegradation policy is an integral part of the CWA, but also explains the relationship of the antidegradation policy to other CWA regulatory programs.[13] Antidegradation reviews are applicable to revisions to effluent limitations based on a TMDL, wasteload allocation, or water quality standard, but they are not required for revisions to a TMDL, wasteload allocation, or water quality standard.[14]

High quality waters provide support for aquatic life and recreation and support unique and significant ecologies and species habitat. These attributes confer a special degree of resiliency and resistance to adverse effects, particularly as the nation's waters face an increasing degree of stress from anthropogenic influences. Therefore, maintenance and protection of high quality waters has never been more important.

Protection of waters that meet or exceed levels necessary to support the CWA uses is central to supporting both economic and community growth and sustainability. Such waters contribute to our public health, aquatic ecosystems, drinking water supplies, and to the welfare of families and communities. The health and growth of tourism, recreation, fishing, and businesses and the jobs they create rely on a sustainable source of clean water. Degradation of water quality may result in increasing public health risks, declining aquatic communities and ecological diversity, and increasing treatment costs that must be borne by ratepayers and local governments. Maintenance of waters that exceed levels necessary to support the CWA uses can sometimes save time and economic resources for a community in the long-term. Using an antidegradation program to prevent the degradation of a water body may be more cost-effective and efficient than long-term restoration efforts. In addition, maintaining a water body in its initial high quality condition helps ensure the preservation of unique attributes that may ultimately be impossible to fully restore in a number of situations.

Currently, 40 CFR 131.12 requires states and tribes to adopt an antidegradation policy and identify implementation methods for that policy. The state's or tribe's policy must provide protection for all existing uses, hereafter referred to as "Tier 1" protection (40 CFR 131.12(a)(1)). The policy must also require the maintenance and protection of high quality ("Tier 2") waters unless the state or authorized tribe finds that "allowing lower water quality is necessary" to accommodate "important economic or social development in the area in which the waters are located," a process hereby referred to as "Tier 2 review" (40 CFR 131.12(a)(2)). Additionally, the policy must provide for the maintenance and protection of water quality in ONRWs, identified by the state or tribe, hereinafter referred to as "Tier 3" waters (40 CFR 131.12(a)(3)). This proposal focuses on different aspects of state and tribal implementation methods to ensure effective and transparent implementation of Tier 2 high quality water antidegradation protection provisions.

In this regard, the EPA indicated in its 1998 ANPRM that "on a national scale, antidegradation is not being used as effectively as it could be," a concern that continues today and is echoed by stakeholders who have identified antidegradation as an underused component of water quality protection. Although the federal antidegradation regulation is intended to help states and tribes protect and maintain high quality waters, the number of waters that are identified as impaired continues to grow. The benefits of high quality waters may be jeopardized if states and tribes do not consider the long-term consequences of lowering water quality or evaluate the alternatives that might be available to reduce the need to accommodate increased pollution.

While the EPA has issued guidance in the past to help facilitate state and tribal implementation of the regulatory antidegradation provisions, the EPA received substantial feedback from stakeholders that existing CWA antidegradation regulatory provisions and related guidance have not been fully successful in ensuring consistent and effective implementation of Tier 2 high quality water protections. Moreover, states have recognized the limits of national guidance in the area of CWA implementation. Most recently on March 30, 2011, the Environmental Council of the States published a resolution entitled "Objection to U.S. Environmental Protection Agency's Imposition of Interim Guidance, Interim Rules, Draft Policy and Reinterpretation Policy" in which it states that the "EPA should minimize the use of interim guidance, interim rules, draft policy and reinterpretation policy and eliminate the practice of directing its regional or national program managers to require compliance by states with the same in the implementation of delegated programs." For these and the other reasons discussed above, the EPA is, therefore, revising its regulation to update the requirements for transparent and effective state and tribal antidegradation implementation.

[13] *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 705 (1994) ("A 1987 amendment to the Clean Water Act makes clear that section 303 also contains an 'antidegradation policy . . .'").

[14] *Native Village of Point Hope v. U.S. Envtl. Prot. Agency*, No. 3:11–cv–00200–TMB, slip op. at 24–25 (D. Alaska Sept. 14, 2012).

1. The EPA Proposal—Part 1: Identification of High Quality Waters

The EPA is proposing to add paragraph (b)(1) to § 131.12 to provide that high quality waters may be identified on a parameter-by-parameter basis or on a water body-by-water body basis, as long as the state or tribal implementation methods ensure that waters are not excluded from Tier 2 protection solely because not all of the uses specified in CWA section 101(a)(2) are attained. The EPA's established view is that either method of identifying high quality waters is acceptable, but is proposing today to codify that flexibility for states and tribes into regulation. By "the uses specified in CWA section 101(a)(2)" the EPA means the uses and functions encompassed within the CWA section 101(a)(2), such as aquatic life support, wildlife support, consumption of aquatic life, and recreation.

The nationally applicable water quality standards regulation at § 131.12 describes high quality waters as those where the quality of the waters exceed levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water (i.e., the CWA goals articulated in section 101(a)(2)). States typically use one of two approaches to identify high quality waters. While the EPA specified in the "Water Quality Guidance for the Great Lakes System" that high quality waters subject to 40 CFR part 132 must be identified using a parameter-by-parameter approach, the WQS regulation applicable to all states and tribes (at 40 CFR part 131) does not currently specify how a state or tribe must identify its high quality waters for purposes of the antidegradation requirements. States and tribes using a parameter-by-parameter approach identify which waters are of high quality for purposes of a Tier 2 review at the time the activity that would lower water quality is proposed. Under this approach, when an activity is proposed that would potentially lower water quality in any high quality water, the state or tribe would determine for which parameters the water quality is better than applicable criteria developed to support the CWA 101(a)(2) uses. Each parameter for which water quality would be lowered by the permitted activity is considered independently and, once a parameter is determined to exist at a level that is better than applicable criteria, the state or tribe would conduct a Tier 2 review for that parameter. In contrast, states and tribes using a water body-by-water body approach typically identify high quality waters in advance on a list by weighing a variety of factors to classify a water body's overall quality. If an activity is proposed that would potentially lower water quality, the state would first determine if that water body is on its Tier 2 list, and thus eligible for Tier 2 review.

The EPA has found, however, that it is currently possible for high quality waters to be identified on a water body-by-water body basis in a manner that the EPA believes may be contrary to the intent of the antidegradation provisions. In some cases, states or tribes have implemented antidegradation such that, where a water body is listed on the CWA section 303(d) list based on one or more parameters affecting only one of the CWA 101(a)(2) uses, the state or tribe automatically considers the water no longer high quality. As a result, the state or tribe would no longer conduct Tier 2 reviews before allowing a lowering of water quality for any parameter. However, individual Section 303(d) listings can be a potentially poor indicator of the overall quality of a surface water because, although one or more of the uses specified in 101(a)(2) is listed as impaired, one or more other uses specified in 101(a)(2) might still be attained and the water quality may be higher than necessary to support such use(s). Such a means of identifying high quality waters would categorically deny Tier 2 protection to a water body that is still of high quality with respect to other uses specified in CWA 101(a)(2).

If a water body can be excluded from Tier 2 protection solely because one of the uses specified in 101(a)(2) is not being attained, without a holistic evaluation of the water body, it is possible that a large number of state and tribal waters would never be subject to Tier 2 review for any parameter. Yet those waters may in fact be high quality waters relative to other unimpaired uses. Thus, such water bodies could be degraded further without a public participation process. For example, mercury is widely prevalent in U.S. waters and is known to bioaccumulate in fish tissue, thus affecting the water body's ability to support protection and propagation of aquatic life. A recent statistically based EPA sampling survey found predator species fish tissue in 49 percent of the sampled population of lakes in the conterminous United States with surface areas greater than or equal to 1 hectare exceeded the EPA's recommended 0.3 ppm tissue-based mercury criterion ("National Study of Chemical Residues in Lake Fish Tissue," EPA 823–R–09–006). If all states and tribes used an approach for identifying high quality water whereby any impairment rendered the water body ineligible for Tier 2 protection, almost half of the lakes would automatically be excluded from Tier 2 high quality water protection. The EPA's view is that this approach would not be consistent with the objectives of the CWA and the intent of the antidegradation regulation.

The EPA recognizes that there may be multiple ways for a state or tribe to develop a water body-based approach for identifying high quality waters consistent with the goals of the CWA and the antidegradation regulation. The EPA understands that in some cases, § 131.12(a)(2) has been interpreted to mean that if any one of the uses reflecting CWA 101(a)(2) goals is not supported, that the water body as a whole cannot be considered high quality. The regulatory language, however, is derived from the language in CWA 101(a)(2) that specifies it is a national goal to achieve water quality that provides for "the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." The intent of this CWA statement is to strive towards all of the uses specified in the provision and not to stop striving towards all of the uses simply because one of them is not being achieved. The EPA's proposal and interpretation of 40 CFR 131.12(a)(2) is consistent with the intent of the CWA.

Rather than excluding a water body from Tier 2 protection solely because not all of the uses specified in CWA section 101(a)(2) are attained, the EPA would expect the state or tribe to consider a combination of chemical, biological, and physical characteristics in identifying high quality waters. In other words, the EPA would expect the state or tribe to use all the relevant available data to conduct an overall holistic assessment of these characteristics in order to determine whether a water body would receive Tier 2 protection. Some of the factors a state or tribe may consider include, but are not limited to, existing aquatic life uses including aquatic assemblages, habitat, hydrology, geomorphic processes, and landscape condition; existing recreational uses and recreational significance; and the overall value and significance of the water body from an ecological and public-use perspective. Numerous tools, such as biological, habitat, hydrologic, geomorphic, and landscape assessments or the environmental impact statement rating system, could be useful to states and tribes in making and supporting these judgments.

For purposes of better understanding this proposal, consider the following examples.

- *Water Body A has aquatic life and recreational designated uses and is listed as impaired for methylmercury and bacteria, pursuant to CWA section 303(d).* Under this proposed rule, a state or tribe using a water body-by-water body approach could exclude Water Body A from its Tier 2 list because the state or tribe could show that high levels of methylmercury prevent the attainment of protection and propagation of fish, shellfish and wildlife, *and* that high levels of bacteria prevent attainment of recreation in and on the water.
- *Water Body B has aquatic life and recreational designated uses and is listed pursuant to CWA section 303(d) as impaired for methylmercury, but not for bacteria or any other pollutant necessary to protect recreation.* Under a water body-by-water body approach, the proposed rule would prohibit the state or tribe from excluding Water Body B from its Tier 2 list solely because the water body cannot attain protection and propagation of aquatic life due to methylmercury. Water Body B is still attaining recreation in and on the water as specified in section 101(a)(2) of the Act.

The EPA invites comments on the proposed addition of paragraph (b)(1) to § 131.12. Additionally, the EPA is considering whether to specify how a state or tribe determines for which parameters Tier 2 review must be conducted depending on the approach used to identify high quality waters. The EPA requests comment on whether, once a high quality water is identified, the Tier 2 review process for that water body should differ depending on the approach used to identify it as high quality. As the EPA has explained before in the ANPRM and in the "Water Quality Guidance for the Great Lakes System" (40 CFR part 132), for high quality waters identified through the parameter-by-parameter approach, states and tribes conduct Tier 2 reviews for all parameters for which the water quality has been identified as better than the applicable criteria developed to support the CWA 101(a)(2) uses. Each parameter for which water quality would be lowered by the permitted activity is considered independently and, once a parameter is determined to exist at a level that is better than applicable criteria developed to support the CWA 101(a)(2) uses, the state or tribe would conduct a Tier 2 review for that parameter.

The EPA has made a variety of different statements about how Tier 2 reviews are conducted once the water body is identified as Tier 2 using a water body-by-water body approach.[15] [16] Thus, for the water body-by-water body approach the EPA could specify that Tier 2 reviews must be conducted for all parameters for which the water quality has been identified as better than the applicable criteria developed to support the CWA 101(a)(2) uses.

Alternatively, the EPA could specify that for waters identified as high quality on a water body-by-water body basis, Tier 2 reviews are only required for parameters associated with the 101(a)(2) uses currently being supported. For example, in Water Body B above, a Tier 2 review would only be required for each parameter that is better than the applicable criteria to protect recreation. And, a Tier 2 review would not be required for any parameter only associated with the aquatic life use (i.e., and not also associated with the recreation use).

The EPA could also specify that states and tribes have discretion on how to conduct the Tier 2 reviews. The EPA also invites comments on any other options it should consider or on the interpretations expressed in this section.

2. The EPA Proposal—Part 2: Alternatives Analysis

The EPA is proposing to add paragraph (b)(2) to 40 CFR 131.12 to ensure that states and tribes will only make a finding that lowering water quality is necessary, as required in § 131.12(a)(2), after conducting an alternatives analysis that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. This proposal also provides that if a state or tribe can identify any practicable alternatives, the state or tribe must choose one of those alternatives to implement when authorizing a lowering of high water quality.

Section 131.12(a)(2) also provides that high quality water shall be maintained and protected unless the state or tribe finds (after satisfaction of public participation and intergovernmental coordination requirements) that "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located" (40 CFR 131.12(a)(2)). As discussed previously, this process is called a Tier 2 review. Tier 2 review calls for the state or tribe to investigate two questions: (1) Whether allowing lower water quality is necessary to accomplish the proposed activity, typically by examining alternative ways of accomplishing the activity through an alternatives analysis; and (2) whether the proposed activity that will result in lower water quality will accommodate important economic or social development, through a socio-economic analysis. States and tribes may determine the order in which to complete the two aspects of the finding. In addition, states have discretion to decide there is no need to answer the second question if the answer to the first question is "no." For example, a state or tribe may choose to first ask whether lowering of water quality is necessary to accomplish the proposed activity, and if the answer is "no," decide at that point not to investigate whether the proposed activity will accommodate important economic or social development. While this finding is a state or tribal responsibility, the EPA recognizes that states and tribes may establish processes requiring the entity responsible for conducting the proposed activity to provide information or conduct the necessary evaluations.

Although the existing regulation implies that the state or tribe must have a means of evaluating whether a lowering of water quality is necessary to accomplish the proposed activity, currently there is no explicit requirement to conduct an alternatives analysis. Even if a state or tribe conducts an alternatives analysis, the regulation does not specify that, where there is a practicable alternative, the state or tribe must select an alternative for implementation. For these purposes, the term "practicable" means that the alternatives considered must be available for the proposed activity, technologically possible, able to be done or put into practice successfully at the site in question, and economically viable. This lack of specificity can result in situations where a state or tribe does not evaluate less-degrading or non-degrading alternatives to the proposed activity, and thus lacks a reasoned basis for determining if the proposed lowering of water quality is necessary to accomplish the proposed activity, or not. The EPA's view is that this lack of specificity can lead to state or tribal decisions to lower water quality without appropriately making a finding that a

[15] See "EPA Region VIII Guidance: Antidegradation Implementation: Requirements, Options, and EPA Recommendations Pertaining to State/Tribal Antidegradation Programs." August, 1883, page 14, *http://water.epa.gov/scitech/swguidance/standards/adeg/upload/Region8_ch2_pg5-20.pdf.*

[16] See "Proposed Water Quality Standards for Kentucky," November 2002, page 68977, *http://www.epa.gov/fedrgstr/EPA-WATER/2002/November/Day-14/w28922.htm.*

lowering is necessary, contrary to section 131.12(a)(2).

This issue was considered carefully as part of the development of updated water quality requirements for the Great Lakes states in 1995. The regulation at 40 CFR part 132, Appendix E, addresses it by requiring that any entity seeking to degrade high water quality must submit an antidegradation demonstration for consideration by the state. This demonstration includes an analysis identifying any cost-effective pollution prevention alternatives and techniques, as well as an analysis identifying alternative or enhanced treatment techniques (and their relative costs) that are available to the entity and that would eliminate or significantly reduce the extent to which the increased loading results in a lowering of water quality. States and tribes should tailor the level of detail and documentation in antidegradation reviews to the specific circumstances encountered. The state or tribe then uses that information to determine whether or not the lowering of water quality is necessary.

Under the approach proposed today, the state or tribe would conduct its alternatives analysis by considering a range of non-degrading and minimally degrading practicable alternatives to the proposed activity. Similar to the alternatives analysis provided for in 40 CFR part 132, this evaluation would include a consideration of any non-degrading or minimally degrading cost-effective pollution prevention alternatives and enhanced treatment techniques, but would not be limited to those. For example, alternatives could include no discharge, pollution prevention measures, process changes, reduction in the scale of the project, advanced or different treatment technologies, water recycling and reuse, land application, seasonal or controlled discharge options avoiding critical water quality periods, and alternative discharge locations, if such measures were practicable.

Once the state or tribe has identified a range of practicable alternatives, the state or tribe would evaluate the alternatives in terms of the extent of degradation that would result. By initially considering practicable alternatives that represent a range from non-degrading to minimally degrading as opposed to simply identifying the single least degrading alternative, the state or tribe then has a basis to make the required finding, considering the implications and technological and economic practicability of the alternatives more holistically, and considering any impacts beyond the direct effects on water quality, such as cross-media impacts (e.g., impacts on land due to land application of pollutants found in water). This will allow the state or tribe to determine whether the lowering of water quality is necessary to accommodate important economic or social development per Part 131.12(a)(2). As reflected in the Great Lakes System regulation at Part 132, the EPA believes states and tribes should tailor the level of detail and documentation of alternatives analyses in antidegradation reviews to the significance and magnitude of the particular circumstances encountered.

The EPA invites comment on the proposed addition of paragraph (b)(2) to § 131.12. The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

3. The EPA Proposal—Part 3: Developing and Making Available to the Public Antidegradation Implementation Methods

The EPA is proposing to add paragraph (b) to 40 CFR 131.12 to specify that states and tribes must develop and make available to the public antidegradation implementation methods to improve program implementation, ensure consistency with the CWA, and provide transparency as to applicable state and tribal antidegradation review requirements. The EPA is also making changes to language in § 131.5(a) describing the EPA's authority to review and approve or disapprove state-adopted or tribal-adopted antidegradation policies. The language in § 131.5(a) further specifies that if a state or tribe has chosen to formally adopt implementation methods as water quality standards, the EPA would review whether those implementation methods are consistent with § 131.12. In addition to the proposed requirements included in this proposal, the EPA is considering and requesting comment on whether the EPA should include a requirement that antidegradation implementation methods be adopted as WQS and thus subject to the EPA's review and approval or disapproval. Alternatively, the EPA is considering and requesting comment on whether the EPA should specify that states and tribes may, but are not required to, adopt antidegradation implementation methods as WQS.

Currently there is confusion whether the existing regulations require states and tribes to adopt antidegradation implementation methods as WQS. Stakeholders have raised concerns that some states and tribes have not developed or made publically available antidegradation implementation methods, despite the fact that the regulation requiring this was established in 1983. Specifically, they are concerned that the absence of such methods reduces transparency in the implementation of states' and tribes' policies, and potentially limits the ability to ensure protection of existing uses, high quality waters, and ONRWs to the full extent required by the regulation. The CWA at section 101(e) specifically states that "public participation in the development, revision, and enforcement of any regulations, standard, effluent limitation, plan, or program established . . . under this Act shall be provided for, encouraged, and assisted. . . ." The EPA encourages states and tribes to provide a robust and transparent process for developing and making available to the public their antidegradation implementation methods and for implementing those methods in specific cases.

Section 501(a) of the CWA (33 U.S.C. 1361(a)) authorizes the EPA Administrator to "prescribe such regulations as are necessary to carry out [her] functions under this Act." The CWA, under section 303(c), also specifies that the EPA Administrator must review and approve new or revised WQS after determining they are consistent with applicable requirements under the CWA. The EPA believes that antidegradation implementation methods are an important component of implementing antidegradation policies. Thus, the EPA is considering and requesting comment on whether the EPA should include a requirement that implementation methods be formally adopted as WQS and thus subject to the EPA's review and approval or disapproval. Formal adoption of implementation methods as WQS, along with EPA review under section 303(c) of the Act, would help ensure the consistent and effective implementation of the state or tribe's antidegradation provisions so that waters will be maintained and protected in accordance with the objectives of the Act.[17] At the same time, the EPA acknowledges the primary role of states and tribes in establishing and implementing water quality standards. The EPA is thus alternatively considering and requesting comment on whether to specify in rule that states and tribes may, but are not required to, adopt antidegradation implementation methods as WQS subject to EPA approval. In this case,

[17] As of 2013, the EPA is aware of 25 states that have adopted antidegradation implementation methods entirely into rule.

states and tribes must develop antidegradation implementation methods, and must make them available to the public, but they would not be subject to EPA review and approval or disapproval unless the state or tribe chose to formally adopt them as WQS.

Additionally, antidegradation is an essential part of WQS and state and tribal approaches to implementing antidegradation requirements may have direct implications for NPDES permits, as well as other federal permits and licenses for activities that affect water quality. The EPA believes that this may be an additional reason why the regulations should require states and tribes to formally adopt, after providing an opportunity for public involvement, and obtain EPA approval for antidegradation implementation methods. Lastly, state and tribal antidegradation programs that have antidegradation implementation methods adopted into regulations are more transparent to stakeholders and the public, as well as provide greater clarity to regulated industry.

The "Water Quality Guidance for the Great Lakes System" (40 CFR part 132) provides that an acceptable antidegradation policy and implementation methods are required elements of a state's or tribe's WQS program for waters of the Great Lakes system. That regulation requires that Great Lakes states and tribes adopt provisions into their policy and implementation methods that are consistent with a list of specifications, including details on how high quality waters are to be identified and on the components of antidegradation Tier 2 reviews.

Consistent with this "Water Quality Guidance for the Great Lakes System" requirement and for the reasons explained, the EPA is considering and seeking comments on a revision to the antidegradation regulation at 40 CFR 131.12 that would require states and tribes to adopt antidegradation implementation methods in order to improve program implementation, ensure consistency with CWA, and provide transparency as to applicable state or tribal antidegradation review requirements. If the EPA were to finalize such a requirement, the EPA would expect that a state or tribe's adopted implementation methods would describe how the state or tribe intended to implement each aspect of its policy, consistent with § 131.12(a), as well as how antidegradation decisions would be documented. This would provide sufficient information so that the public and the EPA would understand the extent to which activities affecting water quality are being authorized consistent with the state's or tribe's antidegradation policy and other CWA requirements.

The EPA invites comments on the proposed addition of paragraph (b) to § 131.12. As previously mentioned, there is confusion whether the existing regulations require states and tribes to adopt antidegradation implementation methods as WQS. The EPA requests comment on whether the EPA should require, as part of Section 131.12(b), that implementation methods be adopted as WQS and thus subject to the EPA's review and approval or disapproval. If the EPA makes adoption of implementation methods a requirement, the EPA is also considering corresponding revisions to sections 131.5(a) and 131.6(d). Specifically, the EPA requests comment on whether a corresponding revision should be made to section 131.6(d) to clarify that implementation methods are one of the minimum requirements for a water quality standards submission. Alternatively, the EPA is requesting comment on whether the EPA should explicitly specify in regulation that states and tribes are not required to adopt antidegradation implementation method as WQS. Finally, the EPA invites comments on any other options it should consider or on the interpretations expressed in this section.

4. Minimum Elements of an Antidegradation Implementation Method

The EPA's basis for taking approval or disapproval action on a state's or a tribe's antidegradation policy is whether the policy is consistent with the CWA and the water quality standards regulations at 40 CFR § 131.12. While the current regulations do not require states or tribes to adopt antidegradation implementation methods as water quality standards, if a state or tribe chooses to do so, the EPA would review a state's or tribe's implementation methods on the basis of ensuring that the methods do not undermine the state's or tribe's own antidegradation policy. This proposed revised antidegradation regulation continues to provide for a wide range of state and tribal approaches to antidegradation. States and tribes have considerable discretion in how they address each of the elements of antidegradation implementation specified in the regulation. To facilitate development of implementation methods, the EPA is providing in this preamble a list of the areas states' and tribes' implementation methods would need to address, at a minimum, to be consistent with the WQS regulation. This list is based on requirements currently found in the federal antidegradation regulation, as well as proposed requirements found in this action. Again, how states and tribes address each of these areas in their methods is within their discretion, as long as it does not undermine their antidegradation policy or is otherwise inconsistent with the Act or EPA's regulations.

a. Scope and applicability: the state or tribe should describe the scope and applicability of their antidegradation policy.

b. Existing uses protection: the state or tribe will ensure the maintenance and protection of all existing uses and the water quality necessary to protect the existing uses.

c. High quality water protection

i. Identification of high quality water: the state or tribe will identify high quality waters on a parameter-by-parameter basis or a water body-by-water body basis, as long as the state's or tribe's implementation methods ensure that waters are not excluded from Tier 2 protection solely because not all of the uses specified in CWA section 101(a)(2) are attained.

ii. Alternatives analysis and social/economic analysis: the state or tribe will determine whether the lowering of water quality that would result from a proposed activity is necessary to accommodate important economic or social development in the area in which the waters are located through an alternatives analysis and a social and/or economic analysis.

iii. Public participation and intergovernmental coordination: the state or tribe will ensure full satisfaction of the public participation and intergovernmental coordination provisions of the state's or tribe's continuing planning process in any finding that will allow lower water quality.

iv. Requirements for point and nonpoint sources: the state or tribe will ensure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control when allowing a lowering of water quality.

d. ONRW protection: the state or tribe will ensure the maintenance and protection of water quality for waters identified as ONRWs.

e. Thermal Discharges: The state or tribe will ensure consistency with Section 316 of the Act in cases that involve potential water quality impairment associated with thermal discharges.

5. How does this proposal affect states or authorized Tribes for which the EPA has promulgated antidegradation implementation methods?

The revised WQS regulation will apply to all states, authorized tribes, and territories, regardless of whether or not the EPA has previously promulgated an antidegradation policy or implementation methods for the state or tribe. Therefore, any previously promulgated antidegradation policies or implementation methods may require revision to meet the new requirements of Section 131.12.

F. WQS Variances

1. Background

The EPA has encouraged states and tribes to utilize WQS variances [18] (hereafter referred to as "variances"), where appropriate, as an important WQS tool that provides states and tribes time to make progress towards attaining a designated use and criteria. The EPA has offered input and support for variances through Office of General Counsel legal decisions,[19] guidance, memoranda, and approval actions for many years. These documents specifically explain the EPA's interpretation that variances may be granted if the state or authorized tribe demonstrates that the variance meets the same requirements as a permanent [20] designated use change, even though the WQS regulation lacks explicit provisions on the issue. As a result, the EPA has heard from states, tribes, and stakeholders that there is confusion, inconsistency, and mixed interpretations about how, when, and where variances may be used appropriately (e.g., with regard to nutrients and implementation of numeric nutrient criteria). In particular, the EPA has found that this WQS tool is underutilized. For example, since tracking WQS variance submittals in 2004, four EPA Regions have never received a WQS variance submittal. However, the EPA has found that where states and tribes and their stakeholders have more specificity in regulation regarding variances, such as those states and tribes covered by the "Water Quality Guidance for the Great Lakes System" (i.e., Great Lakes Initiative) rulemaking at 40 CFR part 132, they are successfully adopting and submitting WQS variances. This proposed rule is intended to provide this specificity nationally.

