



Illinois Coal Association
212 S. Second Street
Springfield, IL 62701
(217)528-2092 phone / (217)523-5191 fax
www.ilcoalassn.com

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Submitted Via Email

Water Docket
Environmental Protection Agency
Mail Code 2822T, 1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011-0880.

RE: Comments on *Definition of "Waters of the United States" Under the Clean Water Act, Proposed Rule, 79 Fed. Reg. 22188 (April 21, 2014)*

Dear Agency Officials:

The Illinois Coal Association referred to herein as "ICA" or the "Association" appreciates the opportunity to comment on the above-referenced rule (referred to herein as the "Proposed Rule" (or the "Proposal") proposed jointly by the U.S. Army Corps of Engineers, Department of the Army (the "Corps") and the U.S. Environmental Protection Agency ("EPA") (the Corps and EPA are collectively referred to herein as the "Agencies") and published in the *Federal Register* on April 21, 2014. We write to express our grave concerns about the overall legality of the Proposed Rule and to request that, in the interest of avoiding unnecessary litigation and delay, the Agencies withdraw the Proposal until the numerous deficiencies noted in these comments can be addressed.

The Illinois Coal Association is a professional trade organization created in 1878 to promote the Illinois coal industry. ICA members produce the majority of coal mined in Illinois. In 2013 Illinois operators produced over 52 million tons of coal, contributing over \$2 billion to the state's economy. The industry employs over 4,000 workers, and is responsible for another 28,000 indirect jobs. The Proposed Rule will have a negative impact on the operations of ICA members.

The ICA submits the following comments on the Proposed Rule on behalf of itself and its members. We agree that the Agencies are long overdue to provide greater consistency, clarity, and certainty for jurisdictional determinations under the Clean Water Act (referred to herein as the "CWA" or the "Act"), and we encourage the Agencies to pursue a rulemaking that would achieve such goals. But this is not at all what the Proposed Rule would accomplish. Rather, if adopted as written, the Proposal would lead to precisely the *opposite* result – inviting only more confusion and inefficiency in the wake of an abrupt and arbitrary departure from established practice, legal precedent and best available science. In pursuit of greater efficiency, the Agencies have unfortunately chosen to ignore legally binding limits on jurisdiction. Indeed, despite promises of an approach to greater clarity that is consistent with judicially imposed limits on jurisdiction, the Proposed Rule would result in a sweeping and impermissible expansion of federal jurisdiction in direct conflict with Supreme Court precedent.

The aggressive expansion of federal jurisdiction under the Proposed Rule is unprecedented and, if adopted, would impose permitting requirements on a broad cross-section of the industry and in extensive geographic areas not previously subject to CWA regulation. Not surprisingly, the Agencies go to great lengths in the Proposal and the supporting economic analysis to downplay the fiscal impact of the proposed revisions on the regulated community. *See generally, Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers* (March 2014).¹ However, the fact is that the strain and regulatory burden of the Proposed Rule would be felt across nearly every sector of industry and commerce in this country. Alarming, even the Agencies themselves have struggled to provide justification for this extraordinary new regulatory burden.² Whatever benefit the Proposal might provide in terms of added protection over isolated and relatively insignificant waters, at best, pales in comparison to the costs it would impose on industry and the American people.

The Proposed Rule would significantly impede daily operations and routine expansions at many of our members' mine sites. The potential expansion of jurisdiction over previously unregulated features such as ephemeral streams, sediment ponds, drainage ditches, vernal pools and other "fill and spill" features is particularly problematic. These features pervade our coalfields and, thus, are frequently encountered during routine activities such as construction and maintenance of access and haul roads or roadside ditches. Having to account for impacts to these features within the section 404 context would increase both permitting costs and associated economic losses due to project delays for our members by several orders of magnitude.

The Agencies have solicited comments pertaining to numerous elements of the Proposed Rule with an apparent goal of proceeding directly to a final rule (regardless of whether the comments received would dictate a re-proposal). Due to its fundamentally flawed expansion of jurisdiction, as well as the other incurable deficiencies addressed below, we respectfully submit that any further efforts to promulgate a final rule based on the current Proposal would be ultimately destined for failure before a court. As written, the Proposal falls well short of providing a defensible foundation for advancing this rulemaking. For these reasons, we are asking the Agencies to reconsider, rather than advance, their Proposal and thus avoid inevitable litigation and further delay.

I. Contrary to the Agencies' Stated Desire for Greater Clarity, Certainty, and Predictability, the Proposed Rule will Result in Just the Opposite.

A major argument and impetus for the Proposal, according to EPA, is the need to clarify and provide greater predictability in the realm of CWA jurisdiction and permitting, based on confusion caused by recent Supreme Court case law. According to Acting Assistant

¹ Available at:

http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

² See "EPA Struggles To Identify Cases To Bolster Rule Defining Water Law's Reach," InsideEPA Article, May 22, 2014, available with InsideEPA.com subscription at <http://insideepa.com/201405222471692/EPA-Daily-News/Daily-News/epa-struggles-to-identify-cases-to-bolster-rule-defining-water-laws-reach/menu-id-95.html?s=mu>.

Administrator Nancy Stoner, that confusion “added red tape, time, and expense to the permitting process . . . [and] so EPA and the Corps are bringing clarity and consistency to the process, cutting red tape and saving money.” Unfortunately, while EPA’s leadership may truly wish for greater clarity and predictability, the exact opposite is what we are likely to get from this Proposal.

Regrettably, rather than respond openly and directly to the public’s growing concerns, the EPA has been on a public relations tour in an attempt to push back and quell those concerns, as evidenced by the EPA’s PR campaign “Ditch the Myth.” This PR campaign appears exclusively focused on persuading the agricultural sector that farmers will not be harmed by this rulemaking. And the campaign is aimed at responding to some of the more fringe “myths,” such as “whether a permit is needed for walking cows across a wet field or stream.” This campaign has done very little to address the reality of the breadth and ambiguity of the Proposal and, in fact, has created greater cynicism regarding EPA’s actions and underlying motivation. If there is any clarity at all with this Proposal it is that the federal government has every intention of expanding jurisdiction to waters never before regulated.

