November 14, 2014

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Water Docket
Environmental Protection Agency
Mail Code 2822T
Docket ID No. EPA-HQ-2011-0880
1200 Pennsylvania Avenue, NW
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RE: Docket Id. No. EPA-HQ-OW-2011-0880; Definition of "Waters of the United States" under the Clean Water Act; Proposed Rule.

The following comments to the proposal of April 21, 2014 by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE), hereinafter referred to as "the agencies", defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview,* and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States (Rapanos)* (76 Fed. Reg. 22187, April 21, 2014), are submitted on behalf of the Independent Petroleum Association of America, the American Exploration & Production Council and the Western Energy Alliance. Collectively, these three groups will be referred to as "the Associations." The comments are also supported by the listed organizations set forth below.

The Independent Petroleum Association (IPAA) represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that most directly will be impacted by the proposed actions. Independent producers develop 95 percent of American oil and natural gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas. IPAA is dedicated to ensuring a strong, viable American oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The American Exploration & Production Council (AXPC), is a national trade association that represents 33 of the largest US independent natural gas and crude oil exploration and production companies - leaders in finding and developing secure energy supplies throughout North America. Members are "independent" in the sense that that they do not have petroleum refining or retail marketing operations and therefore are not "fully-integrated". The AXPC mission is to work constructively for sound energy, environmental and related public policies that encourage responsible exploration, development and production of natural gas and crude oil to meet consumer needs and fuel our economy.

Western Energy Alliance (the Alliance) represents over 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

In addition to the Associations submitting these comments, the comments are also supported by the following organizations:

Arkansas Independent Producers and Royalty Owners Association
California Independent Petroleum Association
Coalbed Methane Association of Alabama
Colorado Oil & Gas Association
East Texas Producers & Royalty Owners Association
Eastern Kansas Oil & Gas Association
Florida Independent Petroleum Association
Illinois Oil & Gas Association
Independent Oil & Gas Association of New York
Independent Oil & Gas Association of West Virginia
Independent Oil Producers Agency
Independent Oil Producers Association Tri-State
Independent Petroleum Association of New Mexico
Indiana Oil & Gas Association
Kansas Independent Oil & Gas Association
Kentucky Oil & Gas Association
Louisiana Oil & Gas Association
Michigan Oil & Gas Association
Mississippi Independent Producers & Royalty Association
Montana Petroleum Association
National Association of Royalty Owners
Nebraska Independent Oil & Gas Association
New Mexico Oil & Gas Association
New York State Oil Producers Association
North Dakota Petroleum Council
Northern Alliance of Independent Producers
Northern Montana Oil and Gas Association
Ohio Oil & Gas Association
Oklahoma Independent Petroleum Association

Panhandle Producers & Royalty Owners Association
Pennsylvania Independent Oil & Gas Association
Permian Basin Petroleum Association
Petroleum Association of Wyoming
Southeastern Ohio Oil & Gas Association
Tennessee Oil & Gas Association
Texas Alliance of Energy Producers
Texas Independent Producers and Royalty Owners Association
Texas Oil and Gas Association
Utah Petroleum Association
Virginia Oil and Gas Association
West Virginia Oil and Natural Gas Association
Association of Energy Service Companies
American Association of Professional Landmen
International Association of Drilling Contractors
International Association of Geophysical Contractors
National Stripper Well Association
Petroleum Equipment and Services Association
US Oil & Gas Association

These joint comments provide the following key points:

- **Impact on Operations.** Factual examples of the exploration and production industry demonstrate the expansive nature of this proposal and the impacts on the industry.
- **Improper Implementation of the Clean Water Act and *Rapanos*.** The proposal fails to adhere to the CWA and the *Rapanos* decision. The significant nexus test as proposed results in a regulatory over-reach beyond the jurisdiction of the CWA.
- **Complicated and Unwarranted Proposal.** The proposed definition complicates rather than streamlines administration of "waters of the United States" under the Clean Water Act and the purpose for change is not well justified.
- **Regulated waters broadly defined.** The proposed definitions for tributary, adjacent waters, neighboring, riparian area, and floodplain and the scope of "other waters" create confusion and will result in significant administrative burdens.
- **Connectivity Report.** The scientific assumptions of the report were not informed by the appropriate jurisdictional scope of the CWA; therefore, its conclusions are not relevant.
- **Expanded Economic Impact.** The economic analysis of this proposal demonstrates broadening of the regulatory scope of "waters of the United States" as evidenced by the increase of overall jurisdiction by 3 percent. The proposed definition is dismissive of the fact that the CWA was not intended to regulate all waters of the United States. The Associations believe that the agencies assertion of an overall jurisdictional increase of 3 percent grossly underestimates the scope of waters that would be jurisdictional under the proposed rulemaking.
- **Grandfathering Needed.** Grandfathering of pending and existing CWA authorizations and interpretations must be addressed.

- **Exhaustion of Existing State and Federal Resources.** State regulatory authorities (e.g., groundwater, water quantity) and state and federal resources (administrative staff) have not been adequately addressed in this proposal. It is apparent that states were not consulted in the development of this proposal when they should have been.
- **Future Litigation.** This proposal invites significant citizen suit litigation with its overly broad jurisdictional implications.