The CWA specifies a national goal at Section 101(a) to restore and maintain the chemical, physical and biological integrity of the Nation's waters and an interim goal in Section 101(a)(2) that, "wherever attainable," water quality provide for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water. In implementing the CWA, the regulation at 40 CFR 131.10 establishes provisions relating to the management of designated uses. In 1977, an Office of General Counsel legal decision considered the practice of temporarily downgrading the WQS as it applies to a specific discharger rather than permanently downgrading an entire water body or waterbody segment(s) and determined that such a practice is acceptable under the EPA's existing regulations as long as the variance is adopted consistent with the substantive and procedural requirements for permanently downgrading a designated use. In other words, a state or tribe may change the standard in a more targeted way rather than remove the standard all together. The EPA further explained that it would be appropriate to grant a variance based on any of the six factors for removing a designated use as listed in § 131.10(g).[21]

The state practice described in the Office of General Counsel legal decision became known as adopting a "variance" to WQS. Specifically, a variance is a time-limited designated use and criterion that is targeted to a specific pollutant(s), source(s), and/or water body or waterbody segment(s) that reflects the highest attainable condition during the specified time period. Variances are different from changes to the designated use and associated criteria in that they are intended as a mechanism to provide time for states, authorized tribes and stakeholders to implement adaptive management approaches that will improve water quality where the designated use and criterion currently in place are not being met, but still retain the designated use as a long term goal. Variances are limited in scope and are an environmentally preferable tool over a designated use change because variances retain designated use protection for all pollutants as they apply to all sources with the exception of those specified in the variance. Even the discharger who is given a variance for one particular constituent is required to meet the applicable criteria for all other constituents. The variance is given for a limited time period and the discharger must either meet the WQS upon the expiration of this time period or the state or tribe must adopt a new variance or re-justify the current variance subject to EPA review and approval. Thus, when properly applied, a variance can lead to improved water quality over time, and in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA.

Presently, the nationally applicable WQS regulation only mentions variances in 40 CFR 131.13. This provision indicates that variance policies are general policies affecting the application and implementation of WQS, and that states and tribes may include variances policies in their state and tribal standards, at their discretion. The EPA provided variance procedure requirements when it promulgated WQS for Kansas (§ 131.34(c)), Puerto Rico (§ 131.40(c)), and the Great Lakes System (40 CFR part 132, Appendix F, Procedure 2). However, the nationally applicable regulation does not explicitly address questions such as when a variance can be granted, how a variance must be justified, what is required during the term of the variance, or for how long a variance can be granted. The EPA's established position has been that variances, as time-limited and narrow use revisions, are appropriate WQS tools that must go through public review and require the EPA's review and approval.[22] This position is supported by the EPA's practice regarding variances.[23] Today, we recognize a more direct link to the CWA Section 101(a)

[18] The EPA distinguishes WQS variances, as described in today's proposed rulemaking, from variances as described in the EPA's permitting regulation at §§ 122.2 and 125.3.

[19] The EPA's memoranda discussing variances are available on the EPA's Web site at *http://water.epa.gov/scitech/swguidance/waterquality/standards/handbook/chapter05.cfm#section3.*

[20] "Permanent" is used here and throughout this section to contrast between the time-limited nature of variances and designated use changes in accordance with 40 CFR 131.10 that require a revision to a State's water quality standards to reverse. In accordance with 40 CFR 131.20, waters that "do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every 3 years to determine if new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly."

[21] Variances in Water Quality Standards, March 15, 1985, Memo from Edwin L. Johnson, Director of the Office of Water Regulations and Standards, to the Regional Water Division Directors and the Advanced Notice of Proposed Rulemaking at 63 FR 36759.

[22] The EPA addressed variances in its Kansas and Puerto Rico promulgations and part 132 Great Lakes Water Quality Guidance regulations (Published March 23, 1995, *http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=105020ee867fe139a8d0965b23bf7557&rgn=div5&view=text&node=40:23.0.1.1.19&idno=40*).

[23] The EPA's WQS Handbook, 1994: *http://water.epa.gov/scitech/swguidance/standards/handbook/chapter05.cfm#section3*

goal of "restore and maintain" for variances. WQS variances are consistent with the "restore" aspect of the goal since variances are intended to allow incremental environmental progress in achieving designated uses. As described in detail in section III.F.2, the EPA is proposing a set of variance provisions that are in many ways parallel to the regulations in 131.10, but are tailored to better fit the circumstances where variances will allow for environmental progress toward achieving the goals of the CWA. The EPA notes that its understanding and past practice allows for variances whether or not those uses are specified in Section 101(a)(2), however, the demonstration may differ.

States and tribes have expressed that variances are useful in a number of circumstances where the state or tribe has demonstrated that the designated use and criterion are not attainable today (or for a limited period of time), but may be attainable in the longer term. Examples include when:

- Attaining the designated use and criterion is not feasible under the current conditions (e.g., attainment of numeric nutrient criteria would result in substantial and widespread social and economic impact) but could be feasible should circumstances change (e.g., development of less expensive pollution control technology or a change in local economic conditions); or
- The state or tribe does not know whether the designated use and criterion can be attained, but feasible progress toward attaining the designated use and criterion can still be made by implementing known controls and tracking environmental improvements (e.g., complex use attainability challenges involving legacy pollutants).

There are a variety of tools available to states, tribes and dischargers that can provide time to meet regulatory requirements; however, the most common regulatory tools considered are variances and permit compliance schedules. Which tool is appropriate depends upon the circumstances. Variances can be appropriate to address situations where it is known that the designated use and criterion are unattainable today (or for a limited period of time) but feasible progress could be made toward attaining the designated use and criterion. A permit compliance schedule, on the other hand, may be appropriate when the use is attainable, but the permittee needs additional time to modify or upgrade treatment facilities in order to meet its WQBEL such that a schedule and resulting milestones will lead to compliance "as soon as possible" with the WQBEL based on the currently applicable WQS. (See CWA section 507(17) for a definition of "Schedules of compliance" and 40 CFR 122.47).

The EPA is proposing and soliciting comment on revisions to the WQS regulation that will provide more specificity and clearer requirements on the development and use of variances. Such revisions will establish requirements to help improve water quality by allowing states and tribes time to work with stakeholders to address any challenges and uncertainties associated with attaining the designated use and the associated criterion. These revisions will also provide assurance that further feasible progress toward the designated use and criterion will be made during the variance period.

The EPA's proposed regulatory provisions for variances at § 131.14 address the following key topic areas: (1) Applicability, (2) submission requirements, (3) implementing variances, (4) how to renew a variance, and (5) conforming changes to §§ 131.34 and 131.40. A discussion of this proposal and the rationale for each proposed regulatory provision follows.

2. Rationale and the EPA Proposal

a. Part 1—Applicability of Variances

i. The Scope of a Variance

To provide clarity, promote consistency, and avoid conflicting interpretations of WQS variances, the EPA is proposing a new regulatory definition for WQS variance at § 131.14. A water quality standards variance (WQS variance) is a time-limited use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period. Variances are WQS subject to EPA review and approval or disapproval and must be consistent with § 131.14. As WQS, variances are subject to § 131.20(a) and thus must be reviewed on a triennial basis. States and tribes continue to have broad discretion on the structure of their triennial reviews and can decide whether and how to modify or adopt WQS as a result of a triennial review. The EPA is also proposing to specify at § 131.14(a)(1) that all other applicable water quality standards not specifically addressed by the variance remain applicable.

Typically, states find variances that apply to a specific pollutant(s) and discharger(s) to be most useful. If a state believes that the designated use and criterion is unattainable for a period of time because the discharger cannot meet its WQBEL, the state may grant a discharger-specific variance so long as the variance is consistent with the CWA and implementing regulation.

Similarly, if a state or tribe believes that the designated use and criterion is unattainable as it applies to multiple permittees because they are all experiencing challenges in meeting their WQBELs for the same pollutant for the same reason, regardless of whether or not they are located on the same water body, a state or tribe may streamline its variance process by granting one variance that applies to all these dischargers (i.e., a multiple discharger variance) so long as the variance is consistent with the CWA and implementing regulations. The EPA recognized the utility of a multiple discharger variance and its distinction from an individual discharger variance in the "Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID; EPA–820–B–95–001; March 1995). The EPA provided further clarification regarding multiple discharger variances in the "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule" (75 FR 75790, December 6, 2010). More recently in March 2013, the EPA provided a set of frequently asked questions to assist states and tribes in developing credible rationales for multiple discharger variances. [24]

Where a state or tribe can demonstrate that the designated use and criterion currently in place for a specific pollutant is not attainable immediately (or for a limited period of time) for an entire water body, the state or tribe may adopt a waterbody variance as an alternative to a designated use change for the water body so long as the variance is consistent with the CWA and implementing regulation. In such an instance, the variance applies to the water body itself, rather than to any specific source or sources. A waterbody variance provides time for the state or tribe to work with both point and nonpoint sources to determine and implement adaptive management approaches on a waterbody/watershed scale to achieve pollutant reductions and strive toward attaining the water body's designated use and associated criteria.

States and tribes retain discretion as to whether, when, and where to adopt variances. However, consistent with the

[24] *Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers*, EPA–820–F–13–012, March 2013 (*http://water.epa.gov/scitech/swguidance/standards/upload/Discharger-specific-Variances-on-a-Broader-Scale-Developing-Credible-Rationales-for-Variances-that-Apply-to-Multiple-Dischargers-Frequently-Asked-Questions.pdf*).

EPA's current position, should a state or tribe choose to grant a variance, it is subject to the EPA's review and approval or disapproval—regardless of the scope of the variance.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section. The EPA also invites comment on the applicability of variances to individual dischargers, multiple dischargers and to entire water bodies.

ii. An EPA Approved Variance Is Only Applicable for CWA Section 402 Permitting Purposes and in Issuing Certifications Under Section 401 of the Act

The proposed WQS regulation at 40 CFR 131.14(a)(2) would specify that where a state or authorized tribe adopts a variance, the state or tribal regulations must continue to reflect the underlying designated use and criterion unless the state or tribe adopts and the EPA approves a revision to the designated use and criterion as consistent with § 131.10 or § 131.11. The interim requirements specified in the variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the pollutant(s), permittee(s) and/or water body or waterbody segment(s) covered by the variance.

To date, the EPA's available guidance has characterized variances as temporary changes to the designated use; however, such a characterization might imply that the variance replaces the designated use while the variance is in effect. This has led to conflicting interpretations of how variances affect the implementation of WQS through CWA programs, such as NPDES permits and the CWA 303(d) requirements.

The CWA and implementing regulation direct the states to add waters that are not attaining *any* applicable WQS to their 303(d) impaired waters list. Specifically, CWA section 303(d)(1)(A) states that "each state shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) of this title are not stringent enough to implement *any* water quality standards applicable to such waters"(emphasis added). Stakeholders have expressed concern that if the interim requirements do not replace the designated use and criterion, there will effectively be two WQS applicable for purposes of implementing the CWA section 303(d) program where a variance has been approved. However, the interim requirements *do not replace* the designated use and criteria for the water body as a whole. Discharger-specific variances affect the development of WQBELs for the discharger(s) specified in the variance; they do not affect the designated use and criterion that apply to the rest of the water body. In addition, variances are time-limited and intended as a tool to facilitate water quality improvements, not to revise the long term goals for a water body. Therefore, any implementation of CWA section 303(d) must continue to be based on the underlying designated uses and criteria for the water body rather than the interim requirements.

By requiring state and tribal regulations to maintain the underlying designated use and criterion where a variance is approved, the proposed regulation will ensure it is clear that the interim requirements associated with a variance do not replace the designated use and criterion. This will, in turn, facilitate a consistent interpretation regarding how variances affect the implementation of WQS through the various CWA programs and how variances are to be used to support feasible progress toward attaining the underlying designated use and criteria.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

iii. Relationship to Technology-Based Requirements in CWA Sections 301(b) and 306

The EPA is proposing to add paragraph (a)(3) to 40 CFR 131.14 to specify that a variance shall not be granted if the designated use and criterion can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

As with designated use changes, variances are not permissible if the WQS can be attained by implementing technology-based effluent limits required under section 301(b) and 306 of the Act. Section 301(b)(1)(A), (B), and section 306 of the Act provide for technology-based requirements through effluent limitations guidelines and new source performance standards. These technology-based requirements represent the minimum level of control that must be imposed in a permit (40 CFR 125.3). Because variances are allowed only where the designated use and criterion are demonstrated to be unattainable during the term of the variance, it would not be appropriate to use a variance if the designated use and criterion can be attained by implementing the technology-based requirements of the Act.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

b. Part 2—Submission Requirements

This section describes the relevant information that a state or authorized tribe must submit to the EPA when requesting the EPA's review and approval of a variance.

i. Components of a Variance

1. Identifying Information—Pollutant(s), Permittee(s), Location

The EPA is proposing to add paragraph (b)(1)(i) at 40 CFR 131.14 requiring states and authorized tribes to identify, in the variance, the pollutant(s), the permittee(s), and/or the water body or waterbody segment(s) to which the variance applies.

This proposed regulatory revision will require all variances to specify for what, to whom, and/or where the variance applies, which will help ensure full transparency and public participation on the applicability and scope of the variance. This will alleviate any inconsistencies in the way states and tribes have articulated where, when and how the variance applies.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

2. Numeric Interim Requirements That Apply During a Variance

The EPA is proposing to add paragraph (b)(1)(ii) at 40 CFR 131.14 to require that a variance must specify (1) the highest attainable interim use and numeric criterion that will apply during the term of the variance or (2) an interim numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Neither (1) nor (2) shall result in any lowering of the currently attained water quality, unless a time-limited lowering of water quality is necessary during the term of a variance for restoration activities, consistent with § 131.14(b)(2)(ii).

As variances have been implemented to date, some states and tribes have not identified in the variance the interim requirements that shall apply for permitting purposes during the term of the variance. Specifying the interim requirements to be met during the variance will provide the legal basis for permit writers to develop permit limits that derive from and comply with a WQS, as required by the permitting regulations at 40 CFR 122.44(d)(vii)(A).

As discussed in Section III.C, the EPA is proposing a requirement that a state

or tribe adopts the highest attainable use closest to the 101(a)(2) goals when it has demonstrated that the use specified in CWA section 101(a)(2) or a subcategory of such a use is not attainable based on a UAA. The EPA is proposing that a similar requirement apply to variances such that if states or tribes can demonstrate that a use specified in section 101(a)(2) or subcategory of such a use is not attainable for the variance period, then the state or tribe must adopt a variance reflecting the highest attainable condition during the term of the variance. Such a requirement ensures that feasible progress will be made towards the designated use and the criterion to protect that use during the period of the variance.

Requiring that states and tribes establish interim requirements that apply for purposes of CWA section 402 permitting and in issuing certifications under section 401 of the Act, and that such requirements reflect the highest attainable condition during the variance, creates a framework for variances to provide states and tribes with time to implement adaptive management approaches that drive progress towards meeting the designated use and criterion in a transparent and accountable manner—a key environmental benefit of a variance. This is consistent with previous EPA statements in the EPA's WQS Handbook and 1998 ANPRM that discuss the EPA's position regarding the progress to be made during the term of the variance towards attaining the designated use and criterion.[25]

A state's or tribe's determination or identification of the highest attainable interim use need not be complex. A state or tribe could simply include the phrase "variance affected" or "variance modified" to the current use description or the state or tribe could describe the interim use by identifying the parameter included in the variance, such as "pH-limited" use as a way to provide transparency. States and tribes may find it appropriate to adopt such "variance modified" uses as the highest attainable interim use, rather than adopting an alternate use from the state or tribe's current use classification system, as they might be more likely to do if they were making a permanent change to a designated use. To determine the numeric criterion that protects the highest attainable interim use, a state or tribe shall determine the condition that is both feasible to attain and closest to the protection afforded by the designated use and criteria. A state's or tribe's determination of the highest attainable condition and numeric interim requirements to apply during a waterbody variance should include consideration and evaluation of pollutant reductions from all contributing sources. This could include an evaluation of the point source controls, pollutant minimization plans and NPS pollutant reductions that could be achieved in the water body.

Rather than identifying the highest attainable interim use and interim numeric criterion, a state or tribe may choose to specify in its variance that the applicable interim water quality standard shall be defined by a numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Adopting a numeric effluent condition that reflects the highest attainable condition is reasonable because the resulting instream concentration reflects the highest attainable interim use and interim criterion and, therefore, the interim numeric effluent condition is acting as a surrogate for the interim use and interim criterion. If current effluent quality represents the highest attainable condition for a specific permittee(s), then this would become the interim requirement during the term of the variance. In situations where a variance addresses a pollutant(s) for which no feasible wastewater treatment option can be identified, an interim numeric water quality-based effluent condition reflecting the levels currently achievable and a requirement to develop and implement a Pollutant Minimization Program (PMP)[26] together would constitute the highest attainable effluent condition.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

3. Expiration Date

The EPA is proposing to add paragraph (b)(1)(iii) at 40 CFR 131.14 to require that all variances must include an expiration date and that variances must be as short as possible but expire no later than 10 years after the date the state or tribe adopts the variance, consistent with § 131.14(b)(2).

Variances are time-limited; therefore, in order to promote consistency and clarity and to ensure that variances are truly time-limited, the EPA is proposing that all variances include an explicit expiration date. Such expiration date must be consistent with the demonstration that a variance is needed for a specified period of time based on one of the factors identified in proposed § 131.14(b)(2), must be as short as possible, and cannot exceed 10 years. Establishing an expiration date will ensure that the conditions of a variance will be thoroughly re-evaluated and subject to a public review on a regular and predictable basis to determine (1) whether conditions have changed such that the designated use and criterion are now attainable; (2) whether new or additional information has become available to indicate that the designated use and criterion are not attainable in the future (i.e., data or information supports a use change/refinement); or (3) whether feasible progress is being made toward the designated use and criterion and that additional time is needed to make further progress (i.e., whether a variance may be renewed).

The EPA believes that up to 10 years is a reasonable duration for a variance, as it represents two 5-year NPDES permit terms and provides adequate opportunity to implement measures to make feasible progress. A maximum of 10 years is also sufficient to reflect changing circumstances, such as the availability of new economic information or affordable treatment technology that may impact whether or not a variance is still warranted.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

ii. Demonstrating the Need for a Variance—Supporting Documentation

The EPA is proposing to add paragraph (b)(2) at 40 CFR 131.14 to specify that in order to document that a variance is needed for uses specified in section 101(a)(2) or sub-categories of such uses, the state or tribe must demonstrate that attaining the designated use and criterion is not feasible during the term of the variance because of one of the factors listed in § 131.10(g) or because actions necessary to facilitate restoration through dam removal or other significant wetland or stream reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.

[25] The EPA's 1994 WQS Handbook stated that "EPA has approved state adopted variances in the past and will continue to do so if ...reasonable progress is being made toward meeting the standards." The EPA's 1998 ANPRM indicated that the EPA was considering revising its regulations to include a requirement that before a variance may be granted the applicant must include documentation that "...reasonable progress will be made toward meeting the underlying or original standard." The EPA did not propose a revised regulation at that time.

[26] A PMP is a structured process to reduce loadings of a pollutant by identifying, preventing and reducing loadings, improving processes and improving wastewater treatment.

The regulation at 40 CFR 131.10(g) identifies six factors that may be used to demonstrate, through a UAA, when a use specified in section 101(a)(2) of the Act, or a subcategory of such a use, is unattainable. The EPA's current position (and its longstanding practice) is that one of these same § 131.10(g) "attainability" factors must be used by states and tribes to justify why and for how long a variance is necessary for uses specified in section 101(a)(2) or sub-categories of such uses. In developing this proposed regulation, the EPA considered other situations where a variance may be appropriate and the EPA concluded that the current § 131.10(g) factors do not accommodate situations where a variance may be necessary to facilitate short-term efforts to restore the natural physical features (i.e., natural geomorphology) of a system. Specifically, this is meant to address the situation when a time-limited exceedance of a criterion might be expected while efforts for dam removal or significant wetlands or stream reconfiguration/restoration efforts are underway to facilitate restoration of the natural physical features of a water body. The proposed new factor is intended only to cover the length of time necessary to remove the dam or the length of time in which stream restoration activities are actively on-going. Although such a variance might not directly impact a NPDES permittee, it may be necessary to allow states and tribes to certify that any federal license or permit that may result in the discharge of pollutants in state/tribal jurisdiction will still meet their state/tribal WQS, under CWA section 401.

In determining whether or not to grant a variance for uses specified in section 101(a)(2) and sub-categories of such uses (and subsequently submit such a variance to the EPA for review and approval), the state or tribe must consider and evaluate whether the available information supports a conclusion that the designated use and criteria are not feasible to attain during the variance period based on one of the factors listed in § 131.14(b)(2).

A factor that has been commonly used to demonstrate the need for a discharger specific variance is § 131.10(g)(6), which provides that a state or tribe may remove a designated use if "[c]ontrols more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact." The Interim Economic Guidance for Water Quality Standards, published March 1995 (see *http://water.epa.gov/scitech/swguidance/standards/economics/*) provides guidance on the types of information that a state or tribe should consider evaluating and include in its record to support a variance based on § 131.10(g)(6).[27]

The state's or tribe's record for granting a variance based on "Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place"[28] may include, but not be limited to, consideration and evaluation of the following types of available information:

- Monitoring data to determine the current ambient conditions.
- Data/maps showing the geographical extent of the problem.
- Engineering studies and literature of the relevant remediation alternatives and best management practices that could be implemented and documentation that none of the alternatives or practices, if implemented, would result in attaining the designated use and criteria within the variance timeframe.
- Description, with supporting information from the scientific literature, of the environmental impacts associated with the remedial alternatives and an analysis of what could be done in an environmentally safe manner. Such an analysis would facilitate a determination of whether the human caused condition or source of pollution would cause more environmental harm to remedy than to leave in place.
- Modeling data showing the associated pollutant reductions achievable within the timeframe of the variance compared to reductions needed to achieve the designated use and criteria.

A variance should be a transparent mechanism that allows a state, tribe or discharger a defined period of time to conduct any necessary studies so long as the state or tribe demonstrates the need for the variance in accordance with the regulations and the state or tribe retains the applicable criteria for all other pollutants. The EPA commonly receives questions about whether permit compliance schedules can be used for this purpose. Permit compliance schedules may only be used in situations where time is needed for a permittee to come into compliance with the WQBEL in the permit, not to provide time to address uncertainty regarding the appropriateness or attainability of the WQS.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

iii. Identifying and Documenting the Controls for Other Sources Related to the Pollutant(s) and Location(s) Specified in a Waterbody Variance That Could Be Implemented

The EPA is proposing to add paragraph (b)(3) at § 131.14 to specify that, in addition to the other requirements under 131.14(b), for a waterbody variance (one not limited to a specific discharger or dischargers), a state or tribe must include an *identification and documentation* of any cost-effective and reasonable BMPs for nonpoint sources related to the pollutant(s) and location(s) specified in the variance that could be implemented water body wide to make progress towards attaining the designated use and criterion. A state or tribe must provide public notice and comment for any such documentation.

Because other sources of pollution (e.g., nonpoint sources) can have a significant bearing on whether the designated use and associated criterion for the entire water body are attainable, it is essential for states and tribes to consider and provide information to the public regarding the impact that controlling other sources through application of cost-effective and reasonable BMPs could have on water quality before granting a waterbody variance. Doing so could inform the state's or tribe's assessment of what interim actions may be needed to make feasible progress towards attaining the designated use and criterion related to the pollutant(s) and location(s) specified in the variance, as well as what the highest attainable interim designated use and criterion may be and for how long they may be needed.

A similar requirement is set out in the WQS regulation at § 131.10(d) and (h)(2) which specifies that a use is deemed attainable and cannot be removed if it can be achieved by the imposition of/implementing effluent limits required under sections 301(b) and 306 of the Act as well as cost-effective and reasonable best management practices for nonpoint source control. The EPA's current position is that before removing a designated use states and tribes must first evaluate the impact that point and nonpoint source controls might have on water quality. When conducting such an evaluation, states and tribes should consider the impacts from

[27] The § 131.10(g)(6) analysis would include costs of point source controls and the impacts on the surrounding community.

[28] As specified in § 131.10(g)(3) and cross-referenced in § 131.14(b)(2)(i).

implementing any [29] cost-effective and reasonable BMPs for nonpoint source controls water body wide. In situations where it can be demonstrated that a use is precluded by non-anthropogenic stressors (e.g., high levels of a naturally occurring metal in a surface water body), the EPA does not expect states and tribes to evaluate nonpoint source controls, as controlling nonpoint sources would not lead to attainment.

The EPA's proposed requirement for waterbody variances differs from those applicable to designated uses because variances are time-limited and targeted serving as a tool to facilitate progress toward the designated use and criterion. It is unnecessary to require states and tribes to demonstrate that the designated use and criteria are unattainable even if cost effective and reasonable BMPs were implemented, as is required when revising a designated use, because variances do not "permanently" downgrade the designated use but establish a regulatory mechanism by which feasible progress will be made during the term of the variance. Instead, a requirement to identify and document cost-effective and reasonable BMPs for other sources will assist states and tribes in identifying the actions they may need to implement to meet their interim requirements as well as to make feasible progress towards attaining the designated use and criterion.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

c. Part 3—Implementing Variances

The EPA is proposing to add paragraph (c) at 40 CFR 131.14 specifying that variances serve as the basis of a WQBEL included in a NPDES permit for the period the variance is in effect. Any activities required to implement the variance shall be included as conditions of the NPDES permit for the permittee(s) subject to the variance.

When variances are adopted and approved, they serve as the basis of a WQBEL included in a NPDES permit during the variance period. However, any specific actions that will be necessary for the discharger to implement the variance and make such feasible progress are typically at the discretion of the permitting authority. Therefore, in § 131.14(c), the EPA is proposing regulatory language similar to § 131.34(c) and § 131.40(c) linking the requirements of variances to the NPDES permitting process, specifically 40 CFR 122.44(d)(1)(viii)(A) that requires the permitting authority to establish limitations that derive from and comply with the applicable WQS. The EPA believes the proposed regulatory requirement will ensure proper accountability when implementing variances. The proposed provision reflects the provisions in the "Water Quality Guidance for the Great Lakes System" (40 CFR part 132, Appendix F, Procedure 2).

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

d. Part 4—How To Renew a Variance

The EPA is proposing to add paragraph (d) at 40 CFR 131.14 to specify that to obtain the EPA's approval of a variance renewal, the state or tribe must meet the requirements of § 131.14 and provide appropriate documentation of the steps taken to meet the requirements of the previous variance. Renewal of the variance may be disapproved if the applicant did not comply with the conditions of the original variance, or otherwise does not meet the requirements of this section. For renewal of a waterbody variance, the state or tribe must also include documentation of whether and to what extent cost-effective and reasonable BMPs have been implemented to address the pollutant(s) subject to the variance and the water quality progress achieved during the variance period.

Although the EPA is proposing to establish a maximum single variance term of no more than 10 years, it recognizes that there may be circumstances in which a renewal of a variance is both necessary and appropriate. As the EPA's 1998 ANPRM articulates, variances are WQS and should be continued or extended only where the initial conditions for granting the variance still apply.[30] If a variance term will expire and the applicant complied with the conditions of the original variance (e.g., feasible progress has been made), but the designated use and criterion remain unattainable, then renewal of a variance may be an appropriate option for the state or tribe to consider.

The EPA is providing an additional requirement for waterbody variances because both point and nonpoint sources are contributing to the water quality challenges. The state or tribe must document whether and to what extent BMPs have been implemented and the water quality progress achieved during the variance period.

This proposed regulation explicitly provides that the EPA may disapprove a renewal of the variance if the applicant did not comply with the conditions of the original variance, or otherwise does not meet the requirements of § 131.14. The EPA recognizes that circumstances out of the permittee, state's or tribe's control may impact the ability to meet the specific conditions and requirements of the variance, even if all required actions to implement the variance were completed. The proposed regulatory language allows the EPA to consider these factors when determining whether to grant a WQS variance renewal. If the EPA disapproves the variance renewal, then the state or tribe must implement its water quality program to meet the applicable designated use and associated criteria or conduct a UAA to justify a revision to the designated use and associated criteria.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

e. Part 5—Variances for the EPA-Promulgated Designated Uses

The EPA is proposing to delete detailed variance procedures promulgated by the EPA in 40 CFR 131.34(c) and 131.40(c) and replace them with language specifying that the appropriate Regional Administrators may grant variances from the EPA-promulgated regulations for Kansas and Puerto Rico consistent with this proposed requirements at § 131.14.