Despite the EPA’s and Corps’ dogged efforts to dispel widely held concerns – what the agencies’ have broadly castigated as myths, misperceptions, and misinformation – the Agencies have failed to address legitimate concerns. That is, the proposed language and ambiguity in new terms and definitions creates enormous uncertainty in the scope and reach of the CWA program. It is abundantly clear that the Proposal will establish jurisdiction over many isolated waters, such as those at issue in *SWANNC*, as well as expand jurisdiction to even more “adjacent wetlands” such as those at issue in *Rapanos*. Despite repeated requests to the Agencies whether this Proposal would cover waters at issue in *SWANCC* and *Rapanos*, the regulated community has yet to get a response. So, we are left to reach our own conclusions.

Rather than harmonize the opinions of Justice Kennedy and the plurality who all agreed in the decision in *Rapanos* and the government’s overreach – a decision that clearly limited the government’s jurisdiction – the Agencies have engaged in head counting, cobbling together a proposal based on the rationale of Justice Kennedy and the four dissenting justices (which the EPA disingenuously refers to as the “more narrow reading”). The result of the Proposal is that most, if not all, isolated wetlands and wetlands adjacent to ditches or streams, no matter how remote they are to traditional navigable waters, could be deemed jurisdictional. Given the ambiguities of the text and enormous discretion of the field personnel in making jurisdictional decisions, we remain very concerned about the implications of this Proposal.

A common refrain of EPA leadership in defense of the Proposal is that it “does not protect any types of waters that have not historically been covered under the CWA and specifically reflects the Supreme Court’s more narrow reading of jurisdiction.” (emphasis added). There have been other unsupported assertions including, for example, that the Proposal “does not broaden coverage of the Clean Water Act” or “expand jurisdiction over ditches.” These assurances ring hollow in light of the actual language of the Proposal. And, while the Proposal may not regulate new “types of waters”, it will in fact result in the regulation of many more waters and water features. For example, EPA’s claim that the Proposal does not expand Clean Water Act coverage is patently inconsistent with the preamble, which clearly indicates the

Agencies intent to expand coverage to isolated waters, such as prairie potholes, which now under the concept of “fill and spill” would be subject to coverage. Proposed Rule at 22208, 22241, and 22249. In addition, the Agencies’ assertions that the Proposal does not expand jurisdiction over ditches is equally vapid, because the vast majority of ditches serve as hydrological connectors conveying water, either directly or indirectly, to jurisdictional water bodies. Thus, the Agencies’ claims regarding ditches is of little comfort. Additionally, until this Proposal, at no time had the Agencies ever regulated wetlands adjacent to other wetlands adjacent to tributaries. This long-standing restraint, however, would be jettisoned under the Proposal, thereby increasing the amount of regulated waters deemed “adjacent” (Id. at 22209).³ So the oft repeated claims that jurisdiction will not be expanded simply fail to square with the facts.

Unfortunately, the Agencies have taken advantage of the confusion created by a 4-1-4 Supreme Court decision and offered a Proposal that will expand jurisdiction according to any historical measure. And given the enormous subjectivity of the Proposal, the confusion will only be compounded by the various interpretations and field applications by the ten EPA regional offices and 43 Corps district offices. The result will be untenable.

II. The Proposed Rule Suffers From Numerous Legal, Scientific, Economic and Practical Deficiencies

Although the Agencies have maintained that the Proposed Rule is narrow and clarifies CWA jurisdiction, nothing could be further from the truth. Rather, the Proposed Rule actually expands and confuses federal authority under the CWA. As discussed in further detail below, this sweeping expansion constitutes an impermissible bypass of both Congressional intent and established judicial boundaries on federal CWA jurisdiction. Moreover, even setting aside threshold questions of statutory authority and consistency with binding Supreme Court precedent, the validity of the Proposed Rule would remain in doubt due to the questionable scientific analysis on which it is purportedly based.

A. *The Proposed Rule’s expansive jurisdiction exceeds the Agencies’ authority under the CWA and contravenes controlling Supreme Court precedent*

According to the Agencies, the Proposed Rule is meant to revise the existing regulatory definition of “waters of the United States” under the CWA **consistent** with Supreme Court rulings and modern science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters. See Proposed Rule at 22188-22189 (emphasis added). In so doing, the Agencies claim that the Proposed Rule would **not** significantly expand jurisdiction beyond the historic reach of the CWA. See *id.* at 22192 (emphasis added). In fact, the Agencies even suggest that the “scope of regulatory jurisdiction . . . in th[e] proposed rule is **narrower** than that under the existing regulations.” *Id.* (emphasis added). The Agencies also suggest in the preamble that the Proposed Rule “is clear and understandable and . . . consistent with the law and

³ The Agencies propose deleting the parenthetical from the existing “adjacent wetlands” regulatory provision because, according to the Agencies, “in practice some wetlands that were indeed adjacent to a tributary were found to not meet the definition of “adjacent” simply because another adjacent wetland was located between the adjacent wetland and the tributary.”

currently available scientific and technical expertise.” *Id.* Such assertions are simply false and fly in the face of reality, well established law, and historical practice.