The following comments are set forth in three general categories: (1) factual descriptions of the exploration and production operational changes that will result from implementation of the definition of "waters of the United States" as proposed; (2) legal analyses of the proposal relative to case law and policy; and (3) specific comment to representations in the proposal. These comments are offered to demonstrate that the proposal does not provide for lawful interpretation of the CWA, administrative efficiency or representative economic analysis if its impact.

Factual Descriptions of Exploration and Production Operations That Will Be Impacted by the Proposal.

The Associations offer a factual analysis of the impacts of this proposal on today's oil and natural gas exploration and production operations. The proposal represents a change to the regulatory definition beyond traditional navigable waters ("TNW")[1] to include: tributaries, waters adjacent to TNWs, and "other waters"[2], wet weather streams, certain ditches, certain basins, depressions in the soil, series of ponds or wetlands within a region, etc. The Associations have researched the particulars of the definitional change relative to common regulatory programs applicable to the oil and natural gas exploration and production industry.

An illustration of the complexity and overall significance of this proposal, is evidenced by the inability of Association member companies to perform the simple task of walking existing and new regulated sites to delineate what constitutes "waters of the United States." Under the proposed rulemaking, this exercise alone will be a large and arduous task. Additional expertise will be required to identify tributaries, ponds, "other waters", etc. which make this proposal cost prohibitive for the regulated community to demonstrate they are not under the jurisdictional authority of the agencies. Simply put, the proposed rulemaking does not allow for this simple jurisdictional test nor does the proposal provide clarity to the regulated community.

The following discusses the Associations' research conclusions which highlight the agencies' failure to represent the important impacts of this proposal, as well as a significant underestimation of the costs associated with this proposal.

The operational examples discussed below explain a far more significant economic impact than those impacts described by EPA and the USACE. The examples below do not address increased reporting pursuant to the new proposal of releases to "waters of the United States" in which it is estimated that the burdens on the regulated community and the agencies

[1] Traditional navigable waters are those waters used in interstate for foreign commerce, interstate waters and wetlands, and territorial seas.

[2] "Other waters" are defined as wetlands, similarly situated waters located in the same region that have a significant nexus to a TNW, ditches, ephemeral streams, and ponds.

will be great. The agencies are urged to revise the study and provide more appropriate economic analyses. The agencies are directed to the Report of the Government Accounting Office ("GAO") of July 2014 titled, *Environmental Regulation: EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses* in which the GAO recommended that EPA both improve adherence to OMB guidance and enhance the usefulness of its Regulatory Impact Analysis ("RIAs").[3] The GAO conclusion included the following statement, "[w]ithout improvements in its estimates, EPA's RIAs may be limited in their usefulness for helping decision makers and the public understand these important effects." The following is a summary of "important effects" the Associations have identified that have been underestimated and in some cases ignored by the agencies.

Key Regulatory Programs Impacted by Proposal Affecting Oil and Natural Gas Exploration and Production Operations

As a threshold matter, the Associations highlight the following key regulatory programs, impacting oil and natural gas production and exploration activities that the Associations believe will be impacted by expansion of "waters of the United States" pursuant to the proposal.

(1) **Spill Prevention Control and Countermeasures ("SPCC") (CWA Section 311 and its Related Regulatory Program)** - Taking into consideration new proposed emphasis upon adjacent waters, and natural or manmade ditches, the Associations assessed whether there are operations that would be required to maintain a SPCC plan which previously had no such regulatory duty. Undiked areas are required to have drainage systems flow into ponds, lagoons, or catchment basins to retain oil and return such runoff to the facility. With the proposed rule, if such catchment basins are within areas subject to periodic flooding causing those facilities now to be adjacent to an "other water," SPCC plans would be required to be implemented or renewed. Such areas impacted by rain events may be deemed a water of the United States and become a protected ephemeral stream/tributary. The agencies' *Economic Analysis* only references anecdotal information, but concedes that "some potentially regulated facilities believe that they are not covered by the applicable SPCC regulations because they do not have the potential to discharge to a water of the U.S.. . . . it is reasonable to assume that a broader assertion of CWA jurisdiction may affect some of those facilities." *Economic Analysis,* p. 29. The agencies suggest the per year incremental costs for the SPCC program changes under the proposal is approximately $11.7 million without providing sufficient information upon which to make this claim. This anecdotal estimate is not sufficient to satisfy the agencies' duty and obligation to determine the economic impact of the rulemaking.[4]

(2) **Discharge of Dredge or Fill Material (CWA 404)** - With the proposed definition's emphasis upon the "significant nexus" of a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest jurisdictional water), it is anticipated the 404 permitting program will expand and will result in pressure on the capacity to identify available mitigation

[3] Highlights of GAO-14-519 unnumbered page contained in front of report, *Environmental Regulation: EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses*, July 2014.
[4] Executive Order, 12866, 58 Fed. Reg. 51735 (1993).

banks and other options. Such expansion has been confirmed by the USACE *Economic Analysis*, p. 29. Assessment of whether such "other waters" and any related discharges would significantly affect the chemical, physical, or biological integrity of a jurisdictional water is required under the new proposed definition. For example, the proposal would provide that the USACE would use the watershed of the single point of entry closest to the TNW rather than at the single reach. *Id.* at 22215. The expansive nature of this proposal is evident.