The EPA promulgated variance procedures that the Regional Administrator could use to grant variances from the specific WQS the EPA promulgated for Kansas and Puerto Rico in § 131.34 and 131.40. This proposal reflects the most efficient and transparent approach to ensure that variances granted by the Regional Administrator for the federally promulgated standards in Kansas and Puerto Rico meet the same requirements as the rest of the United States once the EPA finalizes the nationally applicable revisions to 40 CFR part 131.

The EPA invites comment on its proposal and on any other options it should consider or on the interpretations expressed in this section.

G. Provisions Authorizing the Use of Permit-Based Compliance Schedule

1. The EPA Proposal

The EPA is proposing to add a new regulatory provision at § 131.15 to be consistent with the decision of the EPA Administrator in *In the Matter of Star-*

[29] i.e., not just those that may already be required by state regulations.

[30] 63 FR 36759.

Kist Caribe, Inc. (1990 WL 324290 (EPA), 1990 EPA App. LEXIS 45, 3 EAD 172 (April 16, 1990)). This provision would clarify that a permitting authority may only issue compliance schedules for WQBELs in NPDES permits if the state or tribe has authorized issuance of such compliance schedules pursuant to state or tribal law in its water quality standards or implementing regulations. Any such compliance schedule authorizing provision is a WQS subject to the EPA's review and approval. The proposed provision would also clarify that individual compliance schedules issued pursuant to such authorizing provisions are not themselves WQS but must be consistent with CWA section 502(17), the state's or tribe's EPA-approved compliance schedule authorizing provision, and the requirements of 40 CFR 122.2 and 122.47.

2. Rationale for Revision

CWA section 502(17) defines "schedule of compliance" to mean "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." The EPA's NPDES regulation at 40 CFR 122.2 defines a schedule of compliance as "a schedule of remedial measures included in a 'permit,' including an enforceable sequence of interim requirements . . . leading to compliance with the CWA and regulations." Section 301(b)(1)(C) of the Act specifies that there shall be achieved ". . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet WQS, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter."

In, *In the Matter of Star-Kist Caribe, Inc.*, the EPA Administrator (in an appeal of an EPA-issued NPDES permit) interpreted CWA 301(b)(1)(C) to mean that (1) after July 1, 1977, permits must require immediate compliance with (i.e., may not contain compliance schedules for) effluent limitations based on WQS adopted before July 1, 1977, and (2) permit compliance schedules are allowed for effluent limitations based on WQS adopted after that date *only* if the state or tribe has clearly indicated in its WQS or implementing regulations that it intends to allow them (i.e., the state's or tribe's WQS or implementing regulations must contain a provision authorizing the use of permit-based compliance schedules). The latter requirement ensures that a permit including such a compliance schedule still meets WQS pursuant to CWA section 301(b)(1)(C).

The EPA's current WQS regulation is silent regarding compliance schedules and compliance schedule authorizing provisions. As a result, despite *Star-Kist*, the EPA is concerned that state/tribal permitting authorities may be including compliance schedules in permits, thus delaying compliance with a WQS-based WQBEL, even though the state/tribe may not have authorized the use of such compliance schedules in its WQS or implementing regulations.

Consistent with the *Star-Kist* decision, a state or tribe has the discretion to include a compliance schedule authorizing provision in its WQS or implementing regulations. Such a provision may also be codified in a state or tribe's NPDES regulations. However, regardless of where it appears, a compliance schedule authorizing provision adopted pursuant to state or tribal law is considered a WQS subject to the EPA's approval under CWA section 303(c)(3). Although a compliance schedule authorizing provision does not describe the desired condition or level of protection of a water body in exactly the same way as a designated use or water quality criteria, it expresses the state's or tribe's intent to allow a delay in meeting the desired condition. Compliance schedule authorizing provisions allow the permitting authority to provide a permittee additional time to comply with a WQBEL that derives from and complies with the applicable WQS beyond the date of permit issuance, which is the date upon which a permittee is otherwise required to comply with its WQBEL. In addition, as articulated in the *Star-Kist* decision, states and tribes may only allow this delay if the applicable WQS is new or revised, after July 1, 1977.

When states and tribes authorize the use of compliance schedules in their WQS or implementing regulations, they ensure that WQBELs subject to appropriately issued compliance schedules are "fully consistent with, and therefore 'meet,' the requirements of the State or tribal water quality standard, as contemplated by [CWA] 301(b)(1)(C)." *Star-Kist* at 175. Once approved pursuant to CWA 303(c)(3), the compliance schedule authorizing provision itself becomes part of the applicable WQS; therefore, any delay in compliance with a WQBEL pursuant to that permit compliance schedule would be consistent with state/tribal WQS. A compliance schedule, as defined by section 502(17) of the Act, that is granted pursuant to a state's or tribe's approved compliance schedule authorizing provision is, on the other hand, a permitting tool and is not itself considered a WQS. The EPA has implemented section 502(17) of the Act in the context of the NPDES permitting program at 40 CFR 122.2 and 122.47. Any compliance schedule, itself, must be consistent with these provisions.

The EPA invites comments on the proposed addition of § 131.15. The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

H. Other Changes

1. The EPA Proposal

In the course of developing this proposal, the EPA identified several spelling mistakes, grammatical errors and/or inconsistencies, and incorrect citations in 40 CFR part 131, as well as the need for various conforming edits (e.g., provisions that need to be re-numbered or re-lettered based on a regulatory addition or deletion outlined in this proposal). The EPA is proposing the following changes:

- § 131.2: Change ". . . necessary to protect the uses" to ". . . that protect the designated uses" (consistency with terminology in § 131.11).
- § 131.3(h): Change "technology-bases" to "technology-based" (spelling mistake).
- § 131.3(j): Delete "the Trust Territory of the Pacific Islands."[31] Insert the word "the" in front of "water quality standards program" (grammatical clarification).
- § 131.5(a)(1): Change ". . . has adopted water uses" to ". . . has adopted designated water uses" (grammatical clarification).
- § 131.5(a)(2): Insert ". . . based on sound scientific rationale" (consistency with language in § 131.11).
- § 131.10(j): Insert "and § 131.10(g)" before the word "whenever" (consistency with proposed revisions to § 131.10(g)).
- § 131.10(j)(2): Insert ", to remove a subcategory of such a use," after the first instance of ". . . specified in section 101(a)(2) of the Act" (legal clarification that a UAA is also required when removing a subcategory of a use specified in section 101(a)(2) of the Act without adopting another use in its place).

[31] "The Trust Territory of the Pacific Islands" became the "Commonwealth of the Northern Mariana Islands" in 1986 via Presidential Proclamation. See *http://www.presidency.ucsb.edu/ws/index.php?pid=36688#axzz1XrK7AXLN.*

- § 131.11(a)(2): Change reference from "40 CFR part 35" to "40 CFR part 130" to reflect the correct citation.
- § 131.11(b): Italicize "Form of criteria" (consistency with formatting in § 131.11(a)).
- § 131.12(a)(2): Insert "the protection and" into the phrase "propagation of fish, shellfish and wildlife" to be consistent with CWA 101(a)(2) and the rest of the WQS regulation at part 131. Change "assure" to "ensure" (grammatical clarification).
- § 131.20(b): Change "hold a public hearing" to "hold public hearings" and add "or revising" after "reviewing" (consistency with CWA 303(c) and § 131.20(a)). Insert "EPA's" in front of "public participation regulation" (clarification that 40 CFR part 25 is the EPA's regulation). Delete the phrase "EPA's water quality management regulation (40 CFR 130.3(b)(6))" (nonexistent citation).

The EPA invites comments on the proposed amendments described above. The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

IV. When does this action take effect?

Comments on this proposed rulemaking must be received on or before December 3, 2013. Should this proposed rulemaking be finalized, the effective date will likely be 60 days after date of publication of the final rule in the **Federal Register**. For judicial review purposes, the effective date will likely be 60 days after date of publication of the final rule in the **Federal Register**.

The EPA is proposing to require states and tribes to meet the requirements of the final rule on the effective date of the final rule. The EPA's expectation is that, where a new or revised requirement necessitates a change to state or tribal WQS, such changes will occur within the next triennial review that the state or tribe initiates after the EPA's publication of the final rule.

The EPA invites comments on the proposed effective dates. The EPA also invites comment on any other options it should consider or on the interpretations expressed in this section.

V. Economic Impacts on State and Tribal WQS Programs

The EPA evaluated the potential incremental administrative burdens and costs that may be associated with this proposal. Incremental burden and costs are those above and beyond the burden and costs associated with implementation of current WQS regulations. Because this proposal will not establish any requirements directly applicable to regulated entities, the focus of the EPA's economic analysis is to estimate the potential administrative burden and costs to state, tribal, and territorial governments, and the EPA. The EPA's economic analysis is documented in *Economic Analysis for the Water Quality Standards Regulatory Clarifications (Proposed Rule)* and can be found in the docket for this proposal.

The EPA assessed the potential incremental burden and costs associated with this proposed regulation revisions by first identifying those elements of the proposed revisions that may impose incremental burdens and costs. The EPA estimated the incremental number of labor hours potentially required by states and tribes to comply with those elements of the proposed regulations, and then estimated the costs associated with those additional labor hours. The EPA identified four areas where incremental burdens and costs may be anticipated: (1) One-time burden and costs associated with state and tribal rulemaking activities because states and tribes may need to adopt new or revised provisions into their WQS, (2) annual costs associated with designating uses because identifying the highest attainable use when performing a UAA may require additional labor hours, (3) annual costs associated with antidegradation implementation including reviewing a greater number and more complex antidegradation requests, and (4) annual costs associated with additional development and documentation of variance requests. In addition to the proposed requirements included in this proposal, the EPA is considering and requesting comment on whether the EPA should include a requirement that antidegradation implementation methods be formally adopted as WQS and thus subject to the EPA's review and approval or disapproval. Incremental burden and costs were estimated for all 50 states, the District of Columbia, 5 territories, and the 39 Indian tribes authorized to administer a WQS program with WQS approved by the EPA.

Estimates of the incremental administrative burden and costs to state and tribal governments associated with this proposal without the requirement to adopt antidegradation implementation methods as WQS are summarized in the following table:

SUMMARY OF INCREMENTAL ADMINISTRATIVE BURDEN AND COSTS TO STATE AND TRIBAL GOVERNMENTS ASSOCIATED WITH THIS PROPOSAL WITHOUT THE REQUIREMENT TO ADOPT ANTIDEGRADATION IMPLEMENTATION METHODS AS WQS

Provision	One-time			Recurring	
	Burden (hours)	Cost (2013$ millions)	Annualized cost (2013$ millions/year) [1]	Burden (hours/year)	Cost (2013$ millions/year)
Rulemaking Activities	9,500–47,500	$0.46–$2.28	$0.03–$0.15	—	—
Designated Uses	—	—	—	240–1,200	$0.01–$0.06
Antidegradation [2]	—	—	—	97,070–145,605	$4.61–$7.04
Variances	—	—	—	4,620–5,310	$0.22–$0.26
National Total	9,500–47,500	$0.46–$2.28	$0.03–$0.15	101,930–152,115	$4.84–$7.36

'—' = not applicable.

[1] Although the EPA expects these one-time costs to occur once over a 3 year period, they are annualized here at 3% discount rate over 20 years for comparative purposes.

[2] Includes annual costs associated with reviewing a greater number and more complex antidegradation requests.

Estimates of the incremental administrative burden and costs to the EPA associated with this proposal without the requirement to adopt antidegradation implementation methods as WQS are summarized in the following table:

SUMMARY OF POTENTIAL INCREMENTAL ADMINISTRATIVE BURDEN AND COSTS TO THE EPA ASSOCIATED WITH THIS PROPOSAL WITHOUT THE REQUIREMENT TO ADOPT ANTIDEGRADATION IMPLEMENTATION METHODS AS WQS

One-time					Recurring			
Costs to states and tribes (2013$ million)	Costs to the agency[1] (2013$ million)	Annualized cost to the agency[2] (2013$ million per year)	Burden		Costs to states and tribes (2013$ million per year)	Costs to the agency[1] (2013$ million per year)	Burden	
			Hours[3]	FTEs[4]			Hours per year[3]	FTEs per year[4]
$0.46–$2.28	$0.09–$0.46	$0.01–$0.03	1,200–6,040	0.58–2.9	$4.84–$7.36	$0.97–$1.47	12,810–19,470	6.16–9.36

[1] Assuming that the incremental costs to the EPA are equal to 20% of the costs to states and tribes.
[2] Although the EPA expects these one-time costs to occur once over a 3 year period, they are annualized here at 3% discount rate over 20 years for comparative purposes.
[3] Total costs to the Agency divided by hourly wage rate (including overhead and benefits) of $75.55 per hour.
[4] Burden hours to the Agency divided by hours worked by full-time equivalent (FTE) employees per year (2,080 hours per year).

A summary of the combined estimated costs to all potentially affect states, tribes, and the EPA without the requirement to adopt antidegradation implementation methods as WQS are summarized in the following table:

SUMMARY OF POTENTIAL INCREMENTAL ADMINISTRATIVE BURDENS AND COSTS ASSOCIATED WITH THE PROPOSED RULE TO STATES, TRIBES, AND THE EPA WITHOUT THE REQUIREMENT TO ADOPT ANTIDEGRADATION IMPLEMENTATION METHODS AS WQS

Entities	One-time			Recurring	
	Burden (hours)	Cost (2013$ millions)	Annualized cost[1] (2013$ million/ year)	Burden (hours/year)	Cost (2013 $millions/year)
States and tribes	9,500–47,500	$0.46–$2.28	$0.03–$0.15	101,930–152,115	$4.84–$7.36
Agency	1,200–6,040	$0.09–$0.46	$0.01–$0.03	12,810–19,470	$0.97–$1.47
Total	10,700–53,540	$0.55–$2.74	$0.04–$0.18	114,740–171,585	$5.81–$8.83

[1] Although the EPA expects these one-time costs to occur once over a 3 year period, they are annualized here at 3% discount rate over 20 years for comparative purposes.

To estimate the total annual cost of this proposal without the requirement to adopt antidegradation implementation methods as WQS which include both one-time costs and recurring costs, the EPA annualized the one-time costs over a period of 20 years. Using a 20-year annualization period and a discount rate of three percent, total annual costs for this proposal without the requirement to adopt antidegradation implementation methods as WQS are estimated to range from $5.84 million ($0.04 million + $5.81 million) to $9.01 million ($0.18 million + $8.83 million) per year.

In addition to the proposed requirements included in this proposal, the EPA is considering and requesting comment on whether the EPA should include a requirement that antidegradation implementation methods be formally adopted as WQS and thus subject to the EPA's review and approval or disapproval. This additional requirement would require affected entities to develop or revise antidegradation implementation methods, and adopt the implementation methods in WQS, resulting in one-time (nonrecurring) burden and costs. Estimates of the incremental administrative burden and costs to state and tribal governments associated with this proposal including the requirement to adopt antidegradation implementation methods into WQS are summarized in the following table:

SUMMARY OF INCREMENTAL ADMINISTRATIVE BURDEN AND COSTS TO STATE AND TRIBAL GOVERNMENTS ASSOCIATED WITH THIS PROPOSAL WITH THE REQUIREMENT TO ADOPT ANTIDEGRADATION IMPLEMENTATION METHODS AS WQS

Provision	One-time			Recurring	
	Burden (hours)	Cost (2013$ millions)	Annualized cost[1] (2013$ millions/ year)	Burden (hours/year)	Cost (2013$ millions/year)
Rulemaking Activities	9,500–47,500	$0.46–$2.28	$0.03–$0.15	—	—
Designated Uses	—	—	—	240–1,200	$0.01–$0.06
Antidegradation	33,600–67,200	1.61–3.23	0.11–0.22	97,070–145,605	4.61–7.04
Variances	—	—	—	4,620–5,310	0.22–0.26
National Total	43,100–114,700	2.07–5.51	0.14–0.37	101,930–152,115	4.84–7.36

'—' = not applicable.
[1] Although the EPA expects these one-time costs to occur once over a 3 year period, they are annualized here at 3% discount rate over 20 years for comparative purposes.

Estimates of the incremental administrative burden and costs to the EPA associated with this proposal including the requirement to adopt antidegradation implementation

methods into WQS are summarized in the following table:

SUMMARY OF POTENTIAL INCREMENTAL ADMINISTRATIVE BURDEN AND COSTS TO THE EPA ASSOCIATED WITH THIS PROPOSAL WITH THE REQUIREMENT TO ADOPT ANTIDEGRADATION IMPLEMENTATION METHODS AS WQS

One-time					Recurring			
Costs to states and tribes (2013$ million)	Costs to the agency [1] (2013$ million)	Annualized cost to the agency [2] (2013$ million per year)	Burden		Costs to states and tribes (2013$ million per year)	Costs to the agency [1] (2013$ million per year)	Burden	
			Hours [3]	FTEs [4]			Hours per year [3]	FTEs per year [4]
$2.07–$5.51	$0.41–$1.10	$0.03–$0.07	5,480–14,570	2.63–7.01	$4.84–$7.36	$0.97–$1.47	12,810–19,470	6.16–9.36

[1] Assuming that the incremental costs to the EPA are equal to 20% of the costs to states and tribes.
[2] Although the EPA expects these one-time costs to occur once over a 3 year period, they are annualized here at 3% discount rate over 20 years for comparative purposes.
[3] Total costs to the Agency divided by hourly wage rate (including overhead and benefits) of $75.55 per hour.
[4] Burden hours to the Agency divided by hours worked by full-time equivalent (FTE) employees per year (2,080 hours per year).

A summary of the combined estimated costs of this proposal to all potentially affect states, tribes, and the EPA including the requirement to adopt antidegradation implementation methods into WQS are summarized in the following table.

SUMMARY OF POTENTIAL INCREMENTAL ADMINISTRATIVE BURDENS AND COSTS ASSOCIATED WITH THE PROPOSED RULE TO STATES, TRIBES, AND THE EPA WITH THE REQUIREMENT TO ADOPT ANTIDEGRADATION IMPLEMENTATION METHODS AS WQS

Entities	One-time			Recurring	
	Burden (hours)	Cost (2013$ millions)	Annualized cost [1] (2013$ millions/year)	Burden (hours/year)	Cost (2013 $millions/year)
States and tribes	43,100–114,700	$2.07–$5.51	$0.14–$0.37	101,930–152,115	$4.84–$7.36
Agency	5,480–14,570	$0.41–$1.10	$0.03–$0.07	12,810–19,470	$0.97–$1.47
Total	48,580–129,270	$2.48–$6.61	$0.17–$0.44	114,740–171,585	$5.81–$8.83

[1] Although the EPA expects these one-time costs to occur once over a 3 year period, they are annualized here at 3% discount rate over 20 years for comparative purposes.

To estimate the total annual cost of this proposal including the requirement to adopt antidegradation implementation methods as WQS which include both one-time costs and recurring costs, the EPA annualized the one-time costs over a period of 20 years. Using a 20-year annualization period and a discount rate of three percent, total annual costs for this proposal with the requirement to adopt antidegradation implementation methods as WQS are estimated to range from $5.98 million ($0.17 million + $5.81 million) to $9.27 million ($0.44 million + $8.83 million) per year.

In addition to estimating potential burden and costs, the EPA also evaluated the potential benefits associated with this proposal. States, tribes, stakeholders, and the public will benefit from the proposed clarifications of the WQS regulations by ensuring better utilization of available WQS tools that allow states and tribes the flexibility to implement their WQS in an efficient manner while providing transparency and open public participation. Although associated with potential administrative burden and costs in some areas, this proposal has the potential to partially offset these costs by reducing regulatory uncertainty and consequently increasing overall program efficiency. Furthermore, more efficient and effective implementation of state and tribal WQS has the potential to provide a variety of economic benefits associated with cleaner water including the availability of clean, safe, and affordable drinking water, water of adequate quality for agricultural and industrial use, and water quality that supports the commercial fishing industry and higher property values. Nonmarket benefits of this proposal include the protection and improvement of public health and greater recreational opportunities. The EPA acknowledges that achievement of any benefits associated with cleaner water would involve additional control measures, and thus costs to regulated entities and non-point sources, that have not been included in the economic analyses for this proposed rule. The EPA has not attempted to quantify either the costs of such control measures that might ultimately be required as a result of this rule, or the benefits they would provide. Complete details on how the EPA evaluated burden, costs, and benefits are documented in *Economic Analysis for the Water Quality Standards Regulatory Clarifications (Proposed Rule)* included in the docket for this proposal.

The EPA invites comments on its economic analysis. Specifically, the EPA invites comments on the accuracy of the burden and costs estimates presented in this proposal, and any actual state or tribal data that may help to refine these estimates. This proposal does not establish any requirements directly applicable to regulated point sources or nonpoint sources of pollution, although the EPA recognizes that these sources could potentially incur costs as a result of changes to WQS adopted by states and tribes as a result of this rule (states and tribes could also adopt new or revised WQS independent of this proposed rule). However, unlike some other EPA WQS rules for which an economic analysis was prepared, this proposal does not lend itself to identification of readily predictable outcomes regarding changes to state water quality standards that might result. Likewise, the EPA could

not predict requirements that could ultimately be imposed on NPDES permittees and nonpoint sources. Thus, the EPA has not analyzed potential costs or cost savings associated with any consequences of revised state or tribal WQS. Nonetheless, the EPA is interested in the potential implications of this proposal for regulated entities and non-point sources and on whether and how it should incorporate such costs in its economic analysis of the rule.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under E.O.s 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, the EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in "Economic Analysis for the Proposed Revisions to Water Quality Standards Regulatory Revisions." A copy of the analysis is available in the docket for this action and the analysis is briefly summarized in Section V of the preamble.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The Information Collection Request (ICR) document prepared by the EPA has been assigned EPA ICR number 2449.01.

The EPA is proposing the WQS Regulatory Clarifications Rule to improve the regulation's effectiveness in helping restore and maintain the chemical, physical, and biological integrity of the nation's waters. The core of the current regulation has been in place since 1983; since then, a number of issues have been raised by stakeholders or identified by the EPA in the implementation process that will benefit from clarification and greater specificity. The proposed rule addresses the following key program areas: (1) Administrator's determinations that new or revised WQS are necessary, (2) designated uses, (3) triennial reviews, (4) antidegradation, (5) variances to WQS, and (5) compliance schedule authorizing provisions. In addition to the proposed requirements included in this proposal, the EPA is considering and requesting comment on whether the EPA should require that antidegradation implementation methods be adopted as WQS and thus subject to the EPA's review and approval or disapproval. This mandatory information collection will ensure the EPA has the needed information to review standards and make approvals or disapprovals in accordance with provisions in the proposed Water Quality Standards Regulatory Clarifications Rule. Under the Clean Water Act (CWA), the EPA is responsible for reviewing and approving or disapproving new and revised WQS submitted by states and tribes. The EPA will use the information required by this proposed rule to carry out its responsibility under the CWA. In reviewing state and tribal standards submissions, the EPA considers whether submissions are consistent with the WQS regulation at part 131. The WQS Regulatory Clarifications Rule will add new requirements to part 131. If the information collection activities in the WQS Regulatory Clarifications Rule are not carried out, specific improvements in the implementation of the WQS program will not take place. In some cases, implementation and control steps such as total maximum daily loads and National Pollutant Discharge Elimination System permits may not be as protective as necessary under the CWA.

Burden is defined at 5 CFR 1320.3(b). The EPA expects that the proposed rule will lead to incremental burden hours and labor costs in the following areas: rulemaking activities, designated uses, antidegradation, and variances to WQS. The EPA estimates the cost of labor from data on state government hourly wage rates (data are not available for tribes). The labor categories chosen as applicable to WQS regulatory revision efforts are Environmental Scientist, Department Manager, Environmental Engineer, and Economist. Given the 2012 labor rates for these categories, inflated to March 2013 dollars using the Bureau of Labor Statistics (BLS) Employment Cost Index for professional and related state and local government workers (116.0/115.0 = 1.01), and accounting for benefits using the BLS Employer Cost for Employee Compensation for state and local professional government workers (32.7% of total compensation is attributable to benefits), the EPA calculated an average hourly wage rate of $48.

The EPA estimates the incremental number of labor hours using historical information and data, and the historical knowledge and best professional judgment of EPA personnel with experience administering the WQS program. A total of 95 governmental entities are potentially affected by the proposed rule: 50 states, the District of Columbia, 6 territories, and 39 tribes that have authority to administer WQS programs. Rulemaking activities result in one-time (nonrecurring) burden and costs. Note that these one-time activities will occur over an initial three-year period. The proposed rule will also require affected entities to undertake the following activities each year: conduct use attainability analyses to determine the highest attainable use, review alternative analyses in antidegradation requests, review additional antidegradation requests for high quality waters, comply with new submission requirements for variances, and review additional variance renewal applications. Given the EPA's estimates of the number and frequency of labor hours associated with each of the proposed provisions, the total one-time incremental burden (during each of the first three years) associated with the proposed rule without requiring adoption of antidegradation implementation methods as WQS ranges from 9,500 hours to 47,500 hours, while the annual incremental burden ranges from 101,930 hours to 152,115 hours. Given an hourly wage rate of $48, these labor hours lead to total one-time costs (incurred during each of the first three years) of approximately $0.46 million to $2.28 million and annual costs of $4.84 million to $7.36 million. These incremental burden and costs are associated with a total of 32 one-time responses per year during the initial three-year period for rulemaking activities. In addition, the number of annual responses is 1,405 responses.

In addition to the proposed requirements included in this proposal, the EPA is considering and requesting comment on whether the EPA should include a requirement that antidegradation implementation methods be formally adopted as WQS and thus subject to the EPA's review and approval or disapproval. This additional requirement would require affected entities to develop or revise antidegradation implementation methods, and adopt antidegradation implementation methods as WQS resulting in one-time (nonrecurring) burden and costs. Including this

additional requirement, the total one-time incremental burden (during each of the first three years) associated with the proposed rule ranges from 43,100 hours to 114,700 hours, while the annual incremental burden remains the same ranging from 101,930 hours to 152,115 hours. Given an hourly wage rate of $48, these labor hours lead to total one-time costs (incurred during each of the first three years) of approximately $2.07 to $5.51 million and annual costs of $4.84 to $7.36 million. These incremental burden and costs are associated with a total of 32 one-time responses per year during the initial three-year period for rulemaking activities. In addition, the number of annual responses is 1,405 responses.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–OW–2010–0606. Submit any comments related to the ICR to the EPA and OMB. See ADDRESSES section at the beginning of this notice for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after September 4, 2013, a comment to OMB is best assured of having its full effect if OMB receives it by October 4, 2013. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities.

State and tribal governments responsible for administering or overseeing water quality programs may be directly affected by this rulemaking, as states and tribes may need to consider and implement new provisions, or revise existing provisions, in their WQS. Small entities, such as small businesses or small governmental jurisdictions, are not directly regulated by this rule. The EPA continues to be interested in the potential impacts of the proposed rule on small entities and welcomes comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or for the private sector in any one year. The EPA estimates total annual costs to states and tribes to range from $4,840,000 to $7,360,000. Thus, this rule is not subject to the requirements of sections 202 or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA).

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132 (Federalism)

Under section 6(b) of E.O. 13132, the EPA may not issue an action that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or the EPA consults with state and local officials early in the process of developing the proposed action. In addition, under section 6(c) of E.O. 13132, the EPA may not issue an action that has federalism implications and that preempts state law, unless the Agency consults with state and local officials early in the process of developing the proposed action.