Despite the Agencies’ assertions, it is clear that, if finalized as proposed, the Proposed Rule would substantially expand the scope and reach of the CWA to waters that historically have not been regulated. In particular, the Proposed Rule would make jurisdictional *all tributaries*, regardless of flow and duration, as well as *all adjacent waters*, broadly defined to include waters with a shallow hydrologic or subsurface connection, even where separated by uplands or wholly man-made features. These are not insignificant changes. Rather, when combined with broad and unlimited theories of connectivity, they constitute abrupt and arbitrary deviations from longstanding regulatory meanings. We fail to see how such sweeping changes align with the Agencies’ purported goal of promoting clarity and consistency. In any event, whatever the Proposed Rule might have accomplished in terms of added clarity is undone by the fact that it rests on an erroneous assertion of jurisdiction that runs afoul of the seminal Supreme Court holdings in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr’s*, 531 U.S. 159 (2001) (“SWANCC”) and *Rapanos v. United States*, 547 U.S. 715 (2006). Indeed, though the Agencies provide lip service to Justice Kennedy’s concurrence in *Rapanos*, the Proposal fails to comply with his basic admonition that the connection between a regulated site and traditionally navigable water must be substantial in order to establish jurisdiction. *Rapanos*, 547 U.S. at 778-780, 782.

Congress explicitly sought to limit federal jurisdiction under the CWA to only certain “navigable” “waters of the United States.” See 33 U.S.C. §§ 1311(a), 1342(a) and 1362(7). This clearly underscores the fact that certain other waters necessarily fall beyond the Act’s reach. See 33 U.S.C. §§ 1311(a), 1342(a) and 1362(7). Over the last several decades the U.S. Supreme Court has sought to provide meaning to the concept of “waters of the U.S.” and has shed light on where, along the continuum of the landscape, from wet to dry land, the federal government’s authority under the Act must begin and end. See generally, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *SWANCC*, 531 U.S. 159; and *Rapanos*, 547 U.S. 715. And although that line in the landscape has, in some cases, proven to be difficult to ascertain, here it is clear that the Agencies’ attempts to exert ever increasing control over an ever decreasing volume of water would push this line far beyond the point where the term “navigable” retains any meaning. It goes without saying that Congress did not intend for this definition to be subsequently read out of the CWA by agency regulation.

B. *Reliance on an incomplete scientific analysis casts further doubt on the validity of the Proposed Rule.*

Compounding the numerous concerns addressed elsewhere in these comments regarding the Agencies’ legal authority are other serious procedural deficiencies stemming from the Agencies’ handling of the scientific analysis that purportedly serves as the foundation for the Proposal. For one, the scientific report – U.S. Environmental Protection Agency, *Draft Report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, DC: U.S. Environmental Protection Agency, 2013) (“Connectivity Report”) – which the Agencies cite as the key foundation for their Proposal had undergone neither a complete peer-review nor been finalized at the time the Agencies published

the Proposed Rule. In fact, the Connectivity Report was submitted to the EPA's Science Advisory Board ("SAB") to begin review on the same day the Proposed Rule was provided to EPA's Office of Management and Budget ("OMB") for interagency review. Not only does this defy basic principles of administrative rulemaking,⁴ as well as specific White House regulatory guidelines⁵, it is particularly concerning for a major rulemaking like this where the scientific and legal concepts are inextricably linked and where the sponsoring agencies rely heavily on a scientific basis for promulgating the regulatory scheme. As the House Committee on Science, Space and Technology aptly stated in an October 18, 2013 letter to EPA Administrator McCarthy:⁶

Any attempt to issue a proposed rule before completing an independent examination by the agency's own science advisors would be to put the cart before the horse. The agency's current approach to CWA jurisdiction appears to represent a rushed, politicized regulatory process lacking the proper consultation with scientific peer reviewers and the American people. If EPA has not already provided SAB with the proposed rule, the House Science Committee urges the agency to do so immediately. Under the law, the advice of scientific experts is a pre-requisite, not an afterthought.

In addition, the Agencies' cart-before-the-horse approach to the Proposal becomes even more problematic as we look ahead to final action. As noted below, the SAB has now called into question EPA's proposed approach for addressing connectivity. *See SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Draft Report, at pg. 2 (March 25, 2014) ("SAB Report") (calling for a basic shift from the current all-or-nothing approach to defining connectivity in the draft Connectivity Report to one that more appropriately and accurately recognizes relative degrees of connection).⁷ Thus, having rushed to release the Proposal, the Agencies are now

⁴ It is a fundamental requirement of administrative law that an agency's proposed rule and the basis for public comment must be based upon the best available scientific information. *See* Data Quality Act, Pub.L.106-554 (2001) and *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, EPA Office of Management and Budget (February 22, 2002).

⁵ *See* Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365:

"Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the... [CWA]... is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based." Significantly, the law goes on to explain that this process provides the Board with a critical opportunity to share with the Administrator "its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation."

⁶ *See* Letter from Rep. Lamar Smith, Chairmen, House Committee on Science, Space and Technology and Rep. Rep. Chris Stewart, Chairman, House Subcommittee on Environment to Gina McCarthy, Administrator, USEPA, dated Oct. 18, 2013.

⁷ Available at:

[http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/5E3A5C08948B391585257CAD004CD867/\\$File/SA](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/5E3A5C08948B391585257CAD004CD867/$File/SA)

faced with the Hobson's choice of either substantially revising the Proposal to heed the SAB's critical recommendation – which more accurately reflects the “best available science” – or ignoring it altogether. The first choice would lead to a final rule that is not a “logical outgrowth” of the Proposal⁸ and the second would lead to one that arbitrarily ignores the best available science. Clearly, neither choice is in the best interest of the American people.

Finally, as noted in numerous public comments previously submitted to EPA,⁹ the Connectivity Report suffers from a number of deficiencies which call into question its overall accuracy and completeness. For one, as a general matter, the Connectivity Report fails to support the sweeping assertion of jurisdiction over all headwater streams that would result from the Agencies' suggested new definition of “tributary.” This particular defect was highlighted by comments provided by the Water Advocacy Coalition (“WAC”):

Most of the science of connectivity addressing the importance of the connection of headwater streams with downstream waters has been focused on measuring the flow of resources (matter and energy) from upstream to downstream. While these studies have demonstrated that matter and energy that flow from headwater streams represent some portion of the matter and energy in downstream waters, these studies have not focused on quantifying the ecological significance of the input of specific tributaries or headwaters, alone or in the aggregate, and ultimately whether such effects could be linked directly and causally to impairment of downstream waters. The [Connectivity Report] neglects to quantify the importance of the contribution of matter and energy from upstream tributaries relative to matter and energy derived locally from sunlight and riparian areas that surround downstream waters, and it does not discuss the important temporal and geographical variation that exists in the relative contribution of matter and energy from upstream and downstream sources. Thus, the scientific review in the [Connectivity Report] has not [provided] the quantitative specificity for practical application to a single nexus.

