RED RIVER VALLEY ASSOCIATION

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Via electronic submission at www.regulations.gov

November 13, 2014

Ms. Donna M. Downing
Office of Water (4502-T)
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Ms. Stacey Jensen
Regulatory Community of Practice (CECW-CO-R)
U. S Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20317

Re: Comments on 'Waters of the United States' Under the Clean Water Act Jurisdiction
Docket No. EPA-HQ-OW-2011-0880

Dear Mses. Downing and Jensen:

The Red River Valley Association (RRVA), a non-profit, member supported organization, was established in 1925 to develop the water resources in the four-state Red River Valley: Louisiana, Arkansas, Texas and Oklahoma. Our mission is to promote a balanced approach to using our precious water resource for the benefit of navigation, flood damage reduction, irrigation, ecosystem enhancement, municipal and industrial use.

On April 21, 2014 the U.S. Environmental Agency (EPA) and U.S. Army Corps of Engineers (USACE) published a notice entitled "Definition of 'Waters of the United States' Under the Clean Water Act". The Proposed Rule contains sweeping and vague definitions of "adjacent," "tributary," and other terms. In these and other ways, the proposal creates new, overbroad categories of jurisdictional areas that lack a significant nexus to traditionally navigable waters. It would apply jurisdiction where the nexus to navigable waters is not significant and would include isolated waters. Additionally, the agencies have greatly underestimated the true cost of this proposed rule. Following are the comments from the Red River Valley Association.

1. Exceeds the Authority provided by the CWA Section 404: Under CWA section 404(a), any person engaging in activities that result in the "discharge of dredged or fill material into the navigable waters" must obtain a permit from the Corps. The term "navigable waters" is defined broadly by statute to mean all "waters of the United States, including the territorial seas." In turn, the Corps has further defined this term by regulation to include: (1) waters currently used or used in the past for interstate of foreign commerce, including waters subject to the ebb and flow of the tide (i.e., traditional navigable waters); (2) interstate waters and wetlands; and (3) "other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ." This definition also includes "tributaries" of these waters, impoundments of these waters, and "wetlands adjacent to [these] waters."

The agencies' stated intent for issuing the Proposed Rule is to implement the U.S. Supreme Court's decisions in two noteworthy cases that address the scope of waters protected by the CWA: Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs (SWANCC) and Rapanos v. United States (Rapanos). In

SWANCC, the agencies attempted to use the Migratory Bird Rule to assert jurisdiction over a non-navigable, isolated, intrastate pond based on its use as a habitat for migratory birds. The Court ruled that jurisdiction does not extend to ponds that are not adjacent to open water where the only connection to navigable waters was the presence of migratory birds. The SWANCC court noted that the word "navigable" in the CWA had been given limited effect, in the sense that the CWA could properly govern wetlands and other waters that were not themselves navigable. However, as the Court observed, "it is one thing to give a word limited effect and quite another to give it no effect whatever." In other words, water that is totally isolated from navigable waters is beyond the regulatory authority provided by Congress under the CWA.

In the Rapanos case, the Supreme Court addressed the question of whether CWA jurisdiction extends to wetlands not "adjacent" to navigable water. The Court's decision was essentially split three ways: a four-member plurality opinion issued by Justice Scalia, a concurrence by Justice Kennedy, and a four-member dissent written by Justice Stevens. The Scalia plurality opinion found that "navigable waters" must be "relatively permanent, standing or continuously flowing bodies of water," which does not include intermittent streams and tributaries that empty into navigable waters. The Kennedy concurrence established a "significant nexus" test. Under this test, for a water or wetland to constitute "navigable waters," it must possess a "significant nexus" to waters that are or were navigable in fact (i.e., traditional navigable waters) or that reasonably could be so made. The Stevens dissent would have deferred to the Corps' exercise of regulatory jurisdiction.

The meaning and intent of Rapanos has been the subject of extensive debate, but one aspect of the case is clear: it limits the agencies' jurisdiction. Under Supreme Court precedent, Justice Kennedy's concurring opinion should be viewed as the controlling test in future cases. We urge the agencies to rely exclusively on the Kennedy concurrence, in keeping with the law as articulated by the Eleventh Circuit. The Proposed Rule exceeds the scope of jurisdiction under the Kennedy concurrence.

Under the agencies' interpretation, virtually any nexus beyond "speculative" or "insubstantial" would result in a finding of jurisdiction under the agencies' guidance. Even areas that lack a hydrologic connection to traditional navigable waters can be deemed jurisdictional under the Proposed Rule's expansive test.