The EPA has concluded that the action does not have federalism implications. The EPA is proposing changes to provide clarity and transparency in the WQS regulation that may require state and local officials to reevaluate or revise their standards. However, it will not impose substantial direct compliance costs on state or local governments, nor will it preempt state law. Thus, the requirements of sections 6(b) and 6(c) of the E.O. do not apply to this action.

Consistent with the EPA's policy, the EPA nonetheless consulted with state and local officials early in the process of developing the proposed action to allow them to provide meaningful and timely input into its development. In August and September 2010, the EPA consulted with representatives from states and intergovernmental associations to hear their views on the proposed regulatory changes. Participants expressed concern that the proposed changes may impose a resource burden on state and local governments, as well as infringe on states' flexibility in the areas of antidegradation and designated uses. The EPA's view is that such changes would generally codify the EPA's current practice and provide clear expectations to state and local regulators. Participants urged the EPA to ensure that states with satisfactory regulations in these areas are not unduly burdened by the proposed changes.

Keeping with the spirit of E.O. 13132, and consistent with the EPA's policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed action from state and local officials. In particular, the EPA requests comment on any provision in this proposed rule that state officials believe would impose an undue burden on state water quality standards programs.

F. Executive Order 13175

Subject to the E.O. 13175 (65 FR 67249, November 9, 2000), the EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

The EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. To date, 48 Indian tribes have been approved for treatment in a manner similar to a state (TAS) for CWA sections 303 and 401. Of the 48 tribes, 39 have federally approved WQS in their respective jurisdictions. All of these authorized tribes are subject to this proposed rule. However, this rule might impact other tribes as well because federal, state or authorized tribal standards may apply to waters adjacent to the tribal waters. The EPA consulted with tribal officials early in the process of developing this regulation to allow them to provide meaningful and timely input into its development. In August 2010, the EPA held a tribes-only consultation session to hear their views and answer questions of all interested tribes on the targeted areas the EPA is considering for regulatory revision. Tribes expressed the need for additional guidance and assistance in implementing the proposed rulemaking, specifically for development of antidegradation implementation methods and determination of the highest attainable use. The EPA has considered the burden to states and tribes in developing this proposal and, when possible, has chosen to provide sufficient direction and flexibility to allow tribes to spend resources addressing other aspects of their WQS programs. The EPA also intends to release updated guidance in a new edition of the WQS Handbook. The EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to E.O. 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in E.O. 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in E.O. 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

E.O. 12898 (59 FR 7629, February 16,1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not adversely affect the level of protection provided to human health or the environment. This proposed rulemaking does not directly establish water quality standards for a state or tribe. In addition, this proposed rulemaking is national in scope, and therefore is not specific to a particular geographic area(s).

List of Subjects in 40 CFR Part 131

Environmental protection, Indians—lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: August 20, 2013.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, the EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

■ 1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—General Provisions

■ 2. Amend § 131.2 by revising the first sentence to read as follows:

§ 131.2 Purpose.

A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. * * *

■ 3. Amend § 131.3 by revising paragraphs (h) and (j), and adding paragraph (m) to read as follows:

§ 131.3 Definitions.

* * * * *

(h) *Water quality limited segment* means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

* * * * *

(j) *States* include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of the water quality standards program.

* * * * *

(m) *Highest attainable use* is the aquatic life, wildlife, and/or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, as determined using best available data and information through a use attainability analysis defined in § 131.3(g).

■ 4. Amend § 131.5 by:

■ a. Revising paragraphs (a)(1) and (a)(2);

■ b. Redesignating paragraphs (a)(3) through (a)(5) as (a)(4) through (a)(6) and adding a new paragraph (a)(3); and

■ c. Revising paragraph (b).

The revisions and additions read as follows:

§ 131.5 EPA Authority.

(a) * * *

(1) Whether the State has adopted designated water uses which are consistent with the requirements of the Clean Water Act;

(2) Whether the State has adopted criteria that protect the designated water uses based on sound scientific rationale;

(3) Whether the State has adopted an antidegradation policy consistent with § 131.12(a), and if the State has chosen to adopt implementation methods, whether those implementation methods are consistent with § 131.12;

* * * * *

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (a)(6) of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (a)(6) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

* * * * *

Subpart B—Establishment of Water Quality Standards

■ 5. Amend § 131.10 by revising paragraph (g) introductory text and paragraphs (j), and (k) to read as follows:

§ 131.10 Designation of uses.

* * * * *

(g) Pursuant to § 131.10(j), States may designate or remove a use or a sub-category of a use as long as the action does *not* remove protection for an existing use, and the State can demonstrate that attaining the use is not feasible because of one of the six factors in this paragraph. If a State adopts new or revised water quality standards based on a use attainability analysis, the State shall also adopt the highest attainable use and the criteria to protect that use. To meet this requirement, States may, at their discretion, utilize their current use categories or subcategories, develop new use categories or subcategories, or adopt another use which may include a location-specific use.

* * * * *

(j) A State must conduct a use attainability analysis as described in § 131.3(g), and § 131.10(g), whenever:

(1) The State designates or has designated uses for a water body for the first time that do not include the uses specified in section 101(a)(2) of the Act, or

(2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act, to remove a sub-category of such a use, or to designate a sub-category of such a use which requires criteria less stringent than previously applicable.

(k) A State is not required to conduct a use attainability analysis whenever:

(1) The State designates or has designated uses for a water body for the first time that include the uses specified in section 101(a)(2) of the Act, or

(2) The State wishes to remove a designated use that is not specified in section 101(a)(2) of the Act, or designate a sub-category of a use specified in section 101(a)(2) of the Act which requires criteria at least as stringent as previously applicable.

■ 6. Amend § 131.11 by revising paragraphs (a)(2) and (b) introductory text to read as follows:

§ 131.11 Criteria.

(a) * * *

(2) *Toxic Pollutants.* States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 130).

(b) *Form of criteria:* In establishing criteria, States should:

* * * * *

■ 7. Amend § 131.12 by revising the section heading and paragraphs (a) introductory text and (a)(2), and adding paragraph (b) to read as follows:

§ 131.12 Antidegradation Policy and Implementation Methods.

(a) The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with the following:

* * * * *

(2) Where the quality of the waters exceed levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall ensure water quality adequate to protect existing uses fully. Further, the state shall ensure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

* * * * *

(b) The State shall develop and make available to the public statewide methods for implementing the antidegradation policy adopted pursuant to paragraph (a) of this section. A State's antidegradation implementation methods shall be designed to achieve antidegradation protection consistent with paragraph (a) of this section. Such methods must ensure that:

(1) High quality waters are identified on a parameter-by-parameter basis or on a water body-by-water body basis at the State's discretion, but must not exclude any water body from high quality water protection solely because not all of the uses specified in CWA section 101(a)(2) are attained; and

(2) The State will only make a finding that lowering high water quality is necessary, pursuant to paragraph (a)(2) of this section, after conducting an alternatives analysis that evaluates a range of non-degrading and minimally degrading practicable alternatives that have the potential to prevent or minimize the degradation associated with the proposed activity. If the State can identify any-practicable alternatives, the State must choose one of those alternatives to implement when authorizing a lowering of high water quality.

■ 8. Add § 131.14 to subpart B to read as follows:

§ 131.14 Water quality standards variances.

States may, at their discretion, grant variances subject to the provisions of this section and public participation requirements at § 131.20(b). A water quality standards variance (WQS

variance) is a time-limited designated use and criterion for a specified pollutant(s), permittee(s), and/or water body or waterbody segment(s) that reflect the highest attainable condition during the specified time period. WQS variances are water quality standards subject to EPA review and approval or disapproval and must be consistent with this section. Any such WQS variances adopted after *[effective date of the final rule]* must be consistent with this regulatory section.

(a) *Applicability:*

(1) All applicable WQS not specifically addressed by the WQS variance remain applicable.

(2)(i) Where a state adopts a WQS variance, the State regulations must continue to reflect the underlying designated use and criterion unless the State adopts and EPA approves a revision to the underlying designated use and criterion consistent with § 131.10 or § 131.11.

(ii) The interim requirements specified in the WQS variance are in effect during the term of the WQS variance and apply for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act for the permittee(s), pollutant(s), and/or water body or waterbody segment(s) covered by the WQS variance. For these limited purposes, the interim requirements will be the standards applicable for purposes of the CWA under 40 CFR 131.21(c)–(e).

(3) A WQS variance shall not be granted if the designated use and criterion addressed by the proposed WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

(b) *Submission Requirements:*

(1) A WQS variance must specify the following:

(i) Identifying information: A WQS variance must identify the pollutant(s), permittee(s), and/or the water body or waterbody segment(s) to which the WQS variance applies.

(ii) WQS that apply during a variance for CWA section 402 permitting purposes and in issuing certifications under section 401 of the Act: A WQS variance must specify:

(A) The highest attainable interim use and interim numeric criterion, or

(B) An interim numeric effluent condition that reflects the highest attainable condition for a specific permittee(s) during the term of the variance. Neither (A) nor (B) of this paragraph shall result in any lowering of the currently attained water quality unless a time-limited lowering of water quality is necessary during the term of a variance for restoration activities, consistent with paragraph (b)(2)(ii) of this section.

(iii) Date the WQS variance will expire: States must include an expiration date for all WQS variances, consistent with paragraph (b)(2) of this section. WQS variances must be as short as possible but expire no later than 10 years after state adoption.

(2) The State must submit a demonstration justifying the need for a WQS variance. For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such a use, the State must submit a demonstration that attaining the designated use and criterion is not feasible during the term of the WQS variance because:

(i) One of the factors listed in § 131.10(g) applies, or

(ii) Actions necessary to facilitate restoration through dam removal or other significant wetland or stream reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.

(3) For a waterbody variance, the state must identify and document any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) and location(s) specified in the WQS variance that could be implemented to make progress towards attaining the designated use and criterion. A State must provide public notice and comment for any such documentation.

(c) *Implementing variances in NPDES permits:* Consistent with paragraph (a)(2)(ii) of this section, a WQS variance serves as the basis of a water quality-based effluent limit included in a NPDES permit for the period the variance is in effect. Any limitations required to implement the WQS variance shall be included as conditions of the NPDES permit for the permittee(s) subject to the WQS variance.

(d) *WQS variance renewals:* EPA may approve a WQS variance renewal if the State meets the requirements of this section and provides documentation of the actions taken to meet the requirements of the previous WQS variance. For a waterbody WQS variance renewal, the state must also provide documentation of whether and to what extent BMPs have been implemented to address the pollutant(s) subject to the WQS variance and the water quality progress achieved during the WQS variance period. Renewal of a WQS variance may be disapproved if the applicant did not comply with the conditions of the original WQS variance, or otherwise does not meet the requirements of this section.

■ 9. Add § 131.15 to subpart B to read as follows:

§ 131.15 Compliance schedule authorizing provisions.

A State may, at its discretion and consistent with state law, authorize schedules of compliance for water quality-based effluent limits (WQBELs) in NPDES permits by including a compliance schedule authorizing provision in its water quality standards or implementing regulations. Any such provision is a water quality standard subject to EPA review and approval and must be consistent with sections 502(17) and 301(b)(1)(C) of the Act. Individual compliance schedules issued pursuant to such authorizing provisions are not themselves water quality standards. Individual compliance schedules must be consistent with CWA section 502(17), the state's EPA-approved compliance schedule authorizing provision, and the requirements of §§ 122.2 and 122.47.

Subpart C—Procedures for Review and Revision of Water Quality Standards

■ 10. Amend § 131.20 by revising paragraphs (a) and (b) to read as follows:

§ 131.20 State review and revision of water quality standards.

(a) *State Review.* The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards; in particular, any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Similarly, a State shall re-examine its water quality criteria to determine if any criteria should be revised in light of any new or updated CWA section 304(a) criteria recommendations to assure that designated uses continue to be protected. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process.

(b) *Public Participation.* The State shall hold public hearings for the purpose of reviewing or revising water quality standards, in accordance with provisions of State law and EPA's public participation regulation (40 CFR part 25). The proposed water quality

standards revision and supporting analyses shall be made available to the public prior to the hearing.

* * * * *

■ 11. Amend § 131.22 by revising paragraph (b) to read as follows:

§ 131.22 EPA promulgation of water quality standards.

* * * * *

(b) The Administrator may also propose and promulgate a regulation, applicable to one or more States, setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the Act. To constitute an Administrator's determination, such determination must:

(1) Be signed by the Administrator or his or her duly authorized delegate, and

(2) Contain a statement that the document constitutes an Administrator's determination under section 303(c)(4)(B) of the Act.

* * * * *

Subpart D—Federally Promulgated Water Quality Standards

■ 12. Amend § 131.34 by revising paragraph (c) to read as follows:

§ 131.34 Kansas.

* * * * *

(c) *Water quality standard variances.* The Regional Administrator, EPA Region 7, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of § 131.14 are met.

■ 13. Amend § 131.40 by revising paragraph (c) to read as follows:

§ 131.40 Puerto Rico.

* * * * *

(c) *Water quality standard variances.* The Regional Administrator, EPA Region 2, is authorized to grant variances from the water quality standards in paragraphs (a) and (b) of this section where the requirements of § 131.14 are met.

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COMMENTS OF FEDERAL WATER QUALITY COALITION ON THE PROPOSED RULE DEFINING "WATERS OF THE UNITED STATES"

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

November 14, 2014

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COMMENTS OF FEDERAL WATER QUALITY COALITION ON THE PROPOSED RULE DEFINING "WATERS OF THE UNITED STATES"

The Federal Water Quality Coalition ("FWQC" or "the Coalition") is submitting these comments on the Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule published by the Department of Defense, Department of the Army, Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (together "the agencies") on April 21, 2014. *See* 79 Fed. Reg. 22188 (Apr. 21, 2014) (hereinafter "proposed rule").

The Coalition is a group of industrial companies, municipal entities, property owners, and trade associations that are directly affected, or which have members that are directly affected, by regulatory and policy decisions made pursuant to the Federal Water Pollution Control Act (herein referred to as "the Clean Water Act," "the Act," or "CWA"). Coalition members for purposes of these comments are as follows: Alcoa, Inc., American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Iron and Steel Institute, American Petroleum Institute, Association of Idaho Cities, Auto Industry Water Quality Coalition, City of Superior (WI), Edison Electric Institute, Freeport-McMoRan Copper & Gold, Inc., General Electric Company, Hecla Mining Company, Indiana Coal Council, Kennecott Utah Copper LLC, Mid America CropLife Association, Monsanto Company, National Association of Home Builders, Orange County Sanitation District, Pharmaceutical Research and Manufacturers of America, Rayonier Advanced Materials, Rubber Manufacturers Association, San Juan Water Commission, Shell, Utility Water Act Group, Western Coalition of Arid States, Western States Petroleum Association, and Weyerhaeuser Company.

Coalition member entities – or their members – own and operate facilities located on or near lakes, rivers, streams, ponds, wetlands, ditches, swales, and other "waters" as defined by the proposed rule. Many member facilities may be located in a floodplain or riparian area, depending on how these terms are interpreted. Many member facilities have water management features on-site, including ditches, stormwater management features, fire water ponds, and cooling ponds. Some of these features may have an outlet that discharges to a lake, river, or stream. Many do not. Other member facilities store or manage drinking water. These storage

facilities generally do not have an outlet to a lake, river, or stream, but may interface with groundwater. Based on the expanded definition of waters of the U.S. in the proposed rule, and based on EPA's Draft Connectivity Report that asserts that all water is part of an aquatic ecosystem, FWQC members must now reevaluate the regulatory status of all water located on their property, or near their activities, irrespective of the location or disposition of that water. That reevaluation could affect their ability to use water management features, because under CWA section 402 discharges into waters of the U.S. must be permitted and meet water quality standards. That reevaluation also could affect FWQC members' ability to maintain those features, because under CWA section 404 dredging or filling a water of the U.S must be permitted and mitigated.

I. Executive Summary.

Since releasing the proposed rule for public comment, the agencies, particularly EPA, have been trying to defend it by asserting that the rule (1) is not an expansion of jurisdiction, (2) is supported by the statute and Supreme Court precedent, (3) is based on science, and (4) will clarify jurisdiction. These assertions do not withstand scrutiny. In fact, the proposed rule is a dramatic expansion of jurisdiction that is not supported by the statute, Supreme Court precedent, or the scientific studies referenced by the agencies. In addition, the proposed expansion has caused great uncertainty and confusion, as evidenced by the numerous requests for clarification that have been reported in the trade press. The result will be increased costs, regulatory burden, litigation, and reduced economic activity.

First, as discussed below, while the statute and the regulations have not changed, the agencies in the past have attempted to expand their jurisdiction through guidance and permit decisions, relying on theories such as use of water by migratory birds to argue that water has an impact on interstate commerce, or so-called connections created by ditches or even tire ruts to argue that water is part of or adjacent to a tributary system. Twice, the Supreme Court ruled that these attempts to expand jurisdiction because they exceed the agencies' authority under the CWA. Broad assertions of jurisdiction based on factors such as use of water by migratory birds were never lawful and do not establish a baseline against which the proposed rule can be compared. As such, the attempt to circumvent those Supreme Court decisions cannot be described as anything but an expansion of federal authority.

Second, the agencies fail to recognize that the CWA addresses only water quality. In doing so, they attempt to expand their authority to include jurisdiction based on movement of animals and protection of habitat or based on the storage or flow of water. These are invalid foundations for the proposed rule.

Third, the agencies attempt to expand their jurisdiction by citing an opinion joined by a single Supreme Court justice in the *Rapanos* case, Justice Kennedy's concurring opinion. In doing so they fail to respect the rule established by the Supreme Court that the judgment of the court is the narrowest grounds on which a majority of the judges who concurred in the decision agree.

Fourth, the proposed rule does not recognize the limits established in Justice Kennedy's opinion, taking language of his opinion out of context to justify a determination that, in the aggregate, virtually all water can be federally regulated. In fact, the agencies have issued a proposal that, by abandoning the protection of the quality of navigable waters as the basis for federal jurisdiction, goes beyond even the broad scope supported by the justices who dissented in the *Rapanos* case.

Fifth, even if the scientific studies cited by the agencies to support their rule could form a basis for expanded federal jurisdiction, the studies cited and the proposed rule do not align and the Draft Connectivity Report cannot support the factual determinations made by the agencies to justify the rule.

Sixth, the proposed rule lacks clarity and has caused confusion among regulators and the regulated community alike.

Seventh, the proposed expansion of federal jurisdiction will significantly increase litigation and the burden on the regulated community, state and local governments, and regulators.

Finally, the proposed rule is procedurally flawed due to the agencies' failure to comply with the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Federalism Executive Order.

For all of these reasons, we urge the agencies to withdraw the proposed rule and in dialogue with states and the regulated community to develop a new, narrower, and more focused proposal that articulates legal and technical rationales for regulating water under the CWA that are consistent

with the text, structure, and purpose of the CWA and Supreme Court precedent, and that reflects reasonable, constrained exercises of federal jurisdiction with deference to state control over land and water resources. The agencies must then make those rationales available for public comment.

II. The Proposed Rule Represents a Dramatic and Unfounded Expansion of Asserted Federal Authority.

The existing definition of waters of the U.S. relies on the authority granted by Congress to protect from pollution waters that can be used in interstate commerce. 42 Fed. Reg. 37122, 37127-28 (July 19, 1977).[1] In the proposed rule, the agencies have created an entirely new legal justification for federal jurisdiction. Instead of focusing on water pollution, the agencies have structured the proposed rule relying on the premise that the statute grants the agencies the authority to assert federal control over any water, located anywhere, if the agencies can find a "significant nexus" between that water and a navigable or interstate water or territorial sea. Building on this premise, the agencies assert that the "significant nexus" that creates federal jurisdiction can be based on the movement of animals and insects from one water body to another or on the flow or retention of water, irrespective of the movement of pollutants and the potential for those pollutants to impact navigable waters. Relying on ecological studies that show, unsurprisingly, that land, water, animals, and plants are all linked, the agencies claim the authority, as a threshold matter, to assert federal control over all waters. After claiming this jurisdiction, the agencies then create a few narrow exemptions. This is an expansion of jurisdiction.

A. Navigable and Interstate Waters and Territorial Seas.

The proposed rule asserts jurisdiction over navigable waters, interstate waters, and territorial seas. These waters are jurisdictional under the current regulatory definition of waters of the U.S. 33 C.F.R. § 328.3(a)(1), (2) & (6).

There is no question whether the Constitution or the CWA authorizes federal jurisdiction over navigable waters and territorial seas.[2] However, the proposed rule has created uncertainty

[1] The 1977 definition was reorganized in 1986. 51 Fed. Reg. 41206, 41216 (Nov. 13, 1986).
[2] Territorial seas are navigable. 33 C.F.R. § 328.4(a) ("The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.").

regarding what is considered "navigable." The preamble suggests that commercial navigation can be demonstrated by an experimental canoe trip taken solely to demonstrate navigability. 79 Fed. Reg. at 22253. While the Agencies cite *FPL Energy Marine Hydro L.L.C. v. FERC*, 287 F.3d 1151 (D.C. Cir. 1992), to support this position, such insignificant and speculative evidence does not meet the test set forth by the Supreme Court, which requires a traditional navigable water to be a "highway of commerce." *The Daniel Ball,* 77 U.S. 557 (1870). According to the Supreme Court, use as a highway is the "gist of the federal test." *Utah v. United States,* 403 U.S. 9 (1971). An experimental canoe trip fails that test. Further, under the Commerce Clause, Congress can regulate only those activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Again, a canoe trip fails that test.

The proposed rule also expands the agencies' asserted jurisdiction over interstate water by expanding the concept of "water." As discussed below, under the proposed rule "waters" can be dry; they can be erosion features on the land; they can be ponds or pools that are hydrologically isolated from any navigable water. Moreover, under the rule, if so-called "water" crosses state lines, it is automatically subject to federal jurisdiction, and other "water" connected to this "interstate water" also would be *per se* jurisdictional.

The agencies cite a number of cases to support jurisdiction over interstate waters. 79 Fed. Reg. at 22256-57. But each of the cases cited involved waters that were traditional navigable waters and the geographic scope of federal Clean Water Act jurisdiction was not a question presented to the Court. *See Illinois v. Milwaukee*, 406 U.S. 91 (1972) (Lake Michigan); *City of Milwaukee v. Illinois,* 451 U.S. 304 (1981) (Lake Michigan); *International Paper v. Ouellette*, 479 U.S. 481 (1987) (Lake Champlain); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (a tributary of the Illinois River twenty-two miles from the state border). We are not aware of any case where the issue of federal jurisdiction over interstate water that was not traditional navigable water was litigated. We also are not aware of any jurisdictional determination issued by the Corps finding federal jurisdiction over an interstate wetland.

The proposed expansion in jurisdiction over navigable and interstate water has created tremendous uncertainty regarding the status of a ditch or pond or wetland that has no connection to navigable water but lies on a state boundary.

B. All "Tributaries."

The proposed rule asserts jurisdiction over all tributaries of navigable or interstate water or territorial seas or impoundments thereof. Tributaries are jurisdictional under the current regulatory definition of waters of the U.S. 33 C.F.R. § 328.3(a)(5). However, the term "tributaries" is not currently defined.

1. Scope of Proposed Definition.

The proposed rule expands jurisdiction over this category of water by proposing to define tributaries to include features on the land where an EPA or Corps employee believes he or she can discern a bed, bank, and ordinary high water mark (OHWM), even if these features disappear underground, as long as these features can be identified upstream of where they disappear.[3] And even these features would not be required for a wetland, lake, or pond to qualify as a tributary. A tributary would include wetlands and manmade conveyances. A tributary must contribute flow to a navigable or interstate water or territorial sea, but there are no temporal limits on how often a tributary contributes such flow. It could take years, decades, or even centuries for flow to reach a navigable water. There also are no geographic limits on how distant the flow that is *per se* jurisdictional is from navigable water and no need to show that the flow could carry pollutants to navigable water. Finally, given the fact that a tributary that disappears remains a tributary, it appears that the flow can be contributed through groundwater, which can take centuries to recharge to surface water.[4]

2. Impact of Expansion on States.

The proposal to include ephemeral waters and other minor features as federally regulated waters will require states to expand their regulatory programs.[5] For example, Tennessee's approved

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[3] "A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." Proposed 33 C.F.R. § 328.3(c)(5).

[4] Nadeau, T.-L., and M. C. Rains, Hydrological connectivity of headwaters to downstream waters: Introduction to the featured collection. Journal of the American Water Resources Association 43:1-4 (2007), at 126 (a survey article cited in the Draft Connectivity Report).

[5] *See* Report on State Definitions, Jurisdiction and Mitigation Requirements in State Programs for Ephemeral, Intermittent and Perennial Streams in the United States (April 2014) (attached). EPA's ATTAINS database tracks TMDL development and shows a total of 3,533,205 river and stream miles in the United States, based on data reported by states using the National Hydrography Dataset (NHD). Available at

water quality standards program excludes "wet weather conveyances," from the definition of "stream." Under Tennessee law, wet weather conveyances are "man-made or natural watercourses, including natural watercourses that have been modified by channelization, (a) that flow only in direct response to precipitation runoff in their immediate locality, (b) whose channels are at all times above the ground water table, (c) that are not suitable for drinking water supplies; and (d) in which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months."[6]

Kansas also excludes ephemeral waters from its approved program.[7] In comments on the agencies' 2011 guidance, which the proposed rule largely mirrors, Kansas noted that expanding federal jurisdiction to include ephemeral water would bring approximately 100,000 miles of dry erosion features into Kansas' state clean water act program. Kansas then would be compelled to develop water quality standards and total maximum daily loads for "what amounts to surface depressions that function only during sufficient precipitation."[8] In comments on the Proposed Rule, Kansas reiterates its concern that the federal agencies' quest to reduce their own burden will greatly increase state workloads.[9]

Missouri provides another example. After an extensive stakeholder process, the State of Missouri recently adopted changes to its stream classification program, expanding it to include all streams represented in the 1:100,000 scale of the USGS National Hydrology Dataset.[10] The

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http://ofmpub.epa.gov/waters10/attains_nation_cy.control. The NHD is a database that identifies stream segments that comprise the Nation's surface water drainage system and is based on the USGS 1988 1:100,000-scale Digital Line Graph (DLG) hydrography dataset integrated with reach-related information from the USEPA Reach File Version 3.0-Alpha release (RF3-Alpha). *See* http://water.epa.gov/scitech/datait/tools/waters/docs/nhd_model.cfm. Most ephemeral features do not show up at this scale and thus are not reported in these data bases.

[6] T.C.A. 69-3-1-3(43); TDEC Rule 1200-04-03-.04.

[7] K.S.A. 82a-2001(a)(2).

[8] July 14, 2011 Comments of the State of Kansas on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act (attached).

[9] October 23, 2014, comments filed by Governor Brownback, et al.