(3) **National Pollutant Discharge Elimination System (NPDES) Permitting (CWA 402)** – Review of the agencies' "waters of the United States" related definitions leads to the conclusion of expanded jurisdiction of CWA 402 (NPDES) permitting authority, a point which is noticeably absent from economic analyses conducted by the agencies. For example, under the proposed definition, a rain dependent stream that is ephemeral would qualify as a "water of the United States" and discharge to such would require a permit. *Id.* at 22202. Additionally, if there is a jurisdictional ditch that experiences perennial flow, pursuant to the proposal, it will fall within the definition of water of the United States. *Id.* at 22203. Any direct discharge to a jurisdictional ditch would now require a NPDES permit. Also, if there are a series of "other waters", including wetlands, that are similarly situated when they perform similar functions that are sufficiently close together or close to a navigable water, discharges to such waters are now subject to NPDES permitting. *Id.* at 22211. In spite of these examples of expanded implementation of "waters of the United States," the agencies suggest that it is not possible to estimate the impact of the proposal on NPDES permitting. *Economic Analysis*, p. 27. With regard to new and existing individual and general NPDES permits, a review of those permitted activities relative to the new proposed definition will undoubtedly expand NPDES regulated activities and represent significant economic impacts. The agencies have simply failed to complete the economic analysis of the proposal relative to CWA 402 permitting. In order to accurately reflect the impact of this proposal, a more thorough assessment of impacts on CWA 402 permitting is essential.

(4) **Impact on the Use of Nationwide Permits (NWP)** – Oil and natural gas exploration and production operations often use NWP 12 (utility line activities) and NWP 39 (commercial and institutional developments) to authorize certain activities. The underlying assumption is that NWP 12 permitted activities would not result in impacts greater than 1/2 acre of waters of the United States for each single and complete project. With a more expansive definition of wetlands and significant nexus, it is likely that previous general permit authorizations would now require an individual permit. Alternatively, the current NWPs may be deemed improper warranting revision or elimination. NWP 39 presumed not to result in greater than 1/2 acre of loss of non-tidal waters of the United States. Again, with a more expansive definition of waters of the United States, it may be that previous general permit authorizations would now require an individual permit.

The Associations believe that EPA and USACE will be faced with an influx of individual permits as a result of the proposal. The Associations are concerned that EPA and USACE lack the capacity to timely consider and administer individual permits.

Additionally, if pursuing an individual 404 permit, assessments of practicable alternatives to the dredging operation are required. With the expanded definition, such alternatives will be more difficult to identify.

Operational Impact Examples of Proposed Rulemaking on Oil and Natural Gas Exploration and Production Activities

To further illustrate to EPA and the USACE the expanded federal jurisdiction over "waters of the United States" through the lens of operational impacts on oil and natural gas exploration and production activities, the Associations developed the following factual impact scenarios, through member company input, in various basins with oil and natural gas production in the United States. These regional examples demonstrate the important economic and implementation effects that should have been addressed in the proposal.

(1) ***Permian Basin (NM, TX)*** – As a result of the desert conditions within the oil and natural gas producing areas, the current regulatory implementation of the SPCC program is narrowly applied to manage the threat of release of oil to surface waters. With the broader proposed regulatory management of tributaries and their adjacent waters and the introduction of vague concepts such as "relative strength of downstream effects" the proposal could result in significantly expanded regulatory obligations with regard to the presence of playa lakes, arroyos, etc.

Association member companies estimate a 50-60 percent increase in jurisdictional waters affecting operations in West Texas – well beyond the alleged 3 percent increase asserted by EPA and USACE in the proposal.

One Permian Basin operator has estimated an increase from the 20 SPCC plans currently in effect to an additional 10,000 new SPCC plans under the proposal. Such plans typically cost an estimated $5,000 per plan. This proposed definition and related regulatory impact analysis do not address such significant broadening of the "waters of the United States" program.

Another Permian Basin operator estimates that the cost of merely updating current SPCC plans in the Permian Basin in two relatively small fields (15 multi-well batteries and 20 multi-well batteries), would result in $1,000 per well (field and office work) for a total of $35,000.[5]

Based upon past implementation of SPCC, few hydrocarbon liquid storage facilities in the Permian Basin are adjacent to "waters of the United States," however, such operations typically have protective berms. These existing berms are not always constructed to meet the requirements of secondary containment pursuant to the SPCC regulatory program. Based upon the assessment of the proposed definition for "waters of the United States" it is estimated that for one company over 1,000 new SPCC plans (for

[5] For this example, these wells are currently equipped with berms, so there is no additional cost for installation of berms.

1,200 sites) would be required. The incremental cost for bringing those related facilities into the SPCC program would result in an expenditure of over $11.4 million per year. Upgrading those sites would cost an estimated $10,000 per site for a total of $12 million.

(2) ***Marcellus/Utica/Appalachia (PA, OH, WV, Eastern KY)*** -The mature topography of eastern Kentucky's Appalachian basin is defined by hills and valleys (locally referred to as "hollows"). Ninety-eight (98) percent of Kentucky's natural gas production comes from this region and oil production is increasing. The proposed rule regarding the definition of "waters of the United States" has the potential to significantly alter those features of the Appalachian basin landscape over which jurisdiction under the CWA is asserted. The proposal will have significant effects on the regulated community.