Such specificity is critically needed, and if left unaddressed, will significantly limit the practical and regulatory value of [the] report.¹⁰

In addition, among other more specific flaws, the Connectivity Report lacks sufficient literature on the unique hydrologic conditions in the arid southwest on which to base a complete assessment regarding connectivity and these data gaps are not acknowledged in the draft report.¹¹

B+Connectivity+Panel+Draft+Report_3_25_14.pdf. The draft SAB Report was not released to the public until after the Agencies issued their Proposal.

⁸ See *Small Refiners Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983); *American Iron & Steel Institute v. EPA*, 568 F.2d 284 (3d Cir. 1977).

⁹ See generally, Public Comments on the draft Connectivity Report, EPA Docket No. EPA-HQ-OA-2013-0582, available at www.regulations.gov.

¹⁰ See WAC Comments on the draft Connectivity Report, Docket ID No. EPA-HQ-OA-2013-0582-0261.

¹¹ See Comments submitted to EPA on 4/11/14 on behalf of the Howard Hughes Corporation et al., EPA ID: EPA-HQ-OA-2013-0582-1713:

III. The Proposed Rule Impermissibly Expands Jurisdiction Over All Tributaries, Including Ditches, Regardless of Location and Flow, in Clear Violation of Even Justice Kennedy’s “Significant Nexus” Test.

The Proposed Rule presumptively concludes that all tributaries – perennial, intermittent **and** ephemeral – are jurisdictional based on an unsupported scientific and legal assumption that all tributaries are important to the chemical, physical and biological integrity of traditional navigable waters, interstate waters and the territorial seas. *See* Proposed Rule at 22201. Historically, only ephemeral streams with an ordinary high water mark (“OHWM”) have been deemed jurisdictional. *See* 65 Fed. Reg. 12823 (2000) and GAO-04-297 Report “*Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction.*” The current Proposal would mark the first time the Agencies have sought to assert blanket jurisdiction over all tributaries as *per se* jurisdictional. We find this to be an arbitrary departure from well-established terminology under the Act; one that would impermissibly and substantially expand the scope of historical jurisdiction.

The Agencies reach this erroneous conclusion and the underlying assumption regarding tributaries based in large part on purported scientific evidence in the draft Connectivity Report. Despite the fact that this report has not yet been finalized, EPA has concluded that the scientific consensus supports its decision to assert jurisdiction over all tributaries based on their importance and significant nexus to traditional navigable waters. *See* Proposed Rule at 22201. Yet, in connection with its ongoing peer-review of the Connectivity Report, the SAB recently published initial findings suggesting that EPA’s basic approach to defining connectivity, including in the context of defining tributaries, is **flawed**:

The [Connectivity] Report often treats connectivity as a binary property, either present or absent, rather than as a gradient. In order to make the [Connectivity] Report more technically accurate and useful to decision makers, the SAB recommends that the interpretation of connectivity be revised from a dichotomous, categorical distinction (connected versus not connected) to a gradient approach that recognizes variation in the strength, duration and magnitude, and consequences of those connections.

See SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Draft Report, at pg. 2 (March 25, 2014).

More importantly, the Agencies’ new definition of “tributary” is clearly at odds with a fair and accurate reading of *Rapanos*. Both the plurality opinion and Justice Kennedy’s concurrence rejected jurisdiction based on an “any hydrologic connection” test. *See* 547 U.S. at

. . . most of the studies used in the Connectivity Report are based in wetter parts of the United States, where conditions allow for more quantifiable and reliable hydrologic data. The Connectivity Report contains very little information or discussion about the special conditions that define and characterize headwater streams and wetlands in the Southwestern United States. As a result, the Connectivity Report overstates the potential nexus between the headwaters and intermittent water bodies in the Southwestern states and traditional navigable waters.

742-757; 759-787. Indeed, Justice Kennedy called into question the Corps' overly broad proposed definition of jurisdictional tributaries, *i.e.*, those that "feed into a traditional navigable water (or tributary thereof) and possess an ordinary high-water mark," arguing that such an expansive definition could in fact reach tributaries that lacked significant nexus. *Id.* at 781 ("Yet the 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 towards it - precludes its adoption as the determinative measure . . ."). The Agencies' blanket assertion of jurisdiction over **all** tributaries contravenes Justice Kennedy's significant nexus test, which was designed to rule out minor tributaries involving insignificant connections to TNWs. *Rapanos* at 781-782 ("This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application . . . it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."). Thus, Justice Kennedy's significant nexus test does not support a broad and unlimited assertion of jurisdiction over **all** tributaries without regard to the strength of their connection to downstream waters.

Yet the Proposed Rule, with its revised definition of "tributary," seeks to do just that, sweeping all tributaries, including most ditches, into the definition of waters of the U.S., without regard to flow, duration of flow, proximity to or effect upon traditional navigable waters. *See* Proposed Rule at 22263. To compound this error, the Agencies jettison even the barest and minimal requirements of OHWM and bed and bank, well-established features of the historical definition of tributaries under the CWA, by proposing to expand the definition of tributaries to water features, such as wetlands, that lack bed and bank and OHWM. *See* Proposed Rule at 22202. ("T]he water must also have a bed and banks and ordinary high water mark (except where a wetlands is a tributary) . . .").