[10] *See* 10 CSR 20-7.031(2)(A) (adopting fishable, swimmable standards for: "1. All perennial rivers and streams; 2. All streams with permanent pools; 3. All rivers and streams included within the 1:100,000 scale National Hydrography Dataset (NHD) described in subsection (1)(R) of this rule.") (attached) This decision expanded the miles of classified streams in Missouri from 25,025 to a total of 109,870. Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards (June 3, 2011, at 26 (attached).

decision to exclude smaller streams (those represented at the 1:24,000 scale) was based on the state's determination that the presence of aquatic communities in such small streams was not demonstrated and, if they did exist, could be added on a case-by-case basis.[11]

3. Evolution of the expansion of "tributary" jurisdiction.

The agencies did not originally assert jurisdiction under the CWA over ephemeral water features. In fact, their assertion of authority over ephemeral water is relatively recent. In 1975, the preamble to the Corps' interim final regulations specified that the upstream limit of jurisdiction is the headwaters, or point where average annual stream flow is five cubic feet per second.[12] In 1977, the preamble to the final Corps regulations specified that jurisdiction extends to the entire surface tributary system.[13] In 1994, the Corps Baltimore District issued a guidance letter specifying that ephemeral waters act as rain gutters, conveying water for a brief period of time following rain events. As such, they do not ordinarily develop an ordinary high water mark that would indicate they are part of a tributary system. Consequently, they were not regulated.[14] However, in 2000, the Corps Nationwide Permits preamble specified that federal jurisdiction extends to ephemeral streams, provided they have an ordinary high water mark, overturning the Baltimore District's presumption that ephemeral streams would not have an ordinary high water mark.[15] This assertion of jurisdiction led to abuses.[16] Moreover, even though the Corps took this position in 2000, as discussed below, both the plurality and Justice Kennedy were not persuaded that an ordinary high water mark is a basis for jurisdiction.

The agencies also did not assert authority over ditches until relatively recently. In fact, the 1977 Corps definition of waters of the U.S. expressly excluded "manmade nontidal drainage and

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[11] Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards (June 3, 2011), at 35 (hereinafter MO Regulatory Impact Report).

[12] 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).

[13] 42 Fed. Reg. at 37,129.

[14] Branch Guidance Letter, COE, Baltimore District, CENAB-OP-R, No.95-01, Oct. 17, 1994 ("Project Managers are frequently required to determine the upstream limits of regulatory jurisdiction, including differentiating between intermittent streams, which are regulated (33 CFR § 328.3(a)(3)), and ephemeral streams, which are not regulated.") (attached). This has been relied upon by numerous entities. *See* attached Montgomery County, MD guidance.

[15] 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).

[16] For example, in a March 30, 2004, hearing of the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure on "Inconsistent Regulation of Wetlands and Other Water," one witness testified that a Corps official used a 25-year old skidder rut to connect a wetland to a ditch to a stream. House Doc. No. 108-58 at 81-82 (attached). Under the proposed rule, Corps officials would remain free to conclude that a skidder rut has an OHWM and therefore is part of the tributary system.

irrigation ditches excavated on dry land" from the definition of tributaries, stating that they "are not considered waters of the United States under this definition." 33 C.F.R. § 323.2(a)(3)(1977).[17]

In addition, the agencies have not traditionally asserted jurisdiction over water based on subsurface connections that are not diversions of former surface streams and have never done so categorically.[18] For example, a 2001 policy issued by the Galveston District of the Corps of Engineers states that it does not use groundwater connections to establish jurisdiction.[19] Moreover, directly contradicting the position in the proposed rule, in litigation, EPA has taken the position that identification of a connection to surface water via groundwater must be made on a site-specific basis.[20]

Yet the agencies now claim that all waters proposed to be defined as "tributaries," including ephemeral waters, ditches, and waters with subsurface connections, have a "significant nexus" to navigable or interstate waters or the territorial sea and therefore are *per se* jurisdictional. This is an expansion of jurisdiction.

This proposed expansion of the definition of tributary has created tremendous uncertainty regarding the status of land that exhibits erosion features from wind or water even if dry for many years, the status of water conveyance systems, the status of water drainage systems, the status of ephemeral streams, and the status of features that have no continuous surface connection to navigable water.

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[17] "We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 208 and 402." 42 Fed. Reg. at 37127. Even though the preamble stated that the regulations were merely reorganized, the 1986 definition of waters of the U.S. moved this clarification from rule language to preamble language and reserved the right to regulate ditches on a case by case basis. 51 Fed. Reg. at 41217.

[18] Waters and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (GAO-04-297), at 24 (discussing using connections through subsurface closed conveyances to establish jurisdiction only if the pipe replaced a historic stream) (attached). No such limitation appears in the proposed rule.

[19] Adjacent/Isolated Criteria, Galveston District Policy Number 01-001 (attached).

[20] *Conservation Law Foundation et al. v U.S. EPA, et. al.*, Case No. 1:10-cv-11455-MLW, Memorandum in Support of Defendants' Motion for Summary Judgment, at 20-21 (noting that a hydrological connection to surface water via groundwater is a site-specific determination) (attached).

C. Adjacent Waters.

The current regulations assert jurisdiction over wetlands that are adjacent to waters (other than waters that are themselves wetlands) that are considered jurisdictional waters of the U.S. 33 C.F.R. § 328.3(a)(7). "Adjacent" is defined in current regulations as "bordering, contiguous, or neighboring."

The proposed rule expands this category in two ways. First, the proposed rule would assert jurisdiction over "*all waters*" (not defined), rather than wetlands only, that are "adjacent" to a navigable or interstate water or territorial sea or an impoundment or tributary thereof.[21] Second, the proposed rule expands the definition of "adjacent" by adding a definition of "neighboring" that includes all water located in (1) a "floodplain" (defined only as an area formed by sediment deposition from inland or coastal waters under "present climactic conditions" (not defined) and that is inundated during periods of "moderate to high flows" (not defined)), (2) a "riparian area" (defined as an area where surface or subsurface hydrology directly influences ecological processes and plant and animal community structure), (3) an area that has a shallow subsurface hydrologic connection (not defined), or (4) an area with a confined surface hydrologic connection (not defined – apparently less than a tributary, but could be a non-jurisdictional feature such as a rill, gully or non-wetland swale) to such water.[22]

These new definitions do not reflect current practice. Currently, not all waters in a floodplain are considered jurisdictional.[23] Currently, "riparian area" is a concept used in mitigation, not jurisdiction. In its Nationwide Permit Program, the Corps defines "riparian area" as land.[24] Recognizing the ecological value of riparian areas, under Condition 23 of the Nationwide Permits, restoration of a riparian area can be used to mitigate impacts to wetlands, but riparian areas and wetlands are not one and the same.[25] Currently, Corps districts do not consistently use

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[21] Current law exercises federal jurisdiction over adjacent wetlands only. *See San Francisco Baykeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007) (holding that mere adjacency provides a basis for CWA coverage only when the relevant water body is a "wetland").

[22] 79 Fed. Reg. at 22262-63 (proposed 33 C.F.R. § 328.3).

[23] GAO-04-297, at 17-18 (identifying only one Corps district that used location in the floodplain alone, without other evidence, as a basis for establishing jurisdiction over a wetland). Even in that District (Galveston) jurisdiction was not automatic. *See* Galveston District guidance, *supra* n. 19.

[24] 77 Fed. Reg. 10184, 10289 (Feb. 21, 2012) ("Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines.").

[25] *Id.* at 10285.

surface connections outside a defined channel to establish jurisdiction.[26] And, as discussed above, even if a subsurface connection could be used to establish jurisdiction, proximity to navigable water would be highly relevant.[27]

In contrast, in the proposed rule, the agencies claim that all water features that meet the proposed definition of "adjacent waters" have a "significant nexus" to navigable or interstate waters or the territorial sea and therefore are *per se* jurisdictional. This is an expansion of federal jurisdiction.

The proposed change from "adjacent wetlands" to "adjacent waters" and broad expansion of the concept of "adjacent" have caused tremendous uncertainty regarding the status of wetlands, ponds, water storage systems, and water conveyances that lie in a floodplain or riparian area or that have a groundwater connection, however distant, or where water can move overland to a navigable water.

D. Other "Waters."

Current regulations assert jurisdiction over "other waters" the use, degradation, or destruction of which could affect interstate or foreign commerce, and provide specific examples of water bodies that may be included in this category. 33 C.F.R. § 328.3(a)(3). The proposed rule would assert jurisdiction over all "other waters" (not defined) that alone or in combination with other similarly situated waters have a significant nexus to a navigable or interstate water or territorial sea. "Significant nexus" is defined as a nexus that is more than speculative or insubstantial.[28] Once the "significant nexus" is established for a single water, or a category of waters that are "similarly situated," all are *per se* jurisdictional.

As with ditches and ephemeral waters, the history of the expansion of federal jurisdiction over isolated waters is instructive. In the early 1970s, the Corps did not attempt to assert jurisdiction over isolated waters. In 1975, the Corps' interim final regulations regulated navigable intrastate lakes up to their ordinary high water mark, if they were utilized in interstate commerce.[29] In 1977, the final Corps regulations regulated isolated lakes and other isolated intrastate waters if

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[26] GAO-04-297, at 18. It is unclear what is meant by the term "confined" in defining a surface connection, and whether or not that requires a channel.
[27] *See supra* notes 18-20 and accompanying text.
[28] 79 Fed. Reg. at 22263 (proposed 33 C.F.R. § 328.3(c)(7)).
[29] 40 Fed. Reg. at 31324.

the degradation or destruction of the waters could affect interstate commerce.[30] Further expansion of jurisdiction over isolated waters occurred in the 1980s. In 1985, the EPA General Counsel issued a memorandum stating that waters that are used or would be used by migratory birds or endangered species are regulated (Migratory Bird Rule).[31] In 1986, the preamble to a final Corps regulation included a recitation of the Migratory Bird Rule.[32] In 1989, in *Tabb Lakes v. U.S*, the Fourth Circuit held that the Migratory Bird Rule is invalid because it was illegally promulgated without notice and comment rulemaking.[33] However, federal regulators continued to apply it.[34] In 1997, in *U.S. v. Wilson*, the Fourth Circuit went further and held that asserting jurisdiction over isolated waters merely because they "could affect" interstate commerce is invalid because it goes beyond the authority provided by the Commerce Clause, which requires a showing of actual, substantial, effects.[35] In 1998, the Agencies issued a memorandum instructing federal regulators to follow the *Wilson* case only in the Fourth Circuit, and to continue to assert jurisdiction over isolated waters in other parts of the country, even absent proof of actual use in interstate commerce.

> Of course, for a particular 'isolated,' intrastate water body, Corps or EPA field staff may be able to document only some relatively small-scale connections between that water body and interstate and foreign commerce (*e.g.*, that the isolated water body serves as habitat for migratory birds). Nonetheless, EPA and the Corps believe, and if necessary will demonstrate, that each of these classes of interstate commerce-related activities associated with isolated waters (*e.g.*, migratory bird usage of isolated waters), taken as a whole or in the aggregate, has a substantial effect on interstate or foreign commerce.....[36]

As discussed below, in 2001, in *SWANCC,* the Supreme Court invalidated the use of the Migratory Bird Rule as a basis for federal jurisdiction.

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[30] 42 Fed. Reg. at 37127-28.
[31] Memorandum from Francis S. Blake, EPA General Counsel, to Richard E. Samderson, Acting Assistant Administrator, EPA Office of External Affairs (Sept. 12, 1985).
[32] 51 Fed. Reg. at 41217.
[33] *Tabb Lakes, Ltd. V. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).
[34] Memorandum from John Elmore, Department of the Army, Directorate of Civil Works, and David Davis, EPA, Office of Wetlands Protection, Re: *Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of Tabb Lakes v. United States* (January 24, 1990).
[35] *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).
[36] Robert Wayland, Office of Water, EPA, and Charlie Hess, Director of Civil Works, U.S. Army Corps of Engineers, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404* Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson (May 29, 1998).

The agencies have replaced the Migratory Bird Rule with "significant nexus." This rationale for federal jurisdiction is an inappropriate outgrowth of the Kennedy opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), discussed below.

Under the proposed rule a significant nexus can be based on the movement of biota, so any water could be considered jurisdictional if used by a bird, insect, amphibian, or mammal. If any single water is considered jurisdictional using that criterion, then all waters that are "similarly situated" (*i.e.*, perform the same functions, such as ponds, wetlands, swales, *etc.*) also are jurisdictional. Thus, any water located anywhere could be considered jurisdictional, and the landowner has to worry not just about water on his or her own property, but must also be concerned with the status of water anywhere in the watershed that could be considered "similarly situated."[37] This is an expansion of federal jurisdiction that has caused enormous uncertainty.

E. Exemptions.

The agencies have proposed to recodify exemptions from the current regulations and to codify additional exemptions drawn from language in the preambles of prior rulemakings. However, whether the exemptions were stated previously in rule language or preamble language, they are now exemptions from a *new* underlying rule that is vastly different from the current regulatory definitions of waters of the U.S. This fact has led to confusion regarding what waters are covered by the exemptions.

For example, the proposed exemptions drawn from prior rulemaking preambles describe features that the prior definitions of waters of the U.S. did not reach, because the features *did not qualify* as jurisdictional water under the terms of the prior definitions. However, but for an exemption, the proposed rule would regulate most water features. Thus, the proposed exemptions likely will be interpreted narrowly and will apply only to the features described in each exemption. Further, no explanation for the exemptions is provided other than "longstanding practice" and the observation in the plurality opinion in *Rapanos* that there were certain features that were not primarily the focus of the CWA (*citing* 547 U.S. at 734). 79 Fed. Reg. at 22218. Unfortunately, the explanations from the preambles of prior rules may no longer be relevant because the agencies have changed the underlying definition of waters of the U.S. We agree that there are

[37] *See* 79 Fed. Reg. at 22211; 79 Fed. Reg. at 22263 (proposed 33 C.F.R. § 328.3(c)(7) (defining significant nexus)).

many waters that are not the primary focus of the CWA. The agencies should articulate a clear rationale for distinguishing between waters that are federally regulated and waters that are left to state jurisdiction and expand the exemptions based on that rationale. Their failure to do so has led to significant uncertainty.

1. Waste Treatment Systems and Prior Converted Cropland.

Current regulations include exemptions for waste treatment systems, including impoundments "designed to meet the requirements of the Clean Water Act," and for prior converted croplands. While the words of the wastewater treatment exemption are not being changed, the agencies are proposing to add a comma before the "designed to" clause, potentially applying that clause to all waste treatment systems, not just impoundments. This change would create significant uncertainty about the scope of the long-standing waste treatment system exemption.

2. Ditches.

Instead of being generally excluded, under the proposed rule ditches will be considered tributaries and therefore waters of the U.S. unless they meet the terms of an exemption. Under the proposed rule a ditch is exempt *only if* (1) it is excavated (not a natural feature such as an erosion feature) wholly in uplands, drains only uplands (uplands is not defined), and has less than perennial flow (meaning that during normal years it does not hold water all 12 months of the year); or (2) the ditch does not contribute flow to a water of the U.S., directly or indirectly. It is not clear if "contribute flow" means surface flow only or both surface flow and groundwater.

The agencies claim that with these exclusions for certain ditches, they have narrowed the definition of waters of the U.S.[38] This claim is not true. In fact, the proposed rule constitutes the first time that the regulatory definition has expressly included ditches.

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[38] In a blog posted on EPA's website, former Acting Assistant Administrator for Water, Nancy Stoner, says: "For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, that drain only dry lands, and don't flow all year, are not "waters of the U.S." This includes many roadside ditches, and many ditches collecting runoff or drainage from crop fields. Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches." http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/. This statement does not accurately describe the history of attempts to regulate ditches (which is recent) or the scope of the proposed rule (which includes far more ditches than human-altered streams).

As discussed below, the ditch exemptions have created significant uncertainty about the status of ditches because, under the structure of the rule, all ditches that are not excluded are waters of the U.S.

3. Artificial lakes or ponds.

Under the proposed rule, artificial lakes or ponds that are *used exclusively* for purposes such as stock watering, irrigation, settling basins, or rice growing are not waters of the U.S. Expressly excluding only specific types of artificial lakes and ponds has created significant uncertainty about the status of other artificial lakes and ponds not explicitly included in the exemption language, such as cooling ponds and fire water retention ponds.

4. Artificial pools.

Under the proposed rule, artificial reflecting pools or swimming pools created by excavating and/or diking dry land are not jurisdictional. Limiting the exemption to reflecting or swimming pools has created significant uncertainty about the status of other artificial pools that can hold water, such as concrete tanks and even secondary containment structures.

5. Small ornamental waters.

Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons are not jurisdictional. Limiting the exemption to small ornamental waters has created significant uncertainty about the status of large ornamental waters or ornamental waters that are not primarily aesthetic, such as waters that both capture stormwater and are ornamental.

6. Water-filled depressions.

Water-filled depressions created incidental to construction activity are not jurisdictional. Limiting the exemption to depressions created incidental to construction activity has raised significant uncertainty about the status of other depressions on the ground that could collect water, even tire ruts.

7. Groundwater.

Groundwater, including groundwater drained through subsurface drainage systems, is not jurisdictional. We appreciate the affirmation that the CWA does not regulate groundwater.

However, the frequent use of groundwater in the proposed rule to establish a jurisdictional connection has caused significant confusion and concern. For example, the definition of "tributary" includes water that disappears underground and recharges surface water downstream. It is unclear whether the "tributary" retains its status as a water of the U.S. while underground.

8. Gullies and rills.

Under the proposed rule, gullies and rills would not be jurisdictional. However, neither term is defined. According to the preamble: "Gullies are relatively deep channels that are ordinarily formed on valley sides and floors where no channel previously existed." "Rills are formed by overland water flows eroding the soil surface during rain storms."[39] By contrast, "ephemeral streams" often would be jurisdictional. But again, although the term is used 75 times, the preamble does not define it. EPA's Draft Connectivity Report defines "ephemeral stream" as: "A stream or river that flows briefly in direct response to precipitation; these channels are above the water table at all times."[40] As a result, gullies and rills could be considered ephemeral streams. All are erosion features that carry water only when it rains. The agencies recognize they have not clearly distinguished between these features, even though one is categorically jurisdictional and the others are categorically exempt.[41] Even if not jurisdictional themselves, gullies and rills may be used to establish a connection and turn isolated water into jurisdictional water.[42] The expansion of jurisdiction to reach ephemeral streams, the lack of definitions, and the use of gullies and rills to make jurisdictional determinations have caused significant uncertainty about the status of these features.

9. Non-wetland swales.

Non-wetland swales are not jurisdictional. However, it is difficult to distinguish a swale from an ephemeral stream. According to the agencies: "Swales are distinct from streams in that they are

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[39] 79 Fed. Reg. at 22218.

[40] *See* Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013 External Review Draft, EPA/600/R–11/098B) (hereinafter, "Draft Connectivity Report"), at Glossary.

[41] "The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional." 79 Fed. Reg. at 22219.

[42] "Examples of confined surface water hydrologic connections that demonstrate adjacency are swales, gullies, and rills." 79 Fed. Reg. at 22210. It appears that the skidder rut that was described in Congressional testimony could meet this definition and be used to establish jurisdiction. *See supra* n. 16.

non-channelized, shallow trough-like depressions that carry water mainly during rainstorms or snowmelt." 79 Fed. Reg. at 22219. Like gullies and rills, the agencies propose to use non-wetland swales to establish connections that would make other water jurisdictional. EPA recognizes that the distinction between a non-jurisdictional swale and a jurisdictional ephemeral stream is very vague. *Id.* As a result, landowners will not know if a swale on their property is considered a jurisdictional water or not. As with gullies and rills, the expansion of jurisdiction to reach ephemeral streams, the lack of definitions, and the use of non-wetland swales to make jurisdictional determinations have caused significant uncertainty about the status of these features.

10. Puddles

The version of the proposed rule that was submitted to OMB for interagency review included an exemption for puddles.[43] However, the agencies dropped that exemption before publishing the proposed rule in the *Federal Register*. According to the agencies, the exemption was deleted because "puddles" is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood.[44] The agencies also claim that:

> In addition, one commonly understood meaning for the term "puddle" is a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event. Such a puddle cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground. Puddles of this sort obviously are not, and have never been thought to be, waters of the United States subject to CWA jurisdiction. Listing puddles also could have created the misapprehension that anything larger than a puddle was jurisdictional. That is not the agencies' intent. *Id.*

Unfortunately, because the agencies are proposing to assert jurisdiction over ephemeral features, puddles may in fact be viewed as jurisdictional if not excluded. Furthermore, because the agencies are proposing to establish jurisdiction based on biological connections, any water where biota, even insects, spend a part of their lifecycle, could be considered connected in a significant way to a navigable or interstate water or territorial sea. Moreover, the preamble language quoted above suggests that standing water that does not sink into the ground in a brief period of time

[43] *See* OMB Review Draft, EPA-HQ-OW-2011-0880-0007.
[44] 79 Fed. Reg. at 22218.

could be a water of the U.S. Of course, how quickly water sinks into the ground is a function of how saturated the ground is already. Finally, EPA describes vernal pools as "puddles,"[45] claims the authority to exercise jurisdiction over vernal pools on a case-by-case basis, and seeks comment on whether they should, as a category, be waters of the U.S.[46] Unless the agencies provide a rationale to distinguish between what is or is not "thought to be" waters of the U.S., all adjacent waters, including puddles, could become subject to federal jurisdiction, causing significant confusion and concern.

III. The Proposed Rule is Not Supported by the Text, Structure, or Purpose of the Clean Water Act or Supreme Court Precedent.

The agencies justify their assertion of jurisdiction over tributaries, adjacent waters, and other waters based solely on a "significant nexus" to navigable or interstate water or a territorial sea. "Significant nexus" is defined as an effect that is more than speculative or insubstantial on the chemical, physical, or biological integrity of a navigable or interstate water or territorial sea.[47] To support their determination that all "tributaries," all "adjacent waters," and certain "other waters" have a so-called "significant nexus," the agencies evaluated scientific studies, many of which examined biological connections between bodies of water, or water retention, *without examining impacts on the quality of navigable water*. Jurisdiction based on these studies is not supported by the text, structure, or purpose of the CWA, or by Supreme Court precedent.

A. The Clean Water Act, Which Authorizes the Protection of the Quality of Navigable Waters, Does Not Support Jurisdiction Based on the Flow of Water or on Biota.

The CWA establishes the objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, defined as the navigable waters of the United States. CWA § 101(a). To achieve this objective, the Act focuses on setting and achieving *water quality* goals for each jurisdictional water body. The Act does not more broadly seek to control human activities, land and water resource use, or the management of species and their habitat.

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[45] http://water.epa.gov/type/wetlands/vernal.cfm
[46] 79 Fed. Reg. at 22216.
[47] *See supra* n. 28.

The text of the CWA declares that, "*consistent with the provisions of the Act,* it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 and it is the national goal that by July 1, 1983, wherever attainable, *water quality be achieved which provides for* the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." CWA § 101(a)(1)-(2) (emphasis added).

EPA or states with delegated authority under the Act are required to set water quality goals based on attainable uses of each water body. CWA § 303. To meet these water quality goals, the Act prohibits the discharge of pollutants except where authorized. CWA § 301(a). The discharge of pollutants is regulated under section 402, and the discharge of dredge and fill material is regulated under section 404. CWA §§ 402, 404.

All of these authorities are related to the protection of water quality. In contrast, Congress did not, in the CWA, give the agencies any authority to control water supply[48] or to protect species and their habitat.[49] In fact, Congress added section 101(g) to the Act in the 1977 amendments for the express purpose of preventing federal agencies from using the CWA to expand their authority into areas beyond water quality. According to its sponsor:

> This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. *This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only.*[50]

Despite this limitation on their authority, the agencies purport to assert jurisdiction over water features that restrict flow or hold water. For example, EPA cites irrigation, flood control, and

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[48] CWA § 101(g). "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

[49] Even the Endangered Species Act, which does protect species and their habitat, applies only to certain species. *See* 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.").

[50] 123 Cong. Rec. &. S19677-78, (daily ed., Dec. 15, 1977) (emphasis added) (floor statement of Senator Wallop).

farm ponds as examples of features that can be "connected" to downstream water due to the fact that they can hold water.

> Nearly all river networks in prairie regions have been altered by impoundments for irrigation storage and flood control, from small farm ponds in headwaters to large reservoirs on river mainstems (Smith et al., 2002; Galat et al., 2005; Matthews et al., 2005). Decline in flood magnitude, altered flow timing, and reduced flow variability and turbidity are evident in many prairie rivers compared to historically documented conditions (e.g., Cross and Moss, 1987; Hadley et al., 1987; Galat and Lipkin, 2000).[51]

Based on this rationale, the agencies could, through permitting, control the maintenance and use of any structure that is used to hold water, thereby controlling the supply of water. This would be a radical expansion in CWA authority.

Despite the limits of their authority, the agencies also purport to assert jurisdiction over water based on so-called "biological connectivity." According to the agencies:

> Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semi-aquatic species present in the ''other water'' and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the ''other water,'' and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the ''other water.''[52]

The Draft Connectivity Report states it this way:

> These movements can result from passive transport by water, wind, or other organisms (e.g., birds, terrestrial mammals), from active movement with or against water flow (e.g., upstream fish migration), or from active movement over land (for biota capable of terrestrial dispersal) or through the air (for birds or insects capable of flight). Thus, biological connectivity can occur within aquatic ecosystems or across ecosystem or watershed boundaries, and it can be multidirectional. For example, biota can move downstream from perennial, intermittent, and ephemeral headwaters to rivers, upstream from estuaries to rivers to headwaters, or laterally between floodplain wetlands, geographically isolated wetlands, rivers, lakes, or other water bodies.[53]

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[51] Draft Connectivity Report, at 4-45.
[52] 79 Fed. Reg. at 22214.
[53] Draft Connectivity Report, at 3-39.

Based on this rationale, the agencies could assert jurisdiction over almost any water located anywhere based on its use by biota. As discussed below, none of the Supreme Court cases reviewing CWA jurisdiction have ever suggested that the CWA addresses anything other than water quality.[54] Regulating water based on use by biota would be a radical expansion of CWA authority.

In a brief filed on September 11, 2014, EPA recognized the importance of avoiding an interpretation of the CWA that would assert expansive federal control over water use and allocation. According to EPA:

> The Act is a complex statute with a "welter of consistent and inconsistent goals." Catskill I, 273 F.3d at 494. To be sure, the Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 526 (1987). As this Court has acknowledged, the CWA also reflects Congress's desire to limit interference with traditional state control of water use and allocation. Catskill II, 451 F.3d at 79. Thus, the statute states "the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. 33 U.S.C. § 1251(g). More broadly, Congress emphasized its policy "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of . . . water resources . . . ." Id. § 1251(b). Elsewhere in the statute, Congress prohibits construction of the Act "as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Id. § 1370(2). These provisions do not, of their own force, "limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 720-21 (1994). They do, however, show that one of Congress's purposes was to avoid interference with state water allocation decisions.[55]

We agree. Unfortunately, the proposed rule does not respect these limits.

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[54] *See infra* pp. 23-28.

[55] *Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. EPA*, Docket No. 14-1823 (2d Cir), Brief for Defendant EPA, et al. (Sept. 11, 2014), at 29-30 (attached).

B. Jurisdiction Based on a "Significant Nexus" is Not Supported by Supreme Court Precedent.

In contrast to the proposed rule, in a series of decisions starting with *Riverside Bayview*, 474 U.S. 121 (1985), the Supreme Court interpretations of the Clean Water Act have analyzed the scope of federal jurisdiction based on impacts to the quality of navigable waters.

1. *Riverside Bayview.*

In *Riverside Bayview*, the Court found that a wetland that directly abuts a water of the U.S. is a continuation of such water. In doing so, the Court approved the rationale provided by the Corps when it included adjacent wetlands in the 1977 definition of waters of the U.S. *See* 474 U.S. at 134 ("the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of *this* aquatic system," *quoting* 42 Fed. Reg. 37128 (1977) (emphasis added)). As the Court noted:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which *water ends and land begins*. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs--in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.[56]

Thus, in situations where a wetland abuts a water of the U.S., *Riverside Bayview* stands for the proposition that the landward extent of that particular water of the U.S. includes the wetland. It does not address a wetland that is not physically connected to a water of the U.S. as part of a continuum. The Court did not express any opinion regarding "the authority of the Corps to regulate discharges of fill material that are not adjacent to bodies of open water" citing 33 CFR 323.2(a)(2) and (3). 474 U.S. at 131 n.8. The Court simply held that: "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States - based as it is on the Corps' and EPA's technical expertise - is unreasonable." *Id.* at 134.