As examples of areas in the rule lacking clarity, Kentucky's Appalachian Basin operators point to two examples. First, the proposed rule states, "[a]bsolutely no uplands located in 'riparian areas' and 'floodplains' can ever be 'waters of the United States' subject to the CWA." However, in the very next paragraph, the proposed rule states, ". . .there are some neighboring waters that might be located outside of the riparian zone or floodplain, such as wetlands immediately next to a highly incised and manipulated stream that no longer has a riparian area or floodplain." 76 Fed. Reg. 22207. Second, the proposed rule states, "[t]hose waters and features that would not be 'waters of the United States' are: ... gullies and rills and non-wetland swales." *Id.* at 22193. Further in the proposed rule, it states, "... confined surface connections consist of permanent, intermittent, or ephemeral surface connections through direction flowpaths, such as (but not limited to) swales, gullies, rills, and ditches." *Id.* at 22208. With these examples, it is clear that nearly every water feature will be subject to CWA jurisdiction and that the agencies have utterly failed in their attempts to provide clarity. Again, these examples provide further evidence that the 3 percent increase in jurisdiction asserted by EPA and USACE in the proposal is a gross underestimation of waters affected by the proposal. These types of issues must be resolved in the final rule so that federal regulators as well as the regulated community, have a clear understanding of what are and are not waters of the United States.

Kentucky's Appalachian basin operators also are very concerned about the rule's jurisdictional expansion within a watershed. The rule indicates that waters adjacent to traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries are jurisdictional. The rule indicates that adjacent is defined as bordering, contiguous, or neighboring. *Id.* at 22199. The term "neighboring" includes waters within the riparian area or floodplain of a water. *Id.* The rule further indicates that the riparian area means, "... an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in the area." *Id.* Floodplain means "...an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high flows." *Id.* Under these definitions, *federal regulators could expand jurisdiction to include the watershed in its entirety*. In eastern Kentucky, there will be seeps from mountains, ponded or wet areas that form features in the landscape, either natural or manmade, that are in no way in proximity to a tributary.

However, because of the definition of adjacent in this rule and the breadth for which it allows jurisdiction to expand, these features would be "waters of the United States." As a result, any impact to the feature, such as filling or excavating, would require a Section 404 permit from USACE.

The rule clearly indicates that manmade features can be waters of the United States. In Kentucky, these features may include ponds from prior mining or agricultural activities, road ditches, retained water on abandoned mining benches, etc. These features are remnants of prior activities and do not meaningfully contribute to the physical, biological, or chemical processes of the environment. However, due to the lack of clarity or definition in this rule, any disturbance to these features would require regulatory compliance. For example, the excavation of a drilling pad in an area of past mining could affect a seep in the mountain or a pooled area of water that resulted from reconfiguration of the area either during mining or reclamation. Although these features are the result of anthropogenic influences and do not contribute meaningfully to the watershed, the industry would be required to protect them. With each new requirement, costs of operation escalate.

Under the current interpretation of the CWA jurisdiction and practices by the USACE when reviewing the extent of waters of the United States within a site, isolated waters are considered non-jurisdictional due to the lack of either a surface or subsurface connection. The proposed rule eliminates this exception to jurisdiction by stating, "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." *Id.* There are a great number of instances of isolated waters in Kentucky. In several events, it is impossible for the upstream remnant of tributary to be connected, either physically, chemically, or biologically, to downstream waters. Likewise, there are many wetlands that develop due to springs or other ground water influences. Often, these wetland features are completely isolated from tributaries or navigable waters. These wetlands provide no meaningful contribution to the watershed. However, as this rule relies on physical, chemical, and biological processes to connect features to tributaries or navigable waters, these features would become "waters of the United States" while having no real connection.

Moreover, as the proposed rule has the potential to greatly expand the presence of waters of the United States, the regulatory impact on industry will be expanded multifold. The presence of "waters of the United States" indicates the connection to navigable waters. As a result, several regulatory requirements are invoked under the CWA. These include SPCC plans, permitting for the discharge of dredge or fill material, and NPDES permitting. In response to these requirements and the expansion of waters of the United States, industry must conduct investigations to determine the extent of "waters of the United States," plan accordingly in an effort to avoid or minimize impacts to the extent practicable, and meet various additional regulatory requirements.

SPCC planning is designed to avoid or prevent oil pollution. SPCC plans are required when oil could possibly be discharged to or pollute navigable waters or their tributaries. As "waters of the United States" expand due to the proposed rule, existing facilities for which this regulation was not applicable may be required to meet this standard as waters of the United States are identified in proximity to the site. Further, facilities often use ponds, catchment basins, diked areas, etc. to reduce the potential for discharge of oil to navigable waters or their tributaries. Under this proposed rule, these features may become waters of the United States.

The need for Section 404 (dredge and fill) permitting could be vastly increased as waters of the United States expand. Typically, Kentucky's oil and natural gas activities will qualify for authorization under a NWP (i.e., NWP 12 for utility lines or NWP 39 for commercial/industrial activities). However, NWPs often have limits on the length or acreage of impacts that may be authorized. As more and more features are determined to be waters of the United States, it will be very difficult to comply with these limits. As a result, industry will be required to seek Individual Permits, which are significantly more expensive and require much more time to obtain than a NWP authorization. Likewise, the length of time required for issuance of an Individual Permit is extreme. As a result, operations could grind to a halt awaiting on USACE's authorizing the company's proposed operations.