2. Use of Groundwater in Jurisdiction: The Proposed Rule appears to suggest that a "sub-surface hydrologic connection" may be sufficient to establish a significant nexus between wetlands and jurisdictional waters. It is not possible to rely on groundwater to establish jurisdiction without regulating the groundwater itself, which the agencies seem to acknowledge being beyond their authority. For example, suppose an activity with a discharge directly affecting only an area of shallow groundwater that provides some discernible hydrologic connection between a small upstream water and a jurisdictional area downstream. Under the Proposed Rule, the upstream water also must be jurisdictional. Is it the agencies' position that it is without power to regulate the groundwater between the two putatively jurisdictional areas? If so, then the area constitutes a separation that is analogous to the isolation of the ponds at issue in *SWANCC*. If the agencies believe they can regulate that area directly under the CWA, then they should so state in a straightforward manner (and be prepared to defend that position in the courts).

3. Impacts beyond Current Jurisdiction: The Proposed Rule includes within the scope of CWA jurisdiction "all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, or impoundment." By declaring all adjacent waters—not simply adjacent wetlands, as the current rule and past guidance do categorically jurisdictional, the Proposed Rule includes many waters not previously subject to federal regulation, which is contrary to the agencies' assertion that the proposal does not expand jurisdiction. The definition of "adjacent" is overly broad, impermissibly relying on groundwater connections to capture "neighboring" waters that are not actually adjacent and otherwise would not fall within CWA jurisdiction.

"Tributary" is defined in the Proposed Rule as "a water physically characterized by the presence of a bed and banks and ordinary high water mark [("OHWM")], which contributes flow, either directly or through another [jurisdictional water]," and, additionally, "wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow." While a bed, banks and OHWM can be easily identified in some locations, in others those features are not evident, especially an OHWM. Despite that difficulty, the proposed rule would deem any area with those features to be jurisdictional. Realistically, that has the potential to require examination of miles of upstream tributary features both at the project site and between there and a traditionally navigable waterway. The applicant may not even have access to the entire area due to legal or physical constraints. The definition contains no reference to the volume or frequency of flow, which would seem an important consideration in determining whether an area constitutes a "water" or not.

Although the Proposed Rule would exclude two types of ditches from CWA jurisdiction, ditches that do not meet the criteria for exclusion could be considered waters of the United States. The proposed definition of "tributary" could be interpreted to include man-made waters with artificial features, such as drainage ditches or artificial ponds. Also, ditches with perennial flow are not covered by the exemption, but it is not clear what the agencies believe is meant by "perennial flow."

4. Economic Analysis Underestimates the Cost: Over $1.7 billion is spent each year by the private and public sectors on administrative costs to obtain wetlands permits, without taking into account the cost of required mitigation, and we are concerned that this Proposed Rule will increase both dollar amount and the time required to obtain these permits. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects.

5. Agricultural Interpretive Rule: The agricultural "interpretive rule" governing approved conservation practices, which was issued concurrently with the proposed rule, should be withdrawn. This interpretive rule effectively changes existing regulations, it is subject to public notice and comment requirements under the Administrative Procedure Act ("APA"), and the agencies must provide the public an opportunity to comment on it. In addition, there is a great deal of confusion and uncertainty among the agricultural community regarding the applicability of 404(f)(1)(A) exemptions. The agencies should withdraw the interpretive rule and ensure that any future changes to normal exemptions comply with the APA.

6. Widespread Objection by the US House and Senate: In May 2014 a bipartisan group of 231 House members signed a letter for the agencies to withdraw this Proposed Rule. On May 2013, after issuance of the draft guidance, 52 Senators voted on an amendment to prohibit the agencies from implementing the guidance as a basis for any proposed rule. On September 9, 2014, the House passed (262–152) H.R. 5078, the Waters of the United States Regulatory Overreach Protection Act of 2014, a bipartisan bill to prohibit the Corps and EPA from finalizing the Proposed Rule. The obvious intent of both Houses of Congress is in opposition to this Proposed Rule.

7. State Versus Federal Jurisdiction: We are deeply concerned that this rule undermines the historically successful federal-state cooperation in the administration of the Clean Water Act. The waters this Proposed Rule seeks to cover through federal jurisdiction are not unprotected. They are currently protected as state waters. Surely, a better approach to ensuring these isolated and intrastate waters are adequately protected would be for EPA and the Corps to work with states to improve their water quality programs. Assertion of federal jurisdiction over these waters should be a last resort and not the first course of action.

In conclusion, the Proposed Rule exceeds the proper scope of the agencies' authority as provided by the CWA and subsequently clarified by the courts. Most fundamentally, the Kennedy concurrence in the Rapanos case requires the establishment of a "significant" nexus to traditionally navigable waters. The Proposed Rule exceeds Justice Kennedy's instructions and would assert jurisdiction on the basis of virtually any connection. The agencies should re-propose a more thoughtful and carefully tailored approach to protect these water resources.

Thank you for the opportunity to provide comments and please contact me if you have questions or would like additional explanation. Contact information: (318) 221-5233, redriverva@hotmail.com.

Sincerely,

Richard Brontoli
Executive Director