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[56] *Id.* at 132 (emphasis added).

Importantly, nothing in *Riverside Bayview* suggests that the CWA addresses anything other than water quality. Even if the purpose of maintaining and improving the quality of the water is to provide clean water for fish, birds, mammals, and insects, the focus is on the condition of the *water itself*, not on the biota that may live for part of its life in the water. As the Court noted:

> Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving *water quality*: as the House Report on the legislation put it, "the word 'integrity' ... refers to a *condition* in which the natural structure and function of ecosystems is [are] maintained." H.R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to *control pollution*, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742.[57]

So, in accordance with *Riverside Bayview*, adjacency determines the landward extent of open water ("where water ends and land begins"), and adjacent wetlands are included in the definition of jurisdictional waters to protect and maintain the quality of navigable waters.

2. *SWANCC.*

In the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the Court declined to go beyond *Riverside Bayview* and assert jurisdiction over waters or wetlands that were not "inseparably bound up with the 'waters' of the United States." 531 U.S. at 167 (quoting *Riverside Bayview*). *SWANCC* addressed the part of the current definition of waters of the U.S. that asserts jurisdiction over "other waters" "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). In its decision, the Supreme Court informed us that the term "navigable" cannot be read out of the Act.[58] The Court also noted that the gravel quarry in Cook County, Illinois, was a

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[57] *Id.* at 132-33 (emphasis added).

[58] "We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in Riverside Bayview Homes that the word "navigable" in the statute was of

"far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. The Court distinguished *Riverside Bayview* by noting that:

> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." *Id.* at 131–132, n. 8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. *But we conclude that the text of the statute will not allow this.*[59]

Based on this analysis, the *SWANCC* Court determined that use of a water body by migratory birds alone is not a basis for jurisdiction under the Act.[60] The rationale used to reach this conclusion severely called into question to legitimacy of federal jurisdiction over any isolated water, and since 2001 the Corps and EPA have not attempted to assert jurisdiction over isolated waters.[61]

3. *Rapanos.*

In *Rapanos v. United States*, the Court addressed a third category of jurisdictional waters: tributaries and their adjacent wetlands. 547 U.S. 715 (2006). The plurality held that to be subject to the CWA, water must be relatively permanent surface water.[62] The concurring opinion by Justice Kennedy held that to be subject to CWA jurisdiction, water must have a "significant

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"limited import," 474 U. S., at 133, and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e. g., United States v. Appalachian Elec. Power Co., 311 U. S. 377, 407-408 (1940)." *SWANCC*, at 171-172.

[59] 531 U.S. at 167-68 (emphasis added).

[60] *See SWANCC*, 531 U.S. at 173 (denying jurisdiction over water based on use by migratory birds based on the fact that the Clean Water Act regulates only navigable waters and declining to invoke the "outer limits of Congress' power"); *see also Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (denying jurisdiction over water based on use by migratory birds because connection to interstate commerce is too speculative).

[61] EPA, Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction) (April 27, 2011).

[62] 547 U.S. at 733.

nexus" to traditional navigable water.[63] The dissenting justices would apply jurisdiction more broadly, based on "entwined" ecosystems. 547 U.S. at 797.

However, all of the opinions in *Rapanos* recognized that the CWA protects water quality. The plurality notes that the CWA is a "statute regulating water quality, rather than (for example) the shape of stream beds." 547 U.S. at 736 n.7. In his *Rapanos* concurrence, Justice Kennedy describes the CWA as "a statute concerned with downstream water quality." 547 U.S. at 769. Even the dissent focused on water quality. *Id.* at 796-97, 810 (arguing that "it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's *water quality*," and accusing the plurality of "needlessly jeopardize[ing] the *quality* of our waters.") (emphasis added).

Despite the Court's recognition that the CWA is a water quality protection statute, the proposed rule relies entirely on the opinion of Justice Kennedy, thus ignoring constraints imposed by the plurality opinion, and misapplies Justice Kennedy's opinion to assert the very broad federal jurisdiction described above, without staying focused on water quality protection. Accordingly, the proposed rule is not consistent with Supreme Court case law.

C. The Agencies Cannot Rely on the Kennedy Opinion Alone to Establish Jurisdiction.

Under the Supreme Court's ruling in *Marks v. United States*, 430 U.S. 188, 193 (1977), when no opinion of the Court garners a majority, "the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments on the narrowest grounds*." *Marks*, 430 U.S. at 193 (emphasis added). Several post-*Rapanos* courts have determined that the Kennedy opinion is the narrower of the opinions and therefore, following *Marks*, controlling, without looking for the narrower grounds that underlie both opinions jointly.[64] Other courts have gone even further and refused to apply *Marks* and have agreed with the United States that federal jurisdiction may be established under either the plurality opinion or the Kennedy opinion.[65]

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[63] 547 U.S. at 780.

[64] *See, e.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007).

[65] *See, e.g., United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *U. S. v. Gonzalez-Lauran*, 437 F.3d 1128, 1134-1139 (11th Cir. 2006).

To reach these conclusions, these courts have deviated from the guidance provided by the Supreme Court in *Marks*. To justify using either the plurality or the Kennedy opinion to establish jurisdiction, the First Circuit argues that if Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction and if the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction. *Johnson*, 467 F.3d at 64 (quoting the dissenting opinion in *Rapanos* suggesting that courts could uphold jurisdiction where the plurality test is met but the Kennedy test is not). The Seventh Circuit uses a similar argument to support its conclusion that the Kennedy test is controlling stating that: "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." *Gerke*, 464 F.3d at 725. These holdings ignore the fact that in *Rapanos* Justice Kennedy concurred with the plurality, not the dissent, and have the effect of turning the dissenting opinions into majority opinions. This result is not permissible under Supreme Court precedent.

A proper reading of Supreme Court precedent would apply the *Marks* test to require a water body to meet *both* the plurality and the Kennedy standards before jurisdiction is invoked. That would result in the application of the "narrowest grounds" as required by *Marks*. *See, e.g., King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (requiring the test used to be one in which the plurality and the concurrence would reach the same conclusion to avoid the result where a single opinion that lacks majority support is turned into national law). Thus, a water body should meet the relative permanence, continuous surface connection, and other requirements of the plurality opinion, *and* the significant nexus and other requirements of Justice Kennedy's opinion, to qualify as jurisdictional. Only thus would the water body meet the requirements set by the five Justice majority that issued the controlling decision to remand in *Rapanos*.

Under the analysis of the D.C. Circuit in *Marks*, it is invalid for the agencies to base their regulations on the opinion written by Justice Kennedy without regard to the plurality opinion. "When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *Id.* Yet, that is exactly the approach adopted by the proposed rule. According to one very frustrated district court judge trying to apply *Rapanos*, relying on Justice Kennedy's opinion

would mean that the slogan that we are a "government of laws, and not of men" perhaps "should be amended to add that: 'Sometimes we are a government of one (man) (woman) and not of law.'"[66] That result is not legally defensible.

D. The Proposed Rule Goes Beyond the Jurisdiction Supported by Either the *Rapanos* Plurality or the Kennedy Opinion.

Even if jurisdiction under the CWA could be based on just one of the concurring Supreme Court majority opinions in *Rapanos*, the proposed rule would not be valid because it exceeds the scope of jurisdiction supported by either the plurality or Justice Kennedy. And, as just noted, jurisdiction needs to be based on the two opinions taken together.

In his opinion, Justice Kennedy opines that a wetland "either alone or in combination with similarly situated lands in the region" could "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." 547 U.S. at 780. The agencies have taken that statement and based their entire rule on it. That is, the agencies justify jurisdiction over all "tributaries," all "adjacent waters," and, on a case-by-case basis, "other waters," by arguing that the cumulative or aggregate effects of all such waters located in the same watershed are demonstrated to have (or in the case of other waters can be demonstrated to have) a significant effect on navigable waters.[67] Further, they have argued, expanding Justice Kennedy's words, that a physical, or chemical or biological connection each is sufficient by itself to create a nexus that establishes jurisdiction, allowing the agencies to assert federal jurisdiction based on impacts to the life cycle of biota, not to the quality of navigable water.[68]

This expanded application of Justice Kennedy's words fails to acknowledge that Justice Kennedy himself recognized limits on federal jurisdiction. As a result, under the proposed rule there is no water with an insignificant nexus because, in the aggregate or cumulatively, all effects would be significant. Thus, even if Justice Kennedy's "significant nexus" standard were the law of the land, the proposed rule is overly broad. As discussed above, the Kennedy opinion is not the law of the land so the agencies must incorporate the requirements of the plurality opinion into the

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[66] *United States v. Robinson*, (CV 04-PT-199-S) (U.S. Dist. Ct. No. Dist. Ala.) (mem. opinion Nov. 11, 2007), at 30.

[67] 79 Fed. Reg. at 22197.

[68] 79 Fed. Reg. at 22214.

rule as well. Indeed, the plurality opinion's requirements for waters to be relatively permanent, to have continuous surface connections to navigable waters, and so forth can be understood as indicia of significant nexus, thus reconciling the two opinions.

1. The Proposed Regulation of Tributaries is Overbroad.

Before *Rapanos*, the agencies had attempted to expand the jurisdiction of the CWA to anything that had a bed, a bank, and an ordinary high water mark through guidance and agency practices. Both the plurality and the Kennedy opinions disapproved this interpretation of the law and require more than that to establish federal jurisdiction. Under both opinions, there must be a surface water connection to navigable water. However, a surface hydrologic connection alone is not sufficient to establish jurisdiction. "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." 547 U.S. at 736 n.7 (emphasis in original) (plurality opinion). "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 784-85 (Justice Kennedy concurring). In fact, Justice Kennedy criticizes the plurality opinion for allowing jurisdiction to be based on a hydrologic connection involving relatively continuous flow, without requiring a significant nexus. *Id.* at 776-77 ("by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach").

The proposed rule would reinstate the Corps' practice of asserting jurisdiction over every so-called tributary based on the presence of a bed, a bank, and an OHWM. While the rule also requires a tributary to contribute flow, that flow can be absent for any period of time and also can be supplied through groundwater. Not even Justice Kennedy would support this as a basis for jurisdiction. According to Justice Kennedy, the Corps' existing standard for tributaries provided no assurance that they (or adjacent wetlands) would significantly affect downstream navigable water. 547 U.S. at 781.

> [T]he breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--precludes its adoption as the determinative

> measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.[69]

The proposed rule for the first time also expressly includes manmade conveyances, such as ditches, in the regulatory definition of waters of the U.S.[70] and for the first time in a rule defining waters of the U.S., asserts jurisdiction over ephemeral waters.[71]

In *Rapanos*, the plurality cited Corps claims of jurisdiction over remote roadside ditches, irrigation ditches and drains with intermittent flows, dry land features such as "arroyos, coulees, and washes," occasionally flowing "drain tiles, storm drain systems, and culverts," and, "most implausibly of all," an arid development site "located in the middle of the desert, through which 'water courses . . . during periods of heavy rain'" as examples of agency overreaching. 547 U.S. at 727 (plurality opinion).

According to the plurality opinion:

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.[72]

Yet under the proposed rule, the features identified by the plurality and Justice Kennedy as examples of waters that are not subject to CWA jurisdiction all could meet the proposed definition of "tributary" (even a wet meadow with no ordinary high water mark) that is presumed to have a significant nexus to a navigable or interstate water or territorial sea.[73] Further, in contrast to Justice Kennedy's opinion (quoted above) that remote drains, ditches, and streams, or their adjacent wetlands, would not be jurisdictional because they lack a significant nexus to downstream navigable water, the proposed rule presumes that *all* such drains, ditches, and

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[69] Id. at 781-82 (Justice Kennedy, concurring).
[70] The 1977 Corps regulations expressly *excluded* manmade conveyances. 33 C.F.R. 323.2(a)(3)(1977).
[71] As noted above, the Corps policy shift to include ephemeral streams in the definition of tributary came in the preamble to its 2000 § 404 permit regulations. *See supra* n. 15.
[72] 547 U.S. at 734.
[73] 79 Fed. Reg. at 22263 (proposed 33 C.F.R. 323.2(c)(5)).

streams are tributaries that have a significant nexus to downstream waters based on the *aggregate or cumulative* effects.[74] This expansion of jurisdiction is not supported by either the plurality or the Kennedy opinion.

2. The Proposed Regulation of Adjacent Water is Overbroad.

In *Rapanos*, the plurality expressed incredulity at the breadth of the assertion of jurisdiction under the existing, narrower, concept of adjacency, noting that: "One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a "significant nexus" to covered waters because, *inter alia*, they lay "within the 100 year floodplain of tidal waters." 547 U.S. at 728 (plurality opinion).

Justice Kennedy also expressed skepticism over the Corps' expansion of the concept of "adjacency." "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 780 (emphasis added). Instead, Justice Kennedy suggested that the Corps assert jurisdiction over adjacent wetlands by identifying "categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 780–81. This language recognizes that some tributaries in fact are not jurisdictional and wetlands adjacent to such tributaries do not have a significant nexus.

Under the proposed rule, however, there is no such thing as an insignificant tributary, waters not just wetlands can be jurisdictional based on adjacency, and adjacency encompasses entire floodplains and riparian areas.

The approach taken in the proposed rule thus fails the tests established under both the plurality and the Kennedy opinions. Instead, it embraces the rationale of the dissent, which would allow

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[74] *See* 79 Fed. Reg. at 22227 ("The scientific literature clearly demonstrates that *cumulatively*, streams exert strong influence on the character and functioning of rivers. In light of these well documented connections and functions, the agencies concluded that tributaries, as defined, alone or *in combination with other tributaries in a watershed*, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.") (emphasis added).

jurisdiction to be established based exclusively on biological connections.[75] According to the plurality: "The dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States.'" 547 U.S. at 749 (plurality opinion). Combining the use of biological connections with aggregate effects, the agencies conclude that all "adjacent waters" are jurisdictional.[76] This expansion in jurisdiction related to adjacent waters also is not supported under either the plurality or the Kennedy opinion.

3. The Proposed Regulation of Other Waters is Overbroad.

In *SWANCC*, the Supreme Court invalidated the assertion of federal jurisdiction based on use of water by migratory birds and endangered species. None of the opinions in *Rapanos* purported to overturn *SWANCC*. However, the proposed rule goes far beyond the invalid Migratory Bird Rule. As discussed below, studies of both aquatic and terrestrial species as well as resident and migratory birds were used to make support the agencies' determination that all tributaries and all adjacent waters are subject to federal jurisdiction. The only deference the agencies have given to *SWANCC* is preamble language saying that, to establish jurisdiction over "other waters" on a case-by-case basis, the agencies will not rely on use of water by non-aquatic species or migratory birds."[77] However, this leaves the agencies free to use migration of aquatic species including insects as a foundation for jurisdiction over other waters, no matter how remote. This is another example of the very significant expansion of federal authority without support from the statute or

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[75] 79 Fed. Reg. at 22229 ("Waters and wetlands located in both riparian areas and floodplains support the biological integrity of downstream (a)(1) through (a)(3) waters in a variety of ways. They provide habitat for aquatic and water tolerant plants, invertebrates, and vertebrates, and provide feeding, refuge, and breeding areas for invertebrates and fish. Seeds, plants, and animals move between waters in the riparian zone and floodplains and the adjacent streams, and from there colonize or utilize downstream waters, including traditional navigable waters."). Relying in part on the connections endorsed by the *Rapanos* dissent, the agencies conclude that: "Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a substantial impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas." 79 Fed. Reg. at 22236.

[76] 79 Fed. Reg. at 22236 ("Adjacent waters, including adjacent wetlands, alone or in combination with other adjacent waters in the watershed, have a substantial impact on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.").

[77] 79 Fed. Reg. at 22214 ("Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semiaquatic species present in the ''other water'' and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds).... Non-aquatic species or species such as non-resident migratory birds that are not demonstrating a life cycle dependency on the identified aquatic resources are not evidence of biological connectivity for purposes of this rule.").

any opinion in *Rapanos* and directly contrary to prior direction from the Supreme Court in *SWANCC*.[78]

IV. The Proposed Rule is Not Supported by the Record and Is Not the Result of Reasoned Decision-making.

Under the CWA, EPA and the Corps can regulate only waters where a discharge will both have an impact on interstate commerce *and* pollute navigable waters. As interpreted by the Supreme Court in *Rapanos*, EPA and the Corps can only regulate waters that are both relatively permanent waters *and* have a significant nexus to navigable waters. However, the record created by the agencies does not demonstrate that the non-navigable waters covered by the proposed rule meets either *Rapanos* test or must be regulated to protect the quality of navigable water. Instead, the agencies rely on a Draft Connectivity Report summarizing studies of connections that are not relevant to CWA jurisdiction.[79] The record thus created by the agencies would not only read "navigable" out of the statute, it also in contravention of the *SWANCC* decision would turn the CWA from a specific grant of authority to protect the quality of navigable waters to an omnibus grant of authority to regulate land and water resources for the benefit of flora and fauna. No reading of the Act or Supreme Court case law supports this interpretation.

A. Studies Related to Ecological Connections Do Not Support CWA Jurisdiction.

The Draft Connectivity Report includes studies that focus on the life cycle, habitat, and movement of animals and insects. The Draft Connectivity Report identifies connections between bodies of water based on these animals and insects, calling this "biological connectivity." Draft Connectivity Report at 3-28. However, these studies, including studies of invertebrates, fish, phytoplankton, and the life cycle and movement of animals generally are not relevant to the CWA's provisions.[80] The Draft Connectivity Report cites a study of the transport of live salmon

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[78] *See* 547 U.S. at 741 (noting that "*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*- and upon which the dissent repeatedly relies today, see *post*, at 10-11, 12, 13-14, 15, 18-19, 21-22, 24-25- provided an *independent* basis for including entities like wetlands (or ephemeral streams) within the phrase the waters of the United States.") (plurality opinion) (emphasis in original).

[79] *See* Draft Connectivity Report. Although this report is still a draft, it forms the basis for the agencies' claim that all the waters covered by the proposed rule are subject to federal regulation. *See* 79 Fed Reg. at 22222-52. (Appendix A of the preamble to the proposed rule).

[80] *See generally* studies cited in sections 4.5, 4.7.2.4, and 4.7.3.3 relating to the movement of organisms actively and passively from streams to downstream waters; studies cited in sections 4.5 and 4.7.3.3 related to the movement of

or their carcasses by brown bears as a connection between streams and riparian areas.[81] It cites a study of the movement of muskrats to establish connections between farm ponds and streams.[82] It cites a study of the carcasses of anadromous fish to make the case that nutrients can be transported by biota.[83] The SAB Panel charged with reviewing the Draft Connectivity Report recommended adding references to a study of the impacts of the excretions of Franklin Gulls when nesting in cattails.[84] However, none of these studies or the connections they document is relevant to the Act's focus on protecting the quality of navigable waters from human-related discharges of pollutants.[85]

The goals of the CWA include restoring and maintaining "biological integrity of the Nation's waters." However, that goal, and the Act itself, are focused on the *quality of water* necessary to restore and maintain aquatic life, not on the aquatic life itself. Thus, to use the brown bear example cited above, nothing in that study provides any insight into water quality, or impacts of upstream waters on the ability of navigable water to maintain a healthy population of aquatic life. In fact, none of the studies in the Draft Connectivity Report finding "biological connectivity" based on the life cycle, habitat, and movement of animals and insects can be used to identify a connection to downstream navigable waters that has any legal significance under the CWA. The Supreme Court made this point very clearly in *SWANCC*[86] and it was reiterated by the plurality opinion in *Rapanos*.[87]

In a small concession to the holding in *SWANCC*, in Appendix B ("Legal Analysis") the preamble to the proposed rule states that use of habitat by non-aquatic species or by migratory

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organisms from downstream waters to upstream waters; studies cited in sections 5.3.3, 5.4.4, 5.6.3.3, 5.8.3.3, 5.9.3.2 related to wetlands as sources of organisms, including plants, invertebrates, amphibians, reptiles, and fish, to downstream waters; studies cited in sections 5.3.3.2, 5.6.3.3 related to riparian/floodplain wetlands as feeding habitat for riverine organisms, such as fish, during periods of overbank flow; studies cited in section 5.3.3.1 related to wetlands as sinks for seeds and plant fragments deposited via overbank flow; studies cited in sections 5.3.3.2, 5.4.4 relating to wetlands as refuge for fish, aquatic insects, or other lotic organisms; studies cited in sections 5.4.4, 5.7.3.3, 5.9.3.2 relating to wetlands as habitat and breeding grounds.

[81] Draft Connectivity Report, at 3-8.

[82] *Id.* at 5-32.

[83] *Id.* at 3-27.

[84] October 17, 2014 SAB Review of the Draft EPA Report on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, at 52 (hereinafter "SAB Report Review").

[85] *See supra* pp. 18-21.

[86] The Supreme Court has clearly said that use of body of water by a migratory bird does not establish a significant nexus to navigable water. *SWANCC*, at 172. The same conclusion would apply to any flora or fauna.

[87] *See supra* n. 78 and accompanying text.

birds will not be used when making a jurisdictional determination for "other waters."[88] However, ignoring the rationale of *SWANCC*, that the presence and migration of biota do not suffice as a foundation for jurisdiction, the agencies rely on the presence and migration of aquatic species, including insects, as relevant to determining jurisdiction throughout the proposed rule, including for "other waters." Furthermore, Appendix A ("Scientific Evidence") of the preamble makes it clear that non-aquatic species and migratory birds were used to determine that all tributaries and all adjacent waters, as categories, have a significant nexus to downstream waters and are *per se* jurisdictional.[89] The Draft Connectivity Report also is replete with references to studies of nonaquatic species and migratory birds.[90] For example, it asserts:

> Migratory birds are known for dispersing over very large distances, and they both (1) consume and excrete viable plant seeds (Murkin and Caldwell, 2000; Amezaga et al., 2002; Figuerola and Green, 2002), and (2) move between geographically isolated wetlands and river networks, depending on temporally dynamic habitat availability (Murkin and Caldwell, 2000 and references therein; Haukos et al., 2006).[91]

Accordingly, the record that the agencies have relied on includes studies that are not related to the protection of the quality of navigable waters and even includes studies that the agency lawyers agree cannot be used to establish jurisdiction on a case-by-case basis. This record does not support the proposed rule.

B. Studies Related to Water Bodies or Structures that Provide or Withhold Flow to Navigable Waters Do Not Support CWA Jurisdiction.

The Draft Connectivity Report also discusses studies that focus on "hydrologic connectivity." If, as a result of hydrologic connectivity, pollutants may be carried from upstream surface water to downstream navigable waters, then hydrologic connectivity may be relevant to a determination whether upstream surface water has a relatively permanent connection to downstream navigable waters that is significant. However, studies related to the flow of water alone are not relevant to

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[88] 79 Fed. Reg. at 22214.

[89] 79 Fed. Reg. at 22231 and 22234 (muskrats and flying insects creating connections for tributaries); 79 Fed. Reg. at 22239 (terrestrial species in riparian areas), 22240 (movement of animals move back and forth between riparian or floodplain waters and the river network); and 22245 (use of adjacent water by migratory birds).

[90] The Draft Connectivity Report references use of water by migratory birds specifically thirteen times and use by birds generally ten additional times, citing numerous studies. The SAB panel reviewing the report recommends even greater reliance on the movement of animals. *See, e.g.*, SAB Report Review, at 18, 20, and 30.

[91] Draft Connectivity Report, at 5-31 to 5-32.

CWA goals. Water is not a pollutant.[92] The CWA does not address the ability to either supply or withhold water. In fact, Congress has made it very clear that the CWA addresses only water quality, not water quantity.[93]

Accordingly, studies related to the volume of water contributed by streams or wetlands are not relevant to CWA jurisdiction.[94] Similarly, the function of upstream areas as "sinks" that can hold water also is irrelevant to any evaluation of CWA jurisdiction.[95]

Even studies regarding the transport of pollutants do not support a categorical conclusion that a connection always exists that is relevant to CWA jurisdiction. The SAB panel that reviewed the Draft Connectivity Reportmade a similar point. The panel agreed that "at sufficiently large spatial and temporal scales, all waters and wetlands are connected."[96] However, the panel also noted that connections exist along a gradient and recommended that the agencies recognize that "connections may not be relevant if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters."[97]

Accordingly, the record that the agencies have compiled shows that the existence of hydrologic connectivity of "tributaries" or "adjacent waters" does not support their determination that such connectivity is "significant." This is another reason why the record fails to support the proposed rule.

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[92] *Virginia Department of Transportation v. EPA*, No. 1:12-CV-775, (E.D. Va., 01/03/2013) (vacating a TMDL that purported to regulate flow of water under the Clean Water Act as a surrogate for pollutants).
[93] CWA § 101(g).
[94] *See generally*, studies cited in sections 5.3.1.1, 5.4.2.1, 5.6.3.1, 5.7.2.3, 5.8.3.1 related to wetlands as sources of downstream water; studies cited in section 5.3.1.1 relating to the ability of wetlands to temporarily store water following overbank flow, which then can move back to the stream over time as baseflow due to wetland storage capacity.
[95] *See generally,* studies cited in sections 4.3.1, 4.8.3, 4.8.4.2, 4.8.5.1 relating to how streams divert surface flow from downstream waters via infiltration into underlying soil and evapotranspiration to the atmosphere; studies cited in sections 5.3.1.1, 5.4.2.3, 5.8.3.1 relating to how wetlands can be sinks for water by intercepting overland or subsurface flow; studies cited in section 5.4.2.3 related to the impact of wetlands storage capacity on the time for stream discharge to rise and fall in response to a precipitation event.
[96] SAB Report Review, at 17.
[97] SAB Report Review, at 5 ("The Report also should recognize that all aquatic habitats have some degree of connection, although such connections *may not be relevant* if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters.") (emphasis added).

C. Studies Related to Ground Water Do Not Support CWA Jurisdiction.

Some of the studies cited in the Draft Connectivity Report examine the augmentation of flow to navigable waters by groundwater, as a basis for establishing connections. Groundwater is regulated and controlled by states. It is not a water of the United States.[98] The only regulatory role EPA has in the protection of drinking water aquifers is through a permitting regime for underground injection wells under the Safe Drinking Water Act. The ability to regulate something is the ability to control it. If CWA jurisdiction can be based on groundwater and its supply of flow to navigable waters, then EPA could control ground water withdrawal to maintain such flows. However, EPA has no such authority. As noted above, the disposition of water resources remains with the states. *See* CWA § 101(b) and (g). Accordingly, studies relating to groundwater are not relevant to CWA jurisdiction.

D. Studies Related to Land Do Not Support CWA Jurisdiction.

In numerous places, the Draft Connectivity Report refers to land, not water. It does so in the discussion of wetlands, riparian areas, and flood plains. In section 101(b) of the CWA Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." As discussed above, Congress added section 101(g) to the Act to forestall efforts by federal agencies to use the CWA for purposes such as "Federal land use planning, plant siting and production planning purposes."[99]

Unfortunately the Draft Connectivity Report does not distinguish between land and water when identifying connections. Under the report, a wetland is defined as:

> An area that generally exhibits ***at least one*** of the following three attributes (Cowardin et al., 1979): (1) is inundated or saturated at a frequency sufficient to support, at least periodically, plants adapted to a wet environment; (2) contains undrained hydric soil; or (3) contains nonsoil saturated by shallow water for part of the growing season.[100]

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[98] *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).
[99] *See supra* p. 19.
[100] *See* Draft Connectivity Report Appendix A.