(3) ***Midwest/Upper Midwest (IL, IN, Western KY, MI)*** – Under the current regulations (bed to bank), one regional operator indicated it does not need to obtain a permit from the USACE when building an access road to the new drill site when the road crosses a blue line stream if the disturbance is less than one-tenth of an acre per crossing. The roads have historically been built following "best management practices."[6] The blue line streams are shown in these areas. These are both areas the operator has active drilling operations.

The changes proposed by the USACE and EPA to Section 404 of the CWA could significantly impact oil and natural gas operations. Broadening the regulations to include "waters located within the riparian area" and "all adjacent waters in a watershed (with) significant nexus with their traditional navigable water" potentially expands "waters of the United States" jurisdiction beyond the "high water" mark to include the drainage area of a tributary – from ridge top to ridge top on either side of a stream.[7] Even if the definition of Riparian Area is physically limited, the definition of "Other Waters" is so vague, that "case specific" analysis of ephemeral streams could consider the entire watershed to be "nexus" to a navigable river, or the entire upland around a wetland to be "nexus", and, therefore, require permits. The result of these changes likely mean every stream crossing and well pad will require a nationwide permit from the USACE, and, possibly, an individual permit.

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[6] Please see the attached topographic maps showing these streams for Example #1 in Kentucky and for Example #2 in Illinois.

[7] Please see the attached topographic maps with the shaded pink area which depict the proposed jurisdictional area for Example #1 and Example #2. The area in the Kentucky example is now expanded to approximately 1500 acres and the area in Illinois is expanded to approximately 4,000 acres.

The costs associated with these potential new permitting requirements will be significant. These would likely result in extended permitting timelines and could render many of projects uneconomical.

(4) ***Mid-Continent and Eagle Ford (KS, AR, LA, TX, OK)*** – Upon assessment of the Mississippian Lime in north central Oklahoma, there is an approximate five-fold increase (418 to 2,043) in infrastructure intersections with streams when transitioning from the National Hydrography Dataset ("NHD") (more representative of maps used currently by the USACE) to the lidar (high-resolution) map where a synthetic streams network was generated that includes many ephemeral streams that are not delineated in the NHD dataset. If all ephemeral streams are considered tributaries, then the result would be a fivefold increase in the number of jurisdictional waters to consider.

Based upon current law and interpretation, using the National Hydrology Dataset, pipelines intersected mapped streams at 418 locations and were subject to nationwide permits. Using the High Resolution Mapping, pipelines intersected lidar (high-resolution mapping data inclusive of all the ephemeral streams not often depicted on existing USGS quadrangles and which would all likely become "waters of the United States" under the proposed rule) at 2,043 locations. That represents a better than five-fold increase compared to the intersections assessed from using NHD. An excellent example of expanded jurisdiction is that identified by the State of Kansas. In 2011, Kansas estimated that inclusion of ephemeral streams would increase jurisdictional stream miles from 32,000 to 134,000 miles.[8]

(5) ***South Central Oklahoma Oil Province (SCOOP) (OK)*** - There is substantial potential under the proposed rule for expansion of jurisdiction along headwater drainages through capture of additional lengths of streams (up to 21,507 linear feet of additional jurisdiction within the approximately 1,500 acres of the study area). This represents a 52.4% increase in the amount of regulated waters. Additionally, there would be an approximately 100% increase in jurisdictional review area related to wetlands associated with typical floodplain soil types.

The potential expansion of jurisdiction along headwater streams could result in increased permitting efforts. Specific examples include:

a. Headwater areas would likely not be classified as "jurisdictional by rule" under the proposed rule, but rather would be placed in the class of waters that would require a case-by-case determination of whether they are jurisdictional (JD).

b. Increased field studies could be required to determine whether headwater streams were jurisdictional.

[8] Letter to Nancy Stoner, Acting Assistant Administrator of Water, USEPA from Sam Brownback, Governor of Kansas (July 14, 2011).

c. There also could be increased time for the USACE to complete JDs on each headwater drainage. Currently there is no regulatory time limit for USACE to complete a JD. Some USACE districts have placed substantial paperwork requirements on submission of JDs and eliminated presumptive JDs (i.e., assume water is jurisdictional and complete permit activity without formal JD), which would further lengthen the permit review and approval process.

d. The JD process can be more costly than the permit application process with a presumptive JD and could increase the time for getting a permit by a factor of 3.

Within a major stream setting study site, the proposed rule identifies floodplains as one mechanism that would be used to demonstrate connectivity to establish jurisdiction over waters, potentially including those with no direct surface connection. However, the proposed rule does not define floodplain. As such, there is no indication of whether floodplains mapped by the Federal Emergency Management Agency (FEMA) that are based on current water flow modeling, would be the standard or if some other definition of floodplain would be used. Absent guidance in the rule, the analysis used the extent of mapped alluvial soils (Port Silt Loam) as the maximum boundary of the floodplain of subject creek. This resulted in an approximately 241 acre increase in jurisdictional area (nearly a 50% increase).