The new definition of "tributary" in the Proposed Rule would also radically alter this term's traditional meaning and long-held practice by extending the term to lakes, ponds and wetlands, even where they lack traditional indicia of tributary – *i.e.*, OHWM and bed and bank. Provided the tributary "contribute[s] flow, either directly or through" (a)(1) to (a)(4) waters, no matter how significant or insignificant the flow is, under this Proposed Rule it will be deemed jurisdictional. Proposed Rule at 22272.

The Agencies' proposed approach deeming all tributaries as *per se* jurisdictional is inconsistent with the Agencies' desire for consistency, clarity and certainty to the extent the new definition of "tributary" includes wetlands and other water bodies that do not contain clear and discernible features such as bed and bank and OHWM. The definition is also at odds with the Agencies' description of a tributary elsewhere in the Proposal, where the agencies seem to acknowledge the necessary presence of bed and bank and OHWM. ("A tributary is a longitudinal surface feature that results from directional surface water movement and sediment dynamics *demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of OHWM.*"). *Id.* at 22202 (emphasis added).

In addition to the questionable legality of the Agencies' significant departure from established terminology and meaning, we are deeply concerned about the practical hardships that the new definition of "tributary" would impose on the regulated community. The revised

definition is hardly the picture of clarity that has been promised. Even after this revision, the question will remain – where does a tributary begin? As the Proposed Rule notes, although the upper limit of a tributary is usually established “where the channel begins” (*see id.*), under this new definition, which now includes waters without an OWHW or bed and bank, a tributary could begin well into the headwaters far above any defined channel and remote from traditional navigable waters, provided that it merely “contributes flow, either directly or through another water....” *Id.* at 22272.

The use of OHWM as the primary physical indicator in determining the lateral limits of jurisdiction has been the Corps’ practice for many years.¹² To abandon its use and redefine a jurisdictional tributary as any feature that “drains” to a traditional navigable water, regardless of the volume of flow or presence of an OHWM, creates even greater confusion and uncertainty regarding the lateral limits of a tributary.

The Proposal also advances the position that a tributary can never lose its legal status as a jurisdictional tributary, regardless of the presence of man-made or natural structures. *Id.* This *carte blanche* “no de-federalization” approach could be extremely problematic, especially since the Agencies have proposed no geographic or temporal limits to its application. For the ICA and its members, the revised definition of tributaries is particularly troubling. The majority of eastern coal mine sites, including many currently owned and operated by the Associations’ member companies, have been in active use for decades, during which time operators have relied on drainage ditches and culvert conveyances to manage stormwater flow and maintain compliance with the CWA section 402 and 404 authorizations. These features are common across surface coal mining sites and, in many cases, would likely have once been part of a natural drainage or tributary. Because the locus of activities at surface mine sites is constantly in flux, mine operations frequently come into contact with these types of features and completion of routine operations and regular expansions will often necessitate some alteration or impact. This has posed few regulatory challenges for the Association’s member companies as most of these features have historically been considered outside the realm of CWA jurisdiction. Suddenly bringing these historically exempt and non-jurisdictional features under the lens of CWA sections 402 and 404 would now translate into a significant added regulatory burden and cost for ICA members without any corresponding justification.

We find the Agencies’ proposed revisions regarding jurisdiction over ditches to be similarly inappropriate and inconsistent with established practice and controlling law. The Proposed Rule would, for the first time, expressly define certain ditches as jurisdictional tributaries. Presumably, seeking to avoid a fight over ditches, the Agencies seek to exclude from jurisdiction two specific types of ditches: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and (2) ditches that do not contribute flow, either directly or through another water to (a)(1) through (a)(4) waters. *See* Proposed Rule at 22263. Yet, in the first instance, though the Agencies purport to exclude “ditches that are excavated

¹² *See* Corps RGL 05-05, *Ordinary High Water Mark Identification*, located at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_h_rg105-05.pdf; *See also* GAO-04-297 Report, *Waters and Wetlands, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, located at <http://www.gao.gov/assets/250/241520.pdf>.

wholly in uplands and have less than perennial flow,” the Proposal fails to define “perennial flow,” thereby leaving broad and subjective agency discretion over ditches, including those with water that may flow only one day a year. *See id.* And the second “exemption” is plagued by even greater ambiguity. The Agencies make no attempt to place reasonable bounds on what is meant by “contribute flow,” especially “through another water,” to a TNW. Under the Proposal, “another water” could be interpreted broadly to include any movement of water, even surface sheet flow or groundwater. Under such an interpretation, essentially all water features could be said to “contribute flow” to TNWs sooner or later. Thus, in reality, this second “exemption” is even more illusory than the first.

Indeed, under the Proposed Rule, the Agencies’ would define for the first time four types of ditches as jurisdictional waters of the U.S.: (1) natural streams that have been altered, (2) ditches that have been excavated in waters of the U.S., (3) ditches with perennial flow, and (4) ditches connecting two or more waters of the U.S. *See id.* at 22203. Arguably, under the Proposal, CWA jurisdiction would reach many ephemeral ditches (*e.g.*, roadside, irrigation, stormwater drains) that may flow only episodically and indirectly over a great distance to reach navigable water, and could even extend to ditches from surface mine bench ponds and sediment ponds that ultimately drain to a navigable water. Particularly troubling for many of the ICA members is the fact that these changes under the Proposed Rule could subject coal mine operators to duplicative and unnecessary permitting obligations. Wastewater treatment systems on mines utilize a series of ponds (*i.e.*, bench ponds and sediment ponds), natural drainages and man-made drainage ditches, including both permanent and temporary ditches. These systems are required by federal regulations pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”). *See e.g.*, 30 C.F.R. § 816.41.

Construction of surface mine bench ponds and sediment ponds is already generally subject to 404 permitting, and *outfalls* from the ditches draining them are also already commonly subject to 402 permit requirements. The Proposed Rule would add a burdensome and unworkable layer of complexity to this permitting scheme for surface mines by making the drainage ditches *themselves* subject to CWA jurisdiction as well. These man-made ditches must be frequently altered or moved for maintenance or operational reasons, as well as to ensure compliance under SMCRA. In fact, the federal SMCRA regulations specifically authorize¹³ and direct mine operators to divert flow from mined areas. These regulations require, for instance, that temporary diversions be removed promptly when no longer needed. *See* 30 C.F.R. § 816.43. If these routine interactions with natural drainages and constructed ditches were subject to 404 permitting, as the Agencies’ Proposal would have it, the cost and impact would be staggering.