Under the Corps' wetlands delineation manual, an area must demonstrate all three characteristics to be considered a wetland, not just one, so this definition encompasses areas that are not considered wetlands under federal regulations. Accordingly, any study of an area of land identified as a wetland based on this definition is not relevant to the CWA.[101]

The Draft Connectivity Report finds connections via riparian areas. Riparian areas are defined as:

> Transition areas or zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect water bodies with their adjacent uplands. They ***include those portions of terrestrial ecosystems*** that significantly influence exchanges of energy and matter with aquatic ecosystems. Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine-marine shorelines.[102]

This definition describes land, not water. In fact, in the Draft Connectivity Report the term "riparian area" is distinct from the term "riparian wetland." Accordingly, any connections based on the identification of a riparian area are not relevant to CWA jurisdiction.

The Draft Connectivity Report also finds connections via floodplains. Floodplain is defined as:

> A level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events. Floodplains formed under historic or prehistoric climatic conditions can be abandoned by rivers and form terraces.[103]

Again, this definition describes land, not water. Furthermore, this definition provides no limit on the size of a storm required to turn land into water. Under this definition, huge areas of the United States would be considered floodplain, therefore connected to downstream waters, and therefore jurisdictional waters of the United States. The Draft Connectivity Report suggests the agencies are promoting this interpretation by defining "uplands" as both (1) "Higher elevation lands surrounding streams and their floodplains," and (2) "Within the wetland literature... any area

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[101] *See generally* studies cited in sections 5.4.2.1, 5.9.3.1, and 5.8.3.1 relating to wetlands as sources of water via overland flow.
[102] *See* Draft Connectivity Report, Appendix A.
[103] *Id.*

that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition."[104] Under the first definition, floodplains and uplands are mutually exclusive. This is inconsistent with the interpretation of the term "upland" used in the Corps' 2012 nationwide permits.[105] However, by failing to define uplands, the agencies fail to explain whether uplands can exist in the floodplain. One thing is clear: the definition of floodplain is so broad that it should have no role in identifying what waters are subject to CWA jurisdiction.

Finally, the preamble references to "ephemeral streams" and "ephemeral tributaries" provide no basis for distinguishing between these drainage features and other uplands. "Ephemeral stream" is defined in the Draft Connectivity Report as: "A stream or river that flows briefly in direct response to precipitation."[106] Water is found everywhere during and following storm events. Accordingly, any area of land could be considered an ephemeral stream under the Draft Connectivity Report. Thus, studies relating to drainage from ephemeral features, whether called a stream or not, do not provide a basis for identifying waters that are subject to the CWA.[107]

E. Studies Finding Connections Through Point Sources Do Not Support CWA Jurisdiction.

Just as the Draft Connectivity Report does not distinguish between land and water, it also does not distinguish between bodies of water and point sources. For example, the Draft Connectivity Report discusses the flow of water through tile drains and through ditches. Tile drains may be point sources.[108] Ditches are specifically defined as point sources in the CWA.[109] Point sources cannot be waters of the United States.[110] If they were, a discrete conveyance for the discharge of pollutants would be a water of the United States, and water flowing in the conveyance would have to meet applicable water quality standards. As a result, many cities and industrial facilities would have to discontinue the use of open conveyance systems and would be compelled to

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[104] *Id.*

[105] 77 Fed. Reg. at 10244 ("We acknowledge that floodplains provide important ecological functions and services, but it must also be understood that most areas within 100- year floodplains are not subject to Clean Water Act jurisdiction, because a large proportion of the area within 100-year floodplains consists of uplands.").

[106] *See* Draft Connectivity Report, Appendix A.

[107] *See* studies cited in section 4.8 relating to upland recharge and ephemeral drainages.

[108] However, tile drains will usually be exempt agricultural discharges. *See Pacific Coast Federation of Fishermen's Association, et al. v. Bureau of Reclamation,* Case No. CIV S-2:11-2980-KJM-CKD (E.D.CA Sept. 16, 2013).

[109] *See* CWA § 502(14).

[110] For example, in the 1990 preamble to the Phase 1 regulation, EPA stated that stormwater runoff *into* municipal sewers (including MS4-controlled ditches, roads, storm drains, etc.) is *not* a discharge of a pollutant into a WOTUS. 55 Fed. Reg. 47,900, 47,997 (Nov. 16, 1990).

install pipes to manage storm water and industrial wastewater. Further, water flowing from a point source that is also a water of the U.S. would be a water transfer that is not subject to NPDES permit regulations, reducing water quality protection.[111] This result is not consistent with the CWA. Accordingly, studies finding connections based on point sources are not relevant.[112]

F. Referenced Studies Related To the Transport of Pollutants Do Not Demonstrate An Impact on Navigable Waters.

The Draft Connectivity Report cites some studies relating to the transport of pollutants from upstream waters to downstream waters. The potential to transport pollutants at levels that would prevent navigable water from attaining CWA goals may establish a substantial impact on a highway of commerce that could support CWA jurisdiction. However, not all pollutant transport is substantial (the test under the Commerce Clause) or significant (if the test under Justice Kennedy's opinion in *Rapanos* were the law of the land). Absent a determination of substantial impact or a metric that identifies which impacts are significant and which are not, EPA cannot, even under its own interpretation of *Rapanos*, draw categorical conclusions from these studies. As discussed below, the SAB panel that reviewed the Draft Connectivity Report made the same observation, recommending that the agencies quantify the effects of connections on a gradient and noting that "connections may not be relevant if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters."[113]

In *Arkansas v. Oklahoma*, the Supreme Court upheld an EPA determination that a discharge cannot violate a water quality standard requiring no degradation of water quality unless "the discharge effected an 'actually detectable or measurable' change in water quality." 503 U.S. 91, 111 (1992). Applying this standard, upstream water could be subject to CWA jurisdiction based on its nexus to downstream navigable waters only if pollutants from the upstream water could result in an actually detectable or measurable change in the quality of downstream navigable water.

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[111] 40 C.F.R § 122.3(i).

[112] *See generally* studies cited in sections 5.4.2.1, 5.7.3.1, 5.8.3.1, 5.3.1.1, 5.4.2.1, 5.6.3.1, 5.7.2.3, 5.7.3.1, 5.8.3.1 5.2.3 relating to water provided via subsurface drains ("tile drains") or surface ditches.

[113] SAB Report Review, at 5 ("The Report also should recognize that all aquatic habitats have some degree of connection, although such connections may not be relevant if they do not have important effects on the physical, chemical, and/or biological integrity of downstream waters.").

Dr. Murphy, one of the SAB Panel members who reviewed the proposed rule, makes the same point. According to Dr. Murphy:

> Water quality criteria are an explicit result of measuring what constitutes a scientifically significant nexus between a surface water pathway exposure and a resident aquatic species. There is no better way of assessing the impact of a watershed connection than its potential to degrade the water quality of receiving waters or violate water quality standards for those waters. Yet no reference to either water quality standards or the science for setting them appears in the Proposed Rule.[114]

Most of the studies identified in the Draft Connectivity Report that address pollution transport do not address impact on the quality of water in downstream navigable waters.[115] Accordingly, such studies cannot be used to help policy-makers identify the jurisdictional boundaries of the CWA.

G. The Studies Do Not Support the Lines Drawn by the Agencies Between Jurisdictional and Non-Jurisdictional Water.

As discussed above, the agencies have developed the proposed rule in reliance on (1) a sentence in the Kennedy opinion speculating about the cumulative effects of wetlands on other jurisdictional waters,[116] (2) studies of physical, chemical and biological connectivity between waters, and (3) an assumption that the existence of connections, if aggregated, would support federal jurisdiction.[117]

As many of the SAB panel members who reviewed the proposed rule point out, this framework cannot support the rule, as proposed. Significant changes must be made to the rule to address the concerns raised by the Panel.

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[114] Attachment to September 2, 2014, Memorandum from Dr. Amanda D. Rodewald, to Dr. David Allen, "Comments to the chartered SAB on the adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act," at 93 (hereinafter SAB Rule Review) (attached).

[115] *See generally*, studies cited in chapter 4 relating to the transport of debris and chemicals.

[116] Justice Kennedy speculates that that a wetland "either alone or in combination with similarly situated lands in the region," could "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." 547 U.S. at 780.

[117] *See supra* p. 27.

1. The Existence of a Connection Does not Imply a Significant Effect on Downstream Water.

SAB panel members point out that connectivity occurs on a gradient.[118] Applying that fact to the proposed rule, Dr. Aldous points out that: 'Specific scientifically-grounded, objective methods must be put in place to draw the line between those waters having or not having a significant nexus to other jurisdictional waters."[119]

In particular, SAB panel members noted that this gradient is critical to determining what waters have or do not have a "significant nexus" to downstream waters:

> Panel members generally found that the term "significant nexus" was poorly defined in the proposed rule and that the use of the term "significant" was vague. Panel members commented that the little guidance was provided in the preamble of the rule to interpret these terms. There was agreement among Panel members that it was important to articulate in the proposed rule that (1) "significant nexus" is not a scientific term but rather legal term that requires a policy determination in light of the law and science and (2) the relative strength of downstream effects should inform the conclusions about the significance of those effects for purposes of interpreting the Clean Water Act.[120]

According to the Panel members, developing such methods will require additional research:

> Panel members commented that as the science continues to develop, other sets of wetlands may be identified as "similarly situated." Panel members further noted that before such determinations are made, additional research will be required to establish degree of connectivity and analyze spatial and temporal variability and threshold levels of connectivity. This research will be a requisite step in further development of rules relative to the jurisdictional status of "additional other waters of the U.S."[121]

In response to the agencies' request for comments on including additional categories of water as jurisdictional by rule, Dr. Ali responded as follows:

> The draft rule goes on to say that "*the [EPA science] Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule*" but there again, it is unclear to me whether that very

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[118] Incorporating a gradient approach to connectivity is one of the chief recommendations of the SAB review of the Draft Connectivity Report. SAB Report Review, at 2.
[119] SAB Rule Review, at 2.
[120] September 2, 2014, Memorandum from Dr. Amanda D. Rodewald, to Dr. David Allen, "Comments to the chartered SAB on the adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act," at 6 (hereinafter Rodewald Memorandum) (attached).
[121] Rodewald Memorandum, at 5.

> qualitative terminology ("very strong") is a synonym for "significant". Having other groups or types of waters being determined jurisdictional by rule or category would only be possible if we could rank them according to the frequency and/or magnitude and/or duration with which they actively transfer materials (or prevent the transfer of materials) to downstream waters (see coarse schematic in Figure 1).[122]

The concern regarding the need to address the frequency and magnitude of the transfer of materials to downstream waters applies equally to the waters the agencies have proposed to list as jurisdictional by rule, as to any additional categories that may be suggested by commenters.

2. The Record Is Unrelated to Categories Identified by the Agencies as Jurisdictional.

Just as the Draft Connectivity Report does not address the significance of connections, it also does not address the categories that the agencies propose to determine are *per se* jurisdictional. Specifically, the studies in the Draft Connectivity Report support ecological connections, but the waters addressed in the studies do not match the waters regulated in the proposed rule.

i. Tributaries.

For example, with respect to tributaries, the agencies assert:

> While Justice Kennedy's opinion focused on adjacent wetlands in light of the facts of the cases before him, the agencies determined it was reasonable and appropriate to undertake a detailed examination of the scientific literature to determine whether tributaries, as a category and as the agencies propose to define them, significantly affect the chemical, physical, or biological integrity of downstream navigable waters, interstate waters, or territorial seas into which they flow. Based on this extensive analysis, the agencies concluded that tributaries with bed and banks, and ordinary high water marks, alone or in combination with other tributaries, as defined by the proposed regulation, in the watershed perform these functions and should be considered, as a category, to be "waters of the United States."[123]

The "extensive analysis" referred to in the preamble does not exist. The agencies cite no studies supporting the premise that an OHWM means that a channel has sufficient flow to carry pollutants to navigable water.[124] The OHWM is intended to determine the lateral limits of

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[122] SAB Rule Review, at 12.
[123] 79 Fed. Reg. at 22259.
[124] 79 Fed. Reg. at 22202.

jurisdiction of a body of water, in the absence of wetlands.[125] There has never been a scientific basis for using the OHWM to trace the longitudinal limits of a tributary.[126] A 2004 GAO Report noted significant inconsistencies among Corps districts in identifying waters of the U.S., including identifying an OHWM.[127] Even Justice Kennedy noted this report in the *Rapanos* case. 547 U.S. at 781. The proposed rule suggests that a 2005 Corps Regulatory Guidance Letter and a 2008 field guide have solved the problem of inconsistency relating to identifying an OHWM.[128] However the guidance letter referred to in the preamble says: "There are no 'required' physical characteristics that must be present to make an OHWM determination."[129] Also, the field guide referred to in the preamble applies only to the Arid West.[130]

Recognizing that the definition of ordinary high water mark is vague, there are inconsistent interpretations of the OHWM concept, and there are inconsistent field indicators and delineation practices, the Corps is currently developing new guidance on identifying an OHWM.[131] However, irrespective of how an OHWM is identified, there remains no scientific basis for using it to establish federal jurisdiction. As noted by Dr. Joselyn, an SAB Panel member:

> The indicators used by the Corps and EPA to determine the 'ordinary high water' mark (e.g. natural line on the shore, matted vegetation, sediment sorting) can be observed in very small drainages that are not usually considered in the scientific studies that deal with headwater streams.
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> These low order features may have flow for only a few hours or days following storm events and are the most likely candidates for being on the low end of the

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[125] 33 C.F.R. § 328.4(c)(1).
[126] Robert Pierce, Technical Principles Related To Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act (April 2003), at 1 (comments on the Corps' 2003 Advanced Notice of Proposed Rulemaking, EPA-HQ-OWOW-2002-0050) (attached).
[127] GAO-04-297, at 3-4.
[128] 79 Fed. Reg. at 22259-60.
[129] Corps of Engineers Regulatory Guidance Letter, No. 05-05 (December 7, 2005), at 3. (attached).
[130] Robert W. Lichvar and Shawn M. McColley, A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States, A Delineation Manual (August 2008).
[131] Matthew K. Mersel, Development of National OHWM Delineation Technical Guidance, Engineer Research and Development Center (March 4, 2014) (power point presentation on the Corps' plans to develop guidance) (attached). To date, the Corps has issued a report to determine the most appropriate factors to include in a national OHWM classification. Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification, ERDC/CRREL TR-14-12, August 2014 (attached). However, that report makes no recommendations on streamflow duration, even though the report acknowledges that "[t]he frequency of streamflow in a channel may have a substantial influence on the occurrence and appearance of various physical and biological OHWM indicators." *Id.* at 36.

> gradient where effects on downstream systems are lowest or minimal. Because of the importance of the issue on the extent of federal jurisdiction in these headwaters, the science needs to be more substantial than currently demonstrated in the Draft Science Report....[132]

Dr. Murphy, another SAB Panel member, found no basis for the assertion of jurisdiction over all tributaries:

> As stated in my introductory comments, the inclusion by rule of all tributaries to traditional navigable waters is not scientifically justified by the published literature, the Connectivity report or the SAB review. Inclusion by rule violates the conclusion of the SAB review that connectivity exists as a gradient of causal phenomena that operate variably over flowpaths, and result in consequential disturbances in the watershed.[133]

The agencies also cite no support for their assertion of jurisdiction over streams that disappear into the ground. According to the agencies:

> The significant nexus between a tributary and a downstream water is not broken where the tributary flows underground for a portion of its length, such as in karst topography. The hydrologic connection still exists, meaning that the chemical and biological connections that are mediated by the hydrologic connection also still exist.[134]

However, the agencies cite no studies to support this assertion, much less any studies to support an assertion that water that flows underground affects the quality of navigable or interstate waters or territorial seas. In fact, a study that is relied upon extensively in the Draft Connectivity Report notes that ephemeral and headwaters streams are particularly important for groundwater recharge and "once in the regional aquifer, this water may move long distances over the course of *hundreds to thousands of years* before discharging to the surface to support baseflows in downstream waters (Izbicki et al., 1995)."[135]

The agencies also assert that: All "tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks *because they are directly connected to rivers via permanent surface features* (channels and associated

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[132] SAB Rule Review, at 42.
[133] *Id.* at 95.
[134] 79 Fed. Reg. at 22235.
[135] Nadeau, T.-L., and M. C. Rains, *supra* n. 4.

alluvial deposits).[136] The agencies make this statement even though the definition of tributary expressly includes flow paths that are not permanent and disappear underground or are dry for any length of time.

The agencies state:

> The scientific literature supports this conclusion [that all tributaries have a significant nexus] for ephemeral tributaries, as well as for intermittent and perennial tributaries; for tributaries both near to and far from the downstream traditional navigable water, interstate water, or the territorial seas; and for natural tributaries or man-altered tributaries, which may include certain ditches and canals.[137]

Despite this assertion, the agencies admit that the scientific literature does *not* address impacts to navigable or interstate waters or territorial seas. "Rather, the literature assesses tributaries in terms of their connections to and effects on downstream waters in a watershed."[138] Thus, the physical, chemical and biological impacts of tributaries discussed in the scientific literature relied upon by the agencies, are in most cases *not* impacts to navigable or interstate waters or territorial seas. The agencies assert that the distinction between waters in a watershed and the actual navigable water "does not affect the conclusions of the scientific literature with respect to the effects of tributaries on downstream waters."[139] However, they cite no support for this conclusory statement and, therefore, it does not provide support for the agencies' determination that all tributaries are jurisdictional.

Finally, the agencies assert jurisdiction over manmade conveyances unless excluded, even though the studies in the Draft Connectivity Report focus on natural features. Dr. Josselyn points out:

> The exclusion for ditches seems quite narrow. If it is meant to exclude roadside ditches, for example, the ditch must be entirely constructed in uplands and drain only uplands. This could mean that a highway drainage ditch, even though constructed mostly through wetlands [sic], but perhaps impacting wetlands or streams along 1-2% of its length would then be considered a "water of the US".

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[136] 79 Fed. Reg. at 22227 (emphasis added).
[137] *Id.*
[138] *Id.*
[139] *Id.*

> The Draft Science Report did not address this issue as it focused on natural streams and wetlands.[140]

ii. Adjacent waters.

With respect to adjacent waters, the agencies assert:

> [T]ributaries and their adjacent waters, and the downstream traditional navigable waters, interstate waters, and territorial seas into which those waters flow, are an integrated ecological system, and discharges of pollutants, including discharges of dredged or fill material, into any component of that ecological system, must be regulated under the CWA to restore and maintain the chemical, physical, or biological integrity of these waters.[141]

Despite this broad assertion, the agencies do not cite any studies support the conclusion that pollution discharged into water located in a floodplain affects the navigable water associated with that floodplain. The SAB Panel noted this omission:

> The SAB generally finds that literature on the connectivity of waters and wetlands in floodplain settings included in the Report is limited in scope (i.e., focused largely on headwater riparian wetlands) and should consider the gradient of connectivity that is a function of the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections.[142]

According to Dr. Murphy:

> The definition of and inclusion by rule of adjacent waters also is inconsistent with the published literature, the Connectivity report or the SAB review. Once again, the concepts of 'connectivity,' 'spatial and temporal scale,' 'connective flowpaths,' 'disturbance ecology' and 'ecological function' are implicitly defined as dichotomous conditions or parameters and this violate the idea of a gradient in connectivity that is found throughout the SAB and at the heart of ecological theory and practice. The definition of significant nexus used in the Proposed Rule is scientifically flawed and does not employ modern concepts of scientific significance and statistical inference.[143]

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[140] SAB Rule Review, at 49.
[141] 79 Fed. Reg. at 22261.
[142] SAB Report Review, at 39.
[143] SAB Rule Review, at 95.

iii. Other waters.

Similarly, the Draft Connectivity Report does not support the agencies' analysis for isolated waters. According to the agencies, "[a]vailable literature indicates that ''other waters'' have important hydrologic, water quality, and habitat functions that have the ability to affect downstream waters if and when a connection exists between the 'other water' and downstream waters.[144] However, there is no support for that assumption and, as noted above, the ecological studies cited do not address water quality impacts on navigable or interstate waters. As noted by Dr. Ali, one of the SAB Panel members, extending jurisdiction over "other waters" requires a showing that materials are actually transferred from those waters to downstream navigable waters:

> The draft rule goes on to say that "*the [EPA science] Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule*" but there again, it is unclear to me whether that very qualitative terminology ("very strong") is a synonym for "significant". Having other groups or types of waters being determined jurisdictional by rule or category would only be possible if we could rank them according to the frequency and/or magnitude and/or duration with which they actively transfer materials (or prevent the transfer of materials) to downstream waters (see coarse schematic in Figure 1).[145]

As a result, even if "connectivity" was an appropriate test for asserting jurisdiction, the record developed by the agencies does not support the proposed rule. And, as discussed above, connectivity alone is not sufficient to demonstrate jurisdiction.

3. The SAB Panel Reviews Demonstrate that the Proposed Rule Fails To Articulate A Coherent Theory To Support Including or Excluding Water From Jurisdiction.

"Connectivity" is the agencies' rationale for asserting jurisdiction under the proposed rule.[146] However, as noted by the SAB Panel, all water is connected. Taking the rationale to its logical conclusion, all water, even groundwater, could be a water of the U.S. But this would run afoul of the specific constitutional, statutory, and judicial constraints on CWA jurisdiction described above. Furthermore, the lack of a coherent approach consistent with these constraints has led the

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[144] 79 Fed. Reg. at 22248.
[145] SAB Rule Review, at 12.

SAB Panel to press for an even more inclusive rule, which would stray even further from the constraints.

Thus, the SAB Panel questions why the Draft Connectivity Report did not include deep aquifer connections.[147]

> The Report focuses primarily on the site and subregional scales, perhaps due to cost of and access to data and model results. This tends to either ignore or at least downplay the potential significance of regional-scale hydrologic connectivity, especially as it relates to groundwater. This is a problem because regional groundwater flows commonly interact with the surface environment at sinks and springs. For example, the Floridan aquifer underlies all of Florida as well as portions of Mississippi, Alabama, Georgia, and South Carolina and commonly interacts with the surface environment through sinks, springs, and outcrops (see Sun et al. 1997 and references therein).[148]

In fact, if the agencies' rationale for the proposed rule were a valid basis for federal jurisdiction, all water in Florida, as well as the parts of Mississippi, Alabama, Georgia and South Carolina that overlay the Floridan aquifer would be regulated waters of the U.S.

Similarly, applying the agencies' "connectivity" rationale to biological connectivity, there are no waters that would be unconnected. The SAB Panel notes that "organismal movement can connect waters and wetlands across uplands and between watersheds."[149] Thus, if the agencies' rationale for the proposed rule was valid, waters could be located in completely different watersheds but still be considered connected.

In addition, the Panel recommends including a discussion of manmade connections "via roads, agricultural tiles, dams, pumping groundwater, irrigation, channelization, and other manmade infrastructure (piped streams, stormwater pipes)."[150]

> The SAB recommends that the Report authors consider including examples from at least some of the following human alterations affecting the connectivity of streams: agricultural ditches and tile drains, urban lined channels and buried streams, removal of riparian trees, cattle grazing, gravel mining, channel diversions, low-head dams,

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[146] As discussed above, the agencies assume all connections, in the aggregate, meet their "significant nexus" standard.
[147] SAB Report Review, at 19.
[148] *Id.*, at 20.
[149] *Id.*
[150] *Id.* at 11.

> grade control structures, roads, stream restoration, accelerated erosion, sediment transport and storage, stream restoration, and effluent dominated streams.[151]

Based on their understanding of connectivity, some members of the Panel who reviewed the proposed rule recommended against the exclusions for groundwater, ditches, rills, gullies, non-wetland swales, and artificial lakes and ponds.[152]

Others Panel members observed that the agencies did not provide a rationale for the exclusions, creating confusion:

> Panel members commented that the manner in which decisions would be made about excluding other manmade features was not clearly explained in the preamble of the proposed rule. Members noted, for example, that it was not clear whether the proposed rule would exclude: artificial lakes and ponds that have connections to downstream waters, underground stormwater drainage, natural versus artificial swales, roadside ditches, stormwater quality basins, bioswales, detention basins, industrial water processing and/or treatment facilities, desalination brine storage basins, cooling systems, oil and gas tank basins, fish farms, and rice paddies.[153]

However, one SAB Panel member, Dr. Jossleyn, points out that, as currently drafted, the Draft Connectivity Report does not support including manmade features in the waters of the U.S.:

> The tributary definition in the Proposed Rule also includes other features such as flood control channels, some ditches, underground stormwater drainage works that are not part of, nor discussed in, the Draft Science Report. Presumably such man-made features may alter the functions associated with the tributary or alter the water quality considerably—either beneficially (sediment deposition in reservoirs) or adversely (addition of urban storm water). The Draft Science Report focused on research from natural systems and therefore does not provide sufficient information on which to discuss the role of these man-made features. The Panel recommended that more information be provided in the Science Report on the effect of man-made features on connectivity—either elimination or enhancement of connectivity. In urban environments where water flows are largely in man-made structures, this information will be necessary to support the conclusion that impacts to upstream features not part of the urban infrastructure would have a significant impact on navigable waters, when in fact the urban infrastructure itself is the cause of the impact to water quality.[154]

Dr. Josselyn further recommended that:

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[151] *Id.* at 31-32.
[152] Rodewald Memorandum, at 6-8.
[153] cite
[154] *Id.* at 43.

> [T]he Science Report might also discuss how some man-made features are designed to avoid connectivity in order to protect the environment from toxic or polluted water sources that are present in some of these features. The construction of any facility designed to retain, store, pond, treat, or process water used in industrial processes and to assure that such liquids do not enter the environment should be excluded from jurisdiction as a matter of rule.[155]

These comments all point to a failure by the agencies to articulate a coherent rationale for asserting federal jurisdiction that is consistent with constitutional, statutory, and judicial limits.

V. The Proposed Rule Lacks Clarity.

A. The Broad Legal Rationale For the Proposed Rule Agencies Has Caused Confusion.

The legal rationale for the proposed rule is the assertion that almost all water is connected and therefore jurisdictional. This rationale is so broad that it would justify federal jurisdiction over water that the agencies may never have considered or evaluated when developing the rule. As a result, not only are the SAB Panel members confused, as noted above, but EPA and the Corps of Engineers have not been able to explain how their proposal applies to many waters. This has led to confusion about both what is covered and what is not covered by the proposed rule.

For example, as noted by the SAB Panel, most, if not all of the focus of the Draft Connectivity Report has been on natural waterbodies. This focus has left EPA and the Corps unprepared to answer questions about manmade features.

In a June 30 blog, Acting Assistant Administrator Stoner said that "Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters." However, the proposed rule says ditches that provide flow year-round during periods of normal rainfall are waters of the U.S. whether or not they previously were natural streams.

Ms. Stoner's posting also reveals that EPA did not focus on ditches and conveyances that have year-round flow, not because of rainfall, but because these ditches are designed to move water around a facility, or from a storage basin to a town, farm, or industrial facility. The proposed rule does not provide clear exclusions for these types of conveyances.

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[155] *Id.* at 48.

On June 11, 2014, Deputy Administrator Bob Perciasepe told the House Transportation and Infrastructure Committee that backyards, wet spots, and puddles are excluded.[156] In her blog, Acting Assistant Administrator Stoner says that: "The Clean Water Act applies only to surface waters, not to land, rain gutters, wet lawns, ground water, or a host of other kinds of waters." However, while it may not be the agencies' intent, under the plain language of the proposed rule, absent exclusion, any water in a floodplain would be *per se* jurisdictional under the terms of the rule, even if located in someone's backyard.