The potential for expanded federal jurisdiction and associated case-by-case JDs would potentially have the following impacts:

a. Selecting locations for pipeline corridors, either for transport of oil/gas or transport of produced water, would likely become more at risk. The topography and length of any of these corridors would dictate potential delays and level of siting effort required to mitigate potential delays. In any case, these activities would potentially require greater cost and time to complete JDs and receive permits.

b. Siting access roads to pads, infrastructure, and pipelines would likely become more challenging. Because these access corridors are likely to be more extensive, wider, and prefer to follow least cost routes, establishing acceptable routes would be challenged to avoid crossings of headwater drainages with associated greater cost and time to acquire permits.

c. Development of SPCC plans and stormwater controls would likely become more involved as there potentially would be an increased number of receiving waters. The time to develop such measures also could be increased due to the need to wait for a JD.

(6) ***Bakken (ND, MT)***: While none of the prairie potholes in the Bakken Study Area would be likely jurisdictional waters of the United States under the current regulations:

a. Approximately 31 acres of 127 acres of prairie potholes in the Bakken Study Area probably would be considered waters of the United States under the proposed regulations, primarily because of their connection to downstream waters of the United States by ditches.

b. The additional 96 acres of the 127 acres of prairie potholes have the potential to be considered jurisdictional under the proposed rule because of physical connection to downstream waters of the United States either by ditches or by subsurface flows.

While the current regulations, for the most part, do not require permits at the federal level for impacts on prairie potholes and connecting ditches, there would be potential for considerable additional time and costs required to complete JDs for prairie potholes because:

a. Desktop information (soil permeability and grain size) is not a good predictor for determining subsurface flow and, thus, more effort would be required to determine connectivity to downstream waters of the United States on a case-by-case basis. The USACE likely will require site-specific evaluations of connection to downstream waters of the United States, including the use of soils data, climate (e.g., precipitation), geography, and other factors, and may require subsurface explorations (i.e., deep soil borings) to deduce the subsurface environment (i.e., permeability).

b. While the proposed regulations are focused on physical connections (e.g., ditches or subsurface flow) of prairie potholes with downstream waters of the United States, indications are that indirect connections (e.g., prairie potholes acting as water sinks influencing downstream flows without a physical connection to downstream waters of the United States) could be involved in future regulatory proposals which would make all prairie potholes jurisdictional under such proposals.

c. Although ditches draining prairie potholes generally are not considered jurisdictional waters under the current regulations, many ditches draining prairie potholes to downstream waters likely will be considered jurisdictional under the proposed regulations.

d. The above factors affecting the determination of JD would likely require desktop and field studies to determine connection to downstream waters of the United States. These field studies could involve deep soil borings although it is likely that the USACE will accept applicant-prepared JDs based on the desktop and field studies.

e. These studies, in addition to the added layer of review of the applicant JDs by the USACE, will add additional cost to a project and additional time of at least several weeks to the current typical permitting process and a project's schedule. Perhaps of even greater concern would be the inability to comprehensively plan with a level of certainty the layout for pads, infrastructure, and access roads and pipeline corridors to mitigate potential delays in obtaining JDs.

The potential for expanded federal jurisdiction and associated case-by-case JDs could have the following impacts in the Bakken Study Area:

a. For well pads under existing regulations, most prairie potholes are non-jurisdictional, no USACE permitting is required, and siting considerations are related to resource and engineering design needs. Under the proposed regulations, many prairie potholes would become jurisdictional, and siting of pads near prairie potholes likely would have to include JDs and consideration of USACE permitting requirements in addition to resource and engineering design factors. Mitigating for these delays would require the siting of pads at locations that do not directly impinge on a pothole (or connecting ditch) and avoiding locations that could affect subsurface flow, where subsurface flow might be basis for a prairie pothole to be considered jurisdictional. Depending on the subsurface flow regime, putting a well pad anywhere down-gradient of prairie potholes could be problematic from a permitting perspective. Up-gradient siting also could be an issue, depending on the water source for the prairie pothole (surface runoff or subsurface flows). Permits would still be able to be acquired, but the process would add time to the Project schedule and cost to the Project budget.

b. Under the proposed regulations, selecting corridors for pipelines in the Bakken area likely would become more involved due to the need to mitigate potential conflicts and delays with areas likely to be jurisdictional. Under the current regulations, these corridors could be sited along a line through the center of the prairie pothole area without regulatory conflicts. However, under the proposed rule, to avoid the pothole area might require considerable rerouting to avoid these potential costs and delays for JD determinations.

c. As with the SCOOP Play, development of SPCC plans and stormwater controls in the Bakken Play area likely would become more involved because of the potential for an increased number of receiving waters (jurisdictional prairie potholes and connecting ditches). The time to develop such measures also could be increased due to the need to wait for a JD.

Concluding Observations in Relation to Associations' Impact Analysis

In conclusion, the exploration and production industry anticipates significant operational and economic impacts from this proposal. The agencies have promoted a campaign that continues to announce the proposition that this regulatory proposal will not change the scope of

the regulation. These comments are based upon tangible assessments of actual operations and are offered to educate the agencies about their proposal. The Associations invite the agencies to assess these factual demonstrations with a view toward the perspective of the regulated community.

Additionally, the EPA and USACE proposal provides no clarity to regulated entities and makes jurisdictional determinations nearly impossible. Based on usage of lidar data that includes the ephemeral streams, a significant emphasis on understanding of EPA's implementation of "ordinary high water mark" ("OHWM"), bed and bank, or presence of a 100-year floodplain is essential to determine whether the operations would have an impact on waters if the United States. From an industry viewpoint of assessing impacts, it is very difficult to read the agencies' proposal and determine the extent of the "floodplain", "OHWM", and "bed and bank" where there is little, if any, definition of that in the rule. For example, relative to floodplains, the words of "inundated during periods of moderate to high flows" could mean 100-year and 500-year frequency and mapping. Additionally, the term "frequency" might entail a two-year or similar floodplain. EPA represents that when determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine the flood interval to use (for example, 10 to 20 year flood interval zone). Clearly, the proposal creates little clarity.