But the implications go well beyond 404 permitting alone. For one, bringing these features within CWA jurisdiction would, pursuant to section 301 of the Act, force states to devote limited resources toward the development and enforcement of water quality standards for these man-made and, in many cases, temporary water features. Equally absurd would be the significant amount of Company resources required to comply with these “ditchwater” standards. At the same time, the Proposal’s broad definitions of the terms “tributary,” “neighboring” and

¹³ We question whether the Agencies have adequately considered the interaction between the Proposal and the explicit authorization under the Part 816.43 of the SMCRA regulations to divert perennial and intermittent streams so long as adverse impacts are minimized.

“significant nexus” would multiply the number of regulated outfalls under CWA section 402 at large mine sites. This would significantly increase 402 compliance costs, particularly when viewed in light of the additional requirements under EPA’s currently proposed 2013 Multi-Sector General Permit for stormwater discharges (which serves as a model for corresponding permits in delegated states).

Also troubling to us is the potential for significantly expanded jurisdiction over stormwater ditches and temporary diversion ditches under the current Proposal. If adopted as written, the broad new definition of “tributary” and narrow, if not meaningless, exclusions for ditches under the Proposed Rule would bring many, perhaps even most, stormwater ditches under federal jurisdiction. Specifically, the Proposed Rule would extend jurisdiction to all stormwater ditches with an identifiable bed, bank and OHWM that drain into “waters of the U.S.” Considering the Proposal’s expanded interpretation of “waters of the U.S.,” this would likely become an exceedingly common scenario, necessitating a substantial increase in the number of jurisdictional determinations and permit applications required at regulated sites across the country.

The types of ditches identified above as potentially being “federalized” under the Proposed Rule are all abundant features in and across coal mine sites. Few of these ditches are likely to meet the incredibly narrow criteria for exemption proposed by the Agencies. Indeed, given the ambiguous and unbounded terminology used to craft these exemptions, it is hard to imagine that many ditches anywhere would. While the preamble is replete with assurances from the Agencies that the Proposed Rule will not significantly expand CWA jurisdiction, the proposed jurisdictional treatment of ditches is yet another example in a long list of changes that most assuredly would necessitate far more jurisdictional determinations and 404 permit authorizations. It is hard to fathom how this translates into a net public benefit. The financial burden on regulated parties associated with expanding protection to such marginally connected and relatively insignificant ditches would be staggering, while the added protection to water quality would be negligible.

IV. The Proposed New Definition of “Adjacent” Waters is Overly Broad and Would Include Isolated, Non-Navigable Waters, Such as Those Expressly Found to be Non-Jurisdictional in *SWANCC*.

The Agencies introduce a new definition of “adjacent,” which replaces the old term of “adjacent wetlands.” Here, again, we find the Proposal to be at odds with established law and practice and believe implementation of such a new regulatory definition would be plagued by practical difficulties.

The new definition of “adjacent waters” would capture waters never before defined as jurisdictional, based on the still largely undefined concepts of chemical, physical or biological connection to traditional navigable water. This significantly modified definition also introduces newly defined terms such as “neighboring,” “riparian area,” and “flood plain,” which are plagued by ambiguity and, taken together, threaten to extend the reach of the Act to non-navigable waters far from any traditional navigable water. *See* Proposed Rule at 22266. These new definitions raise the possibility that two waters can be separated by great distance and dry land and still be

considered “adjacent.” This is supported by language in the preamble, which states that “in showing chemical, physical or biological connection between adjacent waters and other jurisdictional waters, adjacent waters, including wetlands, *may be separated by land or other features not regulated under the CWA*” Proposed Rule at 22210 (emphasis added). This is precisely the result that both the plurality and Justice Kennedy sought to avoid in *Rapanos* by refusing to extend jurisdiction where significant distances separated allegedly adjacent water features. There is simply no discernible limit to the concept of adjacency under the Proposed Rule, which affirms Justice Scalia’s worst fears of “turtles all the way down.” *See Rapanos* 547 U.S. 754.¹⁴

Further confounding the attempted revisions regarding adjacency is the Agencies’ proposed new concept of “fill and spill,” which would potentially extend jurisdiction even further beyond, and in contravention of, the judicially imposed boundaries in *SWANCC* and *Rapanos*. *See* Proposed Rule at 22208. The Agencies introduce, for the first time, this new concept of “fill and spill” where wetlands or open waters fill to capacity and during heavy rains spill to downstream jurisdictional waters. *See* Proposed Rule at 22208; 22241. To this end, any isolated, non-jurisdictional wetland that has the potential to “fill and spill” would become jurisdictional. This would potentially recapture isolated, man-made water features, such as the quarry explicitly found to be non-jurisdictional in *SWANCC*. *See generally*, 531 U.S. 159. This particular flouting of precedent would likely translate to unnecessary additional permitting burden for ICA members given the prevalence of “fill and spill” features on many mine sites. Specifically, the Proposed Rule would potentially capture as jurisdictional on-site ponds/impoundments and closed-loop water systems that are open (i.e., not piped) wherever these features are located within a “riparian area” or “floodplain” (terms that, as noted above, are overbroad and left to inconsistent interpretation by agency personnel), or share surface or shallow subsurface connections with other waters.

The attempted jurisdictional stretch here becomes even more problematic, and even less reasonable in light of established law, when factored in combination with the Agencies’ conclusion that a significant nexus can be determined based purely on a **biological connection**. *See e.g.*, Proposed Rule at 22241. In support of this position, the Agencies cite to the habitat and life cycle dependency of aquatic birds. Once again, the reasoning here leads to a result that is inconsistent with binding Supreme Court precedent, as it would bring isolated wetlands back into jurisdiction based on a new “Migratory Aquatic Bird Rule” or “Migrating Duck Rule,” a reincarnation of the “Migratory Bird Rule” which the majority opinion in *SWANCC* rejected. *See* 531 U.S. at 174.