The agencies also do not appear to have focused on how the proposed rule will affect permit programs. In her June 30, 2014 blog, Acting Assistant Administrator Stoner said that "permits will NOT be applied for the application of fertilizer to fields or surrounding ditches or seasonal streams."[157] This statement is not accurate. The proposed rule makes all water in a flood plain and all seasonal streams federally regulated waters of the U.S. The application of fertilizer or pesticides to a water of the U.S. can require a permit.[158] The blog also says that "The pesticide general permit only requires a NPDES permit where pesticides are applied directly to a water of the U.S." This statement also is incorrect. The pesticide general permit expressly applies to pesticide applications that take place near water, such as along the bank of a stream, because EPA takes the position that this pesticide will end up in a water of the U.S.[159] EPA's pesticide permit also says "Delineated Waters of the United States may or may not be wet at the time of discharge; however, discharges to such are still considered discharges to Waters of the United States."[160] Administrator Stoner's blog also says that "Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields." That would be true only if the field, or any other area of land, does not have erosional features that EPA or the Corps might consider an ephemeral stream. A permit could be needed to spray pesticide on any land that is crisscrossed with erosion features that are considered ephemeral streams, even if there is no water present.

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[156] Hearing on Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule, June 11, 2014. (attached).

[157] http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/ This blog is periodically updated. A screen shot from November 13, 2014 is attached.

[158] *Nat' Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009).

[159] U.S. EPA, Pesticide General Permit for Discharges From the Application of Pesticides, Authorization to Discharge under the National Pollutant Discharge Elimination System (2011), at 1-1, 9-21 (permit applies at water's edge as well as in water).

[160] *Id.* at A-8 (defining waters of the U.S. to include areas that are not wet at the time of discharge).

If the officials charged with establishing the position of the agencies regarding the scope of federal jurisdiction under the CWA do not fully understand important provisions of the proposed rule, the rule cannot be said to be the result of reasoned decision-making and therefore is invalid. *See Motor Vehicle Manufacturers Ass'n v. State Farm Ins.*, 463 U.S. 29, 42 (1983) (an agency must provide adequate basis and explanation for its decision or it will be set aside as arbitrary and capricious). This concern further supports the recommendation below that the agencies withdraw the rule and develop a new proposal.

B. The Failure To Define or Limit Essential Terms Renders the Proposed Rule Impermissibly Vague.

Under the proposed rule, the extent of federal control has been and would be decided by the regulators themselves, using their "best professional judgment." EPA and the Corps get to decide what part of the landscape is considered "land" and what is considered "water." They get to decide what part of the landscape is in the flood plain. They get to decide whether run off from rainfall is a "tributary" or "other waters" or simply rain. They get to decide if insects, birds or animals move around, establishing a "significant nexus" between waters.

This extreme degree of discretion invalidates the proposed rule. A rule that is so vague that it fails to constrain regulatory decision-making, is arbitrary and capricious, an abuse of agency discretion, and otherwise a violation of law. *Atlas Copco, Inc. v. Environmental Protection Agency*, 642 F.2d 458, 465 (D.C. Cir. 1979) ("We are well aware of the judicial disdain traditionally accorded standardless regulations."); *South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) ("The prospective applicant for a permit is utterly without guidance as to what he must prove, and how. And the standard is so vague that it invites arbitrary and unequal application.").

VI. The Expansion and Ambiguity in the Proposed Rule Will Significantly Increase Litigation and the Burden on the Regulated Community and the Regulators.

A. Increased Litigation.

The lack of clarity discussed above places EPA and the Corps of Engineers, and activists who file citizen suits, in the position of deciding what economic activity is regulated and what is not. The proposed rule has already engendered citizen suits alleging connections to navigable water

of the type proposed in the rule.[161] If the proposed rule is finalized, even more litigation can be expected. For example, currently only adjacent wetlands are regulated. So, standing water in a field is not jurisdictional if it is not a wetland. In a recent letter, a citizen group is asking EPA to regulate such standing water, alleging that the soil exhibits wetland characteristics, despite a contrary determination by the Corps of Engineers. If the proposed rule is finalized, the soil characteristics will no longer be relevant and the citizen group can try to force regulation of a field with standing water based on adjacency.[162]

B. Increased Burden.

1. *Burden on Landowners.*

The general response to concern over expanded regulation from EPA and the Corps of Engineers has been: "don't worry; just get a permit. This answer ignores the time, money, and effort required to secure a permit and will impose an economic burden that has not been quantified in the regulatory impact analysis accompanying the rule.

2. *Burden on State and Local Governments.*

The agencies have failed to quantify the burden on state and local governments (and the federal government) from the expansion of jurisdiction. The proposed rule will affect state and county highway departments, flood control agencies, local governments with municipal separate storm sewer systems, and economic development agencies. For example, the Tennessee Department of Economic and Community Development recently was told by the Corps that a field that they had designated as an industrial development site was a water of the U.S., after the Tennessee regulatory personnel had evaluated the property and determined that the erosion features in the field were not streams or tributaries, but instead were "wet weather conveyances," an approved

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[161] Galveston Baykeeper, Inc., v. Trendmaker Homes, Inc., (Case No. 4:14-cv-01500 (S.D. Tex, May 30, 2014) (alleging that a prairie pothole is jurisdictional based on an allegation that the wetlands have unidirectional, and possibly bidirectional, hydrologic and biologic exchanges with waters of the United States, provide water storage function, and have biological connectivity with waters of the United States (a) through the movement of amphibians, aquatic seeds, macroinvertebrates, reptiles and mammals); Wildearth Guardians v. The Western Sugar Cooperative,. (Case 1:14-cv-01503-BNB) (D. Colo., May 29, 2014) (alleging on-site wastewater ponds are point sources that discharge to waters of the U.S. through groundwater that has a significant biological, chemical and physical nexus to the South Platte River).

[162] *See* Public Employees for Environmental Responsibility letter dated August 20, 2014, to EPA Region 3, "Petition for Review of "Camp Property" Wetlands Delineated by the Corps of Engineers, Norfolk District Regulatory Office (attached).

designation under the state's water quality standards program.[163] This regulatory determination applies the proposed rule's definition of "tributary" and belies agency assertions that farmers' fields will not be regulated. As a result, state agencies seeking to develop such property will have to incur significant permitting and mitigation costs to develop this property.

3. *Burden on Regulators.*

The agencies also have failed to quantify the burden on regulators from increased jurisdiction. EPA's ATTAINS database that tracks TMDL development reports a total of 3,533,205 river and stream miles in the United States based on data reported by states using the National Hydrography Dataset (NHD). The NHD is a database that interconnects and uniquely identifies the millions of stream segments or reaches that comprise the Nation's surface water drainage system and is based on the USGS 1988 1:100,000-scale Digital Line Graph (DLG) hydrography dataset integrated with reach-related information from the USEPA Reach File Version 3.0-Alpha release (RF3-Alpha).

According to EPA's report on "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest" (EPA/600/R-08/134) (Nov. 2008), even the high resolution NHD "may grossly underestimate the number and length of drainage networks," *i.e.*, ephemeral streams. "Heine et al. (2004) reported that USGS 1:24,000-scale maps under-represented drainage networks by 64.6 percent in a study in Kansas."

EPA's ATTAINS database that tracks TMDL development reports a total of 107,700,000 wetlands acres. Again, the agencies have not reasonably estimated the increase in potential wetland acreage under the proposed rule. Their estimate of only a 2.7 percent increase in jurisdictional wetlands is based on applications for jurisdictional determinations, when in fact landowners would not have applied for JDs for most of the ditches, ephemeral features, isolated wetlands in floodplains and riparian areas, and "other water" wetlands that would be considered jurisdictional under the proposed rule.

EPA's currently approved ICR (EPA ICR No. 1560.10, Nov. 2011) for both water quality reporting and TMDL development activities estimate the cost to States for those programs at

[163] *See supra* pp. 6-8. A photograph of the field is attached as Appendix A.

$193,568,080 a year. Of that amount, $21,390,991 is for assessment activities. The remaining costs of $172,267,089 are for TMDL development and EPA assumes 4,000 TMDLs a year, averaging $43,000 per TMDL.

The agencies have failed to include the cost to states of increased regulation under the proposed rule. What would be the total increase in stream miles if ephemeral streams that show up in the NHD at a high resolution become waters of the United States? What is the increase in acres of waters and wetlands regulated if all broadly-interpreted adjacent waters and wetlands become jurisdictional? What would be the total cost to States to assess those additional miles and acres? What will it cost to develop new water quality criteria, designated uses, and TMDLs for waters not currently regulated?

While the agencies have failed to include these costs in the regulatory impact analysis of the proposed rule, some states have provided cost estimates. According to the State of Missouri, if it had to regulate all stream miles discernable at the 1:24,000 scale of the National Hydrology Dataset, it would add an additional 158,565 miles of stream (183,591 miles total) to its existing classified waters network and would more than double the state's monitoring costs from about $11.2 million to $24.2 million.[164] The state also would incur additional costs for use designations and total maximum daily load development.

The agencies must calculate these increased costs for every state and include them in the regulatory impact analysis for the rule.

VII. The Agencies' Procedural Errors Render the Proposed Rule Invalid.

A. The Proposed Rule Fails to Meet the Requirements of the Administrative Procedure Act.

The Administrative Procedure Act (APA) requires agencies to provide the public with the opportunity to comment on their actions. 5 U.S.C. 553(c). In order to provide for meaningful public comment under the APA, agencies must disclose the data or other material that the agency relies on to make a final decision. Participation is not meaningful if an agency bases its action

[164] *See* MO Regulatory Impact Report, *supra* n. 11 at 25, 35.

on information that is not available to the public. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d. Cir. 1977).

As discussed above, the entire basis for the agencies' determination that categories of waters are *per se* waters of the U.S. is the Draft Connectivity Report. The SAB Panel charged with reviewing that report released their comments on October 17, 2014, and recommended extensive changes, including a recommendation to evaluate connectivity along a gradient that recognizes that connectivity is a function of frequency, duration, magnitude, predictability, and consequences.[165]

The proposed rule that is out for public comment does not reflect these recommendations. As noted by Dr. Fennessy, one of the SAB Panel members who reviewed the proposed rule:

> [ ] I was surprised about the release date of the draft rule, and to see that it does not reflect the many suggestions made by the SAB panel to strengthen the EPA Connectivity Report. While I understand the timing of the release is typical, it possibly weakens the value of the SAB process, which is designed to strengthen the scientific basis upon which the draft rule is based. I hope the draft rule can be modified to reflect the work of the SAB panel. A second, related issue is that the report does not use the connectivity gradient framework that was suggested by the SAB panel. Establishing the framework early in the draft rule would aid in the discussions about what constitutes a significant degree of connectivity, which could help define jurisdictional waters.[166]

The agencies have promised to issue a revised Connectivity Report before they issue a final rule.[167] If the final report addresses the comments of the SAB Panel (including comments noting that connectivity is not a binary function) it will be significantly different from the draft report. Further, if the final rule is amended based on a revised final report, then material that the agencies will rely on to make a final decision will not be available during the public comment period. This means that the public will not have a meaningful opportunity to comment on the rule, violating the APA.

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[165] This recommendation, as well as the limitations discussed above of the studies cited in the Draft Connectivity Report, undermines the agencies' conclusion that all "tributaries" (as defined in the proposal) and all "adjacent waters" (as defined in the proposal) have sufficient connection to navigable water to be considered "waters of the U.S."

[166] SAB Rule Review, at 29.

[167] 79 Fed. Reg. at 22197 ("At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including the final Report reflecting SAB review, and make any adjustments to the final rule that are appropriate based on this record.").

The agencies' plan to rely on guidance relating to the definition of OHWM, floodplain, and other terms used in the proposed rule also would violate the APA because the agencies would be changing federal jurisdiction without notice and comment.[168]

B. The Proposed Rule Fails To Comply With the Regulatory Flexibility Act.

On October 1, 2014, Dr. Winslow Sargeant, Small Business Administration, Chief Counsel for Advocacy, filed comments on the proposed rule asserting that the agencies failed to comply with the Regulatory Flexibility Act, which requires consideration of small business impacts.[169] In the proposed rule, the agencies certified that the rule would not have a significant impact on small businesses.[170] The SBA Office of Advocacy disagrees, saying: "Advocacy believes that the agencies have improperly certified this rule," noting significant direct impacts on small businesses. Accordingly, the SBA Office of Advocacy urges EPA to withdraw the proposed rule and comply with the Regulatory Flexibility Act. We agree.

C. The Proposed Rule Fails to Comply with the Unfunded Mandates Control Act.

The agencies also certified that: "This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector."[171] According to the agencies, the proposed rule does not directly regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA.

As noted above, the proposed rule will require state, local, and tribal governments to take actions due to the expansion of jurisdiction, just as it will require small businesses, landowners, and the entire regulated community to take actions. The failure to consider local government impacts is another reason the agencies must withdraw the rule and issue a reproposal.

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[168] *See, e.g., General Electric v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (guidance that creates legal obligations is a legislative rule).
[169] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[170] 79 Fed. Reg. at 22220.
[171] *Id.*

D. The Proposed Rule Fails to Comply with Executive Order 13121.

In the proposed rule, the agencies also certified that: "This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[172] As these comments have demonstrated, the proposed rule would have a significant effect on states' ability to regulate use of their lands and waters.

Under the Executive Order, federalism implications include "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

As a result, the agencies must fully comply with the "Fundamental Federalism Principles" of section 2 of the Order, which requires the agencies to "act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." Many states have identified these uncertainties in the proposed rule.[173] The agencies also must comply with the "Federalism Policymaking Criteria" of section 3, which requires agencies to strictly adhere to constitutional principles and statutory authority, to provide states with maximum administrative discretion, and to rely on state policies to the maximum extent practicable. Finally, before issuing a proposal, the agencies must develop and provide "a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met."

To meet these requirements, the agencies must withdraw the rule and develop a new proposal.

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[172] 79 Fed. Reg. at 22,220.

[173] *See, e.g.*, October 23, 2014 comments filed by Kansas Governor Sam Brownback; October 8, 2014 comments filed by Pennsylvania's Department of Environmental Protection, Deputy Secretary for Water Management, Kelly Heffner; October 8, 2014 comments filed by the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina.

VIII. Recommendations.

As demonstrated above, the proposed rule lacks statutory, judicial, and record support and the agencies' have failed to meet the requirements of the APA, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders. We therefore urge the agencies to withdraw the proposed rule and develop a new proposal that articulates legitimate legal and technical rationales for regulating water under the Clean Water Act that are consistent with the text, structure, and purpose of the Clean Water Act and Supreme Court precedent, and that reflect reasonable, constrained exercises of federal jurisdiction with deference to state control over land and water resources. The agencies should develop this replacement proposal in dialogue with states and the regulated community, in a search for focused, reasonable positions on what is and is not jurisdictional. One or more workshops for this purpose could be helpful. The agencies must then make the revised proposal and improved rationales available for public comment.

A reproposal must meet the following principles. First, it must focus on water quality impacts to navigable waters. Second, it must focus on natural water bodies, not water that is in municipal, agricultural or industrial use. Third, it must apply the combined constraints of the agencies' constitutional authority, Congress' expression of limits in the CWA, and the Supreme Court's opinions including the plurality and Justice Kennedy opinions take together in *Rapanos*. Fourth, it must focus on water bodies where a federal presence is truly warranted, allowing states to retain primary jurisdiction over other waters. Fifth, the agencies must follow proper administrative procedures in issuing the proposal and taking public comment, including accurate cost-benefit analysis, consultation with affected stakeholders, and a focus on minimizing regulatory burden. By following these principles, the agencies would be able to promulgate a rule that is both lawful and clear.

A. Focus on Water Quality Impacts to Navigable Waters.

As discussed above, the CWA addresses only the quality of navigable waters. Consistent with Supreme Court case law interpreting the Act, to protect the quality of navigable waters the agencies may exert jurisdiction over a limited set of waters that are not navigable. The

identification of those waters must be based on a showing that federal jurisdiction over those non-navigable waters is necessary for the protection of the quality of navigable waters.

1. *Tributaries.*

Under the *Rapanos* case, a showing that regulation of a tributary is necessary to protect navigable water must be based whether the flow in the tributary is "relatively permanent" and whether that flow could affect water quality. The plurality decision determined that flow must be relatively permanent to have any impact on downstream navigable water. Justice Kennedy added a requirement that not just any impact was sufficient; it must be a significant impact. As discussed above, Supreme Court precedent requires that both tests be met for a non-navigable water to be jurisdictional under the CWA.

Applying that test to "tributaries," tributaries would be defined as waters of the U.S. based on whether a natural channel of water that maintains flow even when it is not raining such that it is "relatively permanent." In addition, the tributary must be capable of transporting pollution to a navigable water such that it could have a significant impact on the navigable water. This legal basis for this recommendation is the fact that the purpose of the CWA is to protect navigable waters from pollution. The technical basis would be an evaluation of the permanence of the flow and whether that flow could carry pollutants to a navigable water in a particular geographic area.[174]

This definition would not extend to water that goes underground, so the agencies would not need to make arbitrary decisions about the distance groundwater can travel, or how many years can elapse before groundwater is recharged to surface water, and remain a "tributary." The CWA does not apply to groundwater, shallow or not. Water that becomes groundwater loses its status as a water of the U.S. Thus, non-navigable water that flows on the surface before it becomes groundwater cannot be considered a water of the U.S. These distinctions will do much to increase the clarity of a proposed rule.

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[174] The agencies' subjective determination that an OHWM can be discerned is not an appropriate surrogate. In 2003, Robert Pierce reviewed the reliability of the use of the term "OHWM" and other terms that the Corps uses to determine the limits of its jurisdiction in inland landscapes and identified technically-based alternative concepts that would be more appropriate and defensible. He concluded that: "The COE needs to assess what a reasonable level of flow is necessary to have an effect on a navigable waterbody before it concludes that any particular landscape feature that exhibits an OHWM is jurisdictional." *See* Pierce, *supra* n. 126, at 22.

Under this definition, identification of a tributary would not be based on U.S. Geological Survey maps, aerial photography, or remote sensing information, as proposed by the agencies. Instead, it would be based on quantitative information about flows, adding certainty and clarity and greatly reducing arbitrary differences among jurisdictional determination,

2. *Adjacent and other waters.*

Under *Riverside Bayview*, "adjacent waters" must be limited to wetlands that are part of a continuum that establishes the point at which the water ends and land begins. The legal basis for this recommendation also is protection of navigable waters from pollution. The technical basis would be a determination of the point at which water ends and land begins. Consistent with *Riverside Bayview*, wetlands would meet this definition only if they are not separated from the jurisdictional water by dry land, including berms and levees, so "other waters" would not be a separate category.[175] Any determination that dry land between jurisdictional water and a wetland or other water is somehow part of that continuum would not be legally or technically justified, so wetlands or water beyond that separation cannot be part of the jurisdictional water.

This definition would clarify the scope of federal jurisdiction and would significantly relieve the confusion caused by the proposed rule. Under this definition, the agencies will not have to define the term "waters" because they would no longer be proposing to regulate "all waters." They will not have to define "floodplain" or "riparian area" because location in these geographic areas would not be a basis for asserting federal jurisdiction. This will greatly alleviate the concerns over the regulation of land and arbitrary and inconsistent jurisdictional determinations applying "best professional judgment."

The agencies also would not have to define "shallow subsurface hydrologic connection" or "confined surface connection" because these too would not be used to establish jurisdiction. Abandoning these new bases for jurisdiction will mean that the agencies do not have to justify how water regains its status as a "water of the U.S." after it recharges from groundwater to surface water or after it flows over land. It will also alleviate concerns that the agencies will try to argue that all water is connected every time it rains.

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[175] The *Carabell* case that was consolidated with *Rapanos* addressed a man-made drainage ditch that ran along one side of the wetland, separated from it by a 4-foot-wide man-made berm. 547 U.S. at 729. By remanding the case, both the plurality and Justice Kennedy determined that separation by a berm could not be ignored.

These changes will also alleviate concerns that many stormwater ponds, spreading basins, reservoirs, irrigation canals, and cooling ponds or lagoons, and even puddles or other standing water could become jurisdictional waters of the U.S. under the proposed definition of "adjacent waters."

Finally, these changes will replace the term "significant nexus" with a quantifiable impact on navigable water, removing the concern expressed by some members of the SAB Panel that: "The definition of significant nexus used in the Proposed Rule is scientifically flawed and does not employ modern concepts of scientific significance and statistical inference."[176] Removing the term "significant nexus" from the regulatory language also addresses the concerns expressed above that the agencies are attempting to read "water quality" out of the CWA and regulate based on the life cycle of species. Under these changes, movement of a beaver between a stream to a farm pond or the movement of an alligator from a river to a golf course water trap will not make the farm pond or water trap a water of the U.S.

3. *Clarity for drainage ditches.*

The recommendations above for defining tributaries and identifying what wetlands are jurisdictional will also clarify the regulatory status of drainage ditches. A manmade ditch would not be a tributary, obviating the need to define what it means to contribute flow and what is "perennial" flow. A manmade ditch could be excavated though a wetland that is not jurisdictional, obviating the need to define the term "uplands." A manmade ditch that develops wetland characteristics would remain outside federal jurisdiction. A manmade ditch that allows water to percolate into the ground would not be a water of the U.S. Only a ditch that replaces a natural stream, consistent with that Acting Assistant Administrator Stoner's explanation, would be jurisdictional. These changes would eliminate significant confusion engendered by the proposed rule.

B. Focus on Water Bodies, Not Overland Flow, Point Source Conveyances, or Water Used for Municipal, Industrial, or Commercial Purposes.

The agencies claim the authority to identify what waters are "the focus of the CWA." 79 Fed. Reg. at 22218. However, they do not explain what that focus is. We urge the agencies to

[176] SAB Rule Review, at 95.

recognize that the CWA is focused on the protection of the quality of navigable waters and is not focused on the use of land or water. Further, not all water is a water of the United States even if it can convey pollutants to navigable water. To facilitate future decision-making and promote certainty regarding when the CWA does and does not apply, the agencies should articulate the legal and policy rationales for identifying water that is not a "water of the U.S."

1. *Overland flow.*

First, the agencies should clearly explain that the CWA does not regulate the overland flow of rain and snow melt. All overland runoff may eventually flow to a channel, but this water is considered a nonpoint source.[177] It would not become part of the waters of the U.S. until it flows into a water of the U.S.

Applying this clarification, water that flows only in response to rain or snow melt would not be a water of the U.S. Thus, a reproposal would not need to define gullies and rills or distinguish them from an "ephemeral stream." None of these features would be subject to federal jurisdiction.

2. *Point source conveyances.*

Water in a point source conveyance is not a water of the U.S. Rather, such water may be discharged *to* a water of the U.S. *from* the conveyance. That discharge may carry pollutants that are regulated under section 404 or 402 (or may be exempt by statute). However, the water itself is not regulated until it is discharged and enters a channel that is a water of the U.S.[178]

For example, EPA has long recognized that collected stormwater is not a water of the U.S. Thus, all of the municipally owned or operated pipes, curbs, gutters, ditches, drains, and other conveyances that comprise an MS4 system collect and carry stormwater to an "outfall," which is specifically designated by EPA's regulations as a "point source" because it is "the point where a

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[177] *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir.1984) ("[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance.").

[178] *See, e.g., National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (water in a lagoon is not regulated under the CWA until it is discharged); *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").

municipal separate storm sewer discharges to [WOTUS]."[179] Industrial stormwater, including runoff from many construction sites, also is collected and discharged through an outfall.[180] If stormwater collection systems themselves were considered waters of the U.S., then EPA would have no authority to regulate the discharge from the collection system to a river or stream.[181] Runoff into municipal and industrial stormwater collection systems would be unregulated nonpoint sources, and the collection systems themselves would be waters of the U.S. that merely transfer water to another water of the U.S. The result would leave stormwater unregulated, undermining the objectives of Congress in section 402(p) of the CWA and reducing the protection of the environment.

A reproposal that limits tributaries to natural streams, as suggested above, would add certainty by making make it clear that conveyances, such as MS4 systems, are not waters of the U.S. As noted by one of the SAB Panel members, the agencies must distinguish between infrastructure and waters of the U.S.[182]

3. *Water Used for Municipal, Industrial, or Commercial Purposes.*

Another example of non-jurisdictional water is water that is used or managed for municipal, industrial, or commercial purposes. Courts have held that water that is in use is not regulated.[183] EPA also has long recognized the distinction between water that is in use and water that is part of the waters of the U.S.[184] This policy is embedded in EPA's water transfer rule, which draws the line between waters of the U.S. and water that is subject to a municipal, industrial or commercial

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[179] 40 C.F.R. § 122.26(b)(9). A "major" MS4 outfall discharges from a single pipe with an inside diameter of 36 inches or more; or an inside diameter of 12 inches in the case where an MS4 receives stormwater from lands zoned for construction and other types of industrial activity. *Id.* § 122.26(b)(7). For a further discussion of the distinction between MS4s and waters of the U.S. see the August 8, 2014 comments of the Coalition of Real Estate ("CORE") Associations.

[180] According to EPA's Phase 1 stormwater rules an "industrial activity" includes construction activity (such as land clearing, grading and excavation) on sites larger than five acres, but may also include land clearing activities on smaller lots in a common plan or development (like a subdivision) that is five acres or more. 40 C.F.R. § 122.26(b)(14)(x). Under the Phase 2 rules, "small construction activity" on sites between one and five acres must also obtain NPDES permit coverage for stormwater discharges. *Id.* § 122.26(b)(15).

[181] *See* 40 C.F.R § 122.3(i) (the transfer of water from one water of the U.S. to another does not require a permit even if the water carries pollutants).

[182] *See supra* p. 49-50.

[183] *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").

[184] *See* August 5, 2005, Memorandum From Anne Klee and Benjamin Grumbles to Regional Administrators, "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers," at 18.

use. "For example, if the water is withdrawn to be used *as cooling water, drinking water, irrigation, or any other use such that it is no longer a water of the U.S.* before being returned to a water of the U.S., the water has been subjected to an intervening use."[185] As EPA explains:

> [A water transfer] differs from a situation in which, for example, an industrial facility takes in water for the purpose of cooling some part of the facility itself. In such cases, the water used for cooling *loses its status as a water of the United States when subjected to an intervening industrial use* ....[186]

If water that is being used were somehow a water of the U.S, then EPA could subject that *use* to permitting, gaining complete control of water supply and water use, contrary to the stated purpose of the CWA, discussed above.

Based on longstanding policy and on the language and structure of the statute, the agencies should specify that water that is subject to a municipal, industrial, commercial, or agricultural use is not a water of the U.S, and that such use includes water that is being collected, stored, managed, used, or treated prior to discharge to a water of the U.S. or without discharge. This is the legal rationale for the waste treatment system exemption. It is the legal rationale that would clarify a number of areas of confusion. This clarification also would address concerns raised by some of the SAB Panel members.[187]

For example, clarifying that water that is in use is not jurisdictional makes it clear that a ditch that moves cooling water or process water or waste water around an industrial facility every month of the year is not a water of the U.S. Similarly, a canal used by an irrigation district to move water or hold water every month of the year would not be a water of the U.S.

This recommendation clarifies that all systems that hold, manage, or move water for collection, reuse, treatment, evaporation, infiltration or injection to groundwater, and aquifer storage, would be outside the definition of waters of the U.S. This exclusion would continue to apply even if a storage pond began to grow cattails or if an aquifer storage and recovery system recharges to surface water. Water that is being used by municipalities, industries, and farmers and ranchers are not federal waters.

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[185] 73 Fed. Reg. 33697, 33704 (June 13, 2008) (emphasis added).
[186] *Id.* at 33705 n.10 (emphasis added).
[187] *See supra* pp. 49-50.

IX. Conclusion

For all the reasons cited in above, we urge the agencies to withdraw the proposed rule and work with States and stakeholders to develop a proposed a much more refined, clear, reasonable, and workable definition of waters of the U.S. that is consistent with the CWA and Supreme Court caselaw, as recommended above.

Appendix A. Tennessee Department of Economic and Community Development proposed industrial development site.