Finally, the Associations factual demonstrations illustrate the need for EPA and USACE to reconsider and revise the economic analysis underlying the propose rulemaking. The current economic analysis is flawed and does not account for the drastic increase in jurisdictional waters. As previously stated, the Associations do not believe that the alleged 3 percent increase in jurisdictional waters asserted in the proposal is an accurate representation of waters that will become jurisdictional as a result of the proposed rulemaking. Analysis by Association member companies suggests that jurisdictional waters could increase by 50 to 60 percent in some areas.

Legal Analysis of the Proposal Relative to Case law and Policy: The Agencies Fail To Follow The Plurality Opinion In *Rapanos* Resulting In A Proposed Definition Of Waters Of The United States Not Supported by Case law or Statutory Law

1. Case Law Discussion

a. United States v. Riverside Bayview Homes, Inc.

In 1985, the Supreme Court of the United States first considered whether the CWA, and the regulations promulgated under its authority by USACE, authorized USACE to require landowners to obtain permits from USACE before discharging fill materials into wetlands adjacent to navigable bodies of waters and their tributaries. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). In *Riverside Bayview*, respondent Riverside owned eighty acres of low-lying marshy land in Michigan, and in 1976, began to place fill material on its property in preparation for the construction of a housing development. *Id.* at 124. USACE believed that the low-lying marshy land was an "adjacent wetland" under its jurisdiction as a "water of the United States." *Id.* USACE filed suit seeking to enjoin Riverside from filling the property without USACE's permission. *Id.*

The Court held that USACE's jurisdiction extended to all wetlands adjacent to navigable or interstate waters and their tributaries. *Id.* at 129. Wetlands are lands that "are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* (citing 33 C.F.R. § 323.2(c) (1985)). The Court opined that USACE has jurisdiction over adjacent wetlands, including those low-lying marshy areas of land on respondent's property. In short, the Court concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. The Court did not conclude that the USACE's judgment on these matters was unreasonable, and it therefore concluded that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the USACE has jurisdiction is a permissible interpretation of the Act. *Id.* at 135. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case. *Id.* at 135. *Riverside Bayview* established for the first time that wetlands that abut navigable waters could themselves be considered navigable waters under the CWA.

b. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*

Following its decision in *Riverside Bayview*, the Supreme Court was asked to again determine USACE's jurisdiction under the CWA. In *Solid Waste Agency of N. Cook Cnty.* ("*SWANCC*"), twenty-three suburban Chicago cities and villages engaged in an effort to locate and develop a disposal site for nonhazardous solid waste. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001). The cities and villages decided that a 533-acre parcel of land that was formerly a sand and gravel mining operation would be appropriate for the disposal of nonhazardous solid waste. *Id.* Because operation of the disposal site required the filling of permanent and seasonal ponds, *SWANCC* contacted USACE to determine if a permit was required under the CWA. *Id.*

USACE initially concluded that it had no jurisdiction over *SWANCC* because the site contained no wetlands or areas that "support vegetation typically adapted for life in saturated soil conditions." *Id.* at 164 (citing 33 C.F.R. § 328.3(b) (1999)). USACE later changed its decision, asserting jurisdiction under the "Migratory Bird Rule,"

> [T]he USACE formally "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States' . . . based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed natural character; and (3) the waters areas are used as habitat by migratory bird [sic] which cross state lines.

Id. at 164-65 (citing U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6). The Court held the "Migratory Bird Rule" was not sufficient to establish USACE jurisdiction under the CWA. *Id.* at 167. The Court opined:

> 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 "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.

Id. at 171-172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940) (emphasis added).

The use of the phrase "significant nexus" appeared in *SWANCC* for the first time. The Court held:

> 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 167 (citing *Riverside Bayview Homes, Inc.*, 474 U.S. at 131-32, n. 8). Although the Court in *SWANCC* did not elaborate as to what constitutes a "significant nexus," the phrase becomes an important component in a later decision, *Rapanos v. U.S.*, and in the agencies' proposed rule for the definition of "waters of the United States."

c. *John A. Rapanos, et al., v. United States*

In 2006, the Supreme Court issued, *John A. Rapanos, et al. v. United States*, 547 U.S. 715 (2006), the most recent decision interpreting USACE's jurisdiction under the CWA. This decision, however, only muddied the waters, as it was a plurality decision, with the Court splitting 4-1-4. Justice Anthony Kennedy joined the Court only in its decision to remand the cases to the Sixth Circuit for further proceedings. The result from *Rapanos* is the emergence of two different standards that could be controlling: the plurality standard (Justice Scalia, The Chief Justice, Justice Thomas, and Justice Alito) and Justice Kennedy's "significant nexus" standard. It is the position of the Associations that the plurality opinion should govern implementation of the Clean Water Act "waters of the United States." The agencies have over-stated the Kennedy standard and have extended the proposed definition beyond the scope of the CWA.