V. The Proposed New Definition of “Other Waters” Includes Waters with Insignificant Connections to and Remote From Traditional Navigable Waters, Posing Unique Procedural and Legal Hurdles.

The Proposed Rule would establish jurisdiction on a “case-specific basis” over “other waters,” “provided those waters alone, or in combination with other similarly situated waters,

¹⁴ Justice Scalia was using this metaphorical reference to criticize aspects of Justice Kennedy’s interpretation that sought to revive the notion that physically unconnected ponds could be included based on their ecological connection to covered waters which the Court explicitly rejected in *SWANCC*.

including wetlands, located in the same region, have a significant nexus” Proposed Rule at 22273. As used in the Proposal, the words “in combination with other similarly situated waters” have been lifted but intentionally repurposed from Justice Kennedy’s concurrence in *Rapanos* (see 547 U.S. at 780), and raise the prospect that an aggregated approach could be used to categorize numerous historically non-jurisdictional bodies of water as protected “other waters” under the CWA. While the concept of aggregation has been endorsed to some degree by the Supreme Court, the particular application sought in the Proposed Rule has not. The broad-based approach contemplated by the Agencies could lead to sweeping desktop interpretations and conclusions, impacting many bodies of water and many acres of land, all with little to no on-the-ground verification by the Agencies. More importantly, the Agencies have taken far too great a liberty with the aggregation concept and seek to extend federal jurisdiction to waters well beyond even what Justice Kennedy viewed as an appropriate exercise of the Agencies’ authority. See *Rapanos* 547 U.S. at 780-81.

In addition, the Proposed Rule contemplates situations where a hydrologic connection may be lacking, yet still authorizes the assertion of jurisdiction. See Proposed Rule at 22213. (“A hydrologic connection is not necessary to establish a significant nexus . . .”). The Agencies seek to justify this based solely on the presence of a “biological connection” between semi-aquatic species present in “other waters” and the tributary system. In other words, the Agencies come to the erroneous conclusion that a biological connection alone is sufficient to confer jurisdiction. See Proposed Rule at 22214.

We note that this radical departure from the established meaning of connectivity appears to be premised on a misinterpretation of one isolated statement by Justice Kennedy in his *Rapanos* concurrence. Unfortunately, the Agencies have failed to read this particular statement in its appropriate context and thus misinterpret its meaning.

A hydrologic connection is not necessary to establish a significant nexus, because, as Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water’s functional relationship to the traditional navigable water, interstate water or the territorial seas. These functional relationships include retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water or the territorial seas. See 547 U.S. at 775 (citations omitted) (J. Kennedy) (“it may be the absence of the interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme”).

Proposed Rule at 22213. The Agencies fail to note that Kennedy’s comment here was made in response to the plurality’s argument as to why wetlands adjacent to TNWs, but separated by a man-made berm, may still have a significant nexus to TNWs and thus be subject to the Corps’ regulations. See 547 U.S. at 775. Justice Kennedy was highly skeptical of and rejected the plurality’s “any hydrological connection” test, opining that a hydrological connection alone would be inadequate in some cases to assert jurisdiction. *Id.* at 784-785. (“ . . . mere 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.”). Justice Kennedy never concluded that jurisdiction as a general matter could be broadly asserted in the absence of hydrologic connection. Rather, Justice Kennedy specifically

called into question the Corps' overly broad proposed definition of jurisdictional tributaries, *i.e.*, those that “feed into a traditional navigable water (or tributary thereof) and possess an ordinary high-water mark,” arguing that such an expansive definition could in fact reach tributaries that lacked significant nexus. *Id.* at 781 (“Yet the 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 towards it - precludes its adoption as the determinative measure . . .”). In sum, the Agencies' misreading of Supreme Court precedent leads us to conclude that this particular approach to defining jurisdiction over “other waters” is fatally flawed.

VI. The New Definition of “Significant Nexus” Exceeds the Agencies' Authority Under the Clean Water Act and Raises Serious Constitutional Problems.

Contrary to the Agencies' assertions, we find their view of “significant nexus” to be legally and scientifically unsound. The Agencies present an arbitrary new take on this key term that departs considerably from the concept espoused by Justice Kennedy in *Rapanos*. *See* 547 U.S. at 759-787. The breadth of this departure from *Rapanos* is underscored by the fact that the altered definition in the Proposal, if adopted, would place previously unregulated features such as ditches, ephemeral drainages, ponds (natural or man-made), prairie potholes, seeps, flood plains and other occasionally or seasonally wet areas directly under federal control. That so many historically non-jurisdictional features would now suddenly be swept within the realm of jurisdiction underscores the fact that the Agencies are seeking to impermissibly stretch the meaning of “significant nexus.”

Based on the scope and breadth of the “significant nexus” test as construed by the Agencies, it is entirely conceivable and indeed likely that tributaries and wetlands remote from TNWs with an insubstantial and speculative connection to downstream TNWs could be deemed jurisdictional. This runs directly counter to the legal maxim articulated in *Rapanos* that “[f]or an effect to be “significant,” it must be more than “speculative or insubstantial.” *See* 547 U.S. at 780. Indeed, Justice Kennedy concluded that certain minor tributaries would necessarily lack a significant nexus because they were insubstantial. *Id.* at 781. Despite this judicial guidepost, the Agencies have nevertheless sought to deem all tributaries *per se* jurisdictional, even expanding the traditional meaning of “tributary” to features without bed and bank or OHWM. The Proposal thus leaves open the possibility that “drains, ditches, and streams remote from any navigable-in-fact water” may in fact be deemed jurisdictional, a result which subverts the outer limits on jurisdiction established by *Rapanos*. *Id.* Moreover, as mentioned above, the Proposal further contemplates the possibility of jurisdiction absent a hydrologic connection, based on, for example, a connection with aquatic birds, which in the *SWANCC* case then-Chief Justice Rehnquist, joined by Justice Kennedy, cautioned was a serious encroachment on the rights of states to manage land and water resources. *See* 531 U.S. at 172-74.