In *Rapanos*, petitioner backfilled land that contained sometimes-saturated soil conditions. *Rapanos v. U.S.*, 547 U.S. 715, 720 (2006). "The nearest body of navigable water was eleven to twenty miles away" from the saturated lands, yet petitioner was informed by USACE that his saturated lands were "waters of the United States," and he would need a permit to fill said lands. *Id.* The Supreme Court granted certiorari in order to determine if USACE had jurisdiction over the petitioner's saturated lands.

i. The plurality standard

The plurality in *Rapanos* held that channels through which water flows intermittently or ephemerally, or those channels that periodically allow drainage of rainfall, are not "waters of the United States."

> In sum, on its only plausible interpretation, the phrase, "waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams . . . oceans, rivers, and lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "waters of the United States" is thus not "based on a permissible construction of the statute."

Id. at 739 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843 (1984)). The Associations direct the agencies' attention to the plurality's guidance in which they found that the USACE's authority to regulate limited "waters of the United States" constituted those waters that were "relatively permanent, standing or flowing bodies of water. . .forming geologic features" and not "ordinary dry channels through which water occasionally or intermittently flows." *Id.* at 732-33. The plurality excluded from the definition "streams that flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id* at 739. The plurality also considered whether a wetland may be considered "adjacent to" remote "waters of the United States," because of mere hydrologic connection to them.

> [O]nly those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*.

Id. at 742 (citing *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 167). The proposed expansion of the definition of "waters of the United States" to include "other waters" extends far beyond the plurality ruling of the Court. The "significant nexus" that the plurality alludes to from *SWANCC* is the standard advanced by Justice Kennedy in his concurring opinion. It is clear from the proposal that the agencies ignore the plurality opinion reasoning and instead selectively read only the "significant nexus" test as discussed further below.

ii. The "significant nexus" standard

Justice Kennedy determined that the *Rapanos* decision required the Court to determine "whether the term 'navigable waters' in the CWA extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact." *Id.* at 759 (citing *Solid Waste Agency of N. Cook Cnty*, 531 U.S. at 159). In Justice Kennedy's view, it is the "significant nexus," first mentioned in *SWANCC,* which is the determining factor.

In his concurrence, Justice Kennedy holds that "[u]nder the Corps' regulations, wetlands are adjacent to tributaries, and thus covered by the [CWA], even if they are 'separated from other "waters of the United States" by man-made dikes or barriers, natural river berms, beach dunes, and the like.'" *Id.* at 762 (citing 33 C.F.R. § 328.3(c)). A "significant nexus" standard must be applied in order to determine if a connection between a nonnavigable water or wetland is significant enough to deem the water or wetland a "navigable water" under the CWA. *Id.* at 767.

> [T]he connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

Id. Justice Kennedy's "significant nexus" standard is based upon *SWANCC* and *Riverside Bayview* is qualified by the term "navigable." The required nexus must be assessed in terms of the statute's goal and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§1311(a), 1362(12). With respect to wetlands, the rationale for CWA regulation is, as the USACE has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 C.F.R. § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When in contrast, wetlands' effects on water quality are speculative or insubstantial; they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Id.* at 780.

Finally, Justice Kennedy stated:

> When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular

wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.

Id. at 782.

The "significant nexus" standard expounded by Justice Kennedy in his concurrence in *Rapanos* is what the EPA and USACE rely upon in creating the "other waters" category in the proposed rule for the definition of "waters of the United States" under the CWA. *Rapanos v. U.S.*, 547 U.S. 715, 767 (2006). The Associations disagree that the "significant nexus" standard is the applicable standard. EPA and USACE have gone beyond the bounds of the "significant nexus" standard with the proposed rulemaking.

2. Analysis Based on Case Law

a. "Other waters" and Justice Kennedy's "significant nexus" standard

The EPA and USACE are proposing to add a new category to the definition of "waters of the United States." This "other waters" category will not be jurisdictional as a single category, but will instead be jurisdictional if found, on a case-specific basis, to have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. *Id.* at 22188. These "other waters" will be evaluated either individually or as a group of waters when they are determined to be similarly situated in the region. *Id.*

In creating this "other waters" category, the agencies have provided several key definitions for interpreting waters that may become classified as "other waters" under the proposed rule. The proposed rule provides that the term "waters of the United States" means, on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same regions, have a significant nexus to traditional navigable water. *Id.* at 22263. First, "other waters" will be similarly situated "where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water." *Id.* at 22211. Whether these "other waters" are aggregated enough to be evaluated under a "significant nexus" standard "depends on the functions they perform and their spatial arrangement within the 'region' or watershed." *Id.* These "other waters" may be aggregated into a single category if they perform similar functions that significantly affect the physical, chemical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. *Id.* [9]

Second, "significant nexus" is proposed to be "defined to mean that a water, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the

[9] It is noteworthy that the agencies suggest that "other waters" may be considered "similarly situated" using Omernik Level III ecoregions. *Id.* at 22215. The Associations raise concern about the use of ecoregions as the basis for a significant nexus analysis due to the fact that ecoregions are indicative of terrestrial vegetation patterns and rarely are suggestive of aquatic resource type or functions.

territorial seas." *Id.* The effect these "other waters" have on traditional navigable waters, interstate waters, or the territorial seas may not be speculative or insubstantial. *Id.*

Finally, "region" is defined to be the "watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas." *Id