- A. *The Proposed Rule treats all hydrological connections as significant, regardless of flow, duration and importance of connection with a downstream navigable water.*

We note that the Agencies treatment of “significant nexus” in the Proposed Rule also fails to conform to the edict from the Supreme Court in *SWANCC* and *Rapanos* that significance must be demonstrated. In other words, under these cases, the mere demonstration of some arbitrary level of connection does not establish significance. Rather, to confer jurisdiction, the “connection” must be “significant,” with such connectivity playing an important role in the ecological integrity of downstream TNW. If no physical connection exists or the connection is not significant in terms of downstream water quality, jurisdiction cannot stand. Unfortunately, the Agencies’ attempts to define “significant nexus” ignore this binding principle and are thus legally deficient.

The ordinary meaning of “significant” connotes something of importance or of meaningful consequence, and as Justice Kennedy opined, involves an effect on traditional navigable waters that is more than speculative or insubstantial. *See Rapanos*, 547 U.S. at 780. Notably, Kennedy rejected the dissent’s theory of jurisdiction based on “any hydrologic connection” arguing that it “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into a traditional navigable water.” *Id.* at 784-85 (“mere hydrological 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.”). Yet, this is precisely what the Proposed Rule would do. Apart from a limited category of excluded upland ditches, which may be more fanciful than actual, the Proposed Rule would deem hydrologic connections as *per se* significant and sufficient to establish jurisdiction. We believe such an approach clearly crosses the boundaries of controlling law.

B. *The Proposed Rule is a significant impingement on States’ traditional and primary power over land and water use, and thus raises serious federalism questions.*

Expanding federal jurisdiction from navigable to isolated waters would mark a serious encroachment upon traditional powers of the states, and runs afoul of basic constitutional limits on federal power. Indeed, the Supreme Court has long been wary of agency interpretations that would infringe upon the states’ “traditional and primary power over land and water use.” *See e.g., SWANCC*, 531 U.S. at 174, citing *Hess v. Port Authority TransHudson Corporation*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”). As highlighted by Justice Rehnquist in *SWANCC*, federal courts view agency actions through the lens of a “prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” 531 U.S. at 173. This concern over, and respect for, federalism “is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.*, citing *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”). This altering of the federal-state framework due to an encroachment upon a traditional state power (i.e., regulation of non-navigable, isolated state waters) is precisely what would result from the Proposed Rule if adopted as written. The federal judiciary’s clear preference for avoiding such an outcome should send a strong signal to the Agencies about how the Proposal would likely be

viewed on appeal. Indeed, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.*, quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). The result of this Proposal would be “plainly contrary to the intent of Congress.”

VII. The Proposed Rule Erodes Longstanding Exclusions Under The Rule, Such as the Waste Treatment Exclusion.

The Agencies claim that the Proposed Rule does not change the existing exclusion from the definition of “waters of the U.S.” for waste treatment systems. But it remains unclear how the Proposed Rule’s broad definition and application of tributaries and adjacent waters, including its discussion on impoundments (*see* Proposed Rule at 22201) could potentially affect the jurisdiction of waste treatment systems or, more importantly, waters upstream of them.

For one, despite the claim that the existing exclusion for waste treatment systems has been preserved, the Agencies have proposed clerical changes to the exclusion that appear to have the effect of narrowing it. The following marked text highlights the difference between the existing exclusion and the proposed one:

Existing. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Proposed. Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

Comparison. Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act ~~CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not~~ waters of the United States.¹⁵

The addition of a comma after “lagoons” would presumably make all waste treatment systems – not just treatment ponds or lagoons – subject to the “designed to meet” standard. This clerical change could have an unintended substantive effect of narrowing the exclusion by making all waste treatment systems – not just treatment ponds or lagoons – subject to the “designed to meet” standard. This is a particular concern for the coal mining industry. As noted above, wastewater treatment systems at surface coal mine sites are, as they must be, designed to meet the requirements of SMCRA. We question the Agencies’ characterization of this as being an ineffectual “clerical” revision. If the Agencies did not intend to alter the wastewater treatment

¹⁵ Some of these revisions are tied to the Agencies new proposed structure for the rule and others to the Agencies’ interest in removing the now irrelevant cross-reference. But the addition of the comma after “lagoons” is inexplicable.

system exemption in any way, as they claim, then it is hard to see why there is even a need for this change.

Moreover, the Agencies state on pg. 22201 of the Proposed Rule that (1) “impoundments do not de-federalize a water, even where there is no longer flow below the impoundment,” (2) impoundments can become jurisdictional, and (3) “an impoundment does not cut off a connection between upstream tributaries and a downstream water so tributaries above the impoundment are still considered tributaries even where the flow of water is impeded due to the impoundment.” We note that this may conflict with the ruling in *OVEC v. Aracoma Coal*, 556 F.3d 177 (4th Cir., Feb. 13, 2009), where the court rejected claims that stream segments connecting fill areas and treatment systems were “waters of the U.S.” See 556 F.3d at 211-16. Under the Proposed Rule, even though waste treatment systems remain exempt, stream segments flowing into them may be deemed to be jurisdictional, thus creating the illogical outcome where section 402 permits would be required, not just for the effluent point **from** the waste treatment system, but also the influent point **into** that system.

For the foregoing reasons, the Illinois Coal Association respectfully requests that the Proposed Rule be withdrawn.

Sincerely,



Phillip M. Gonet, President
Illinois Coal Association
212 S. Second Street
Springfield, IL 62701
217-528-2092
philgonet@springnet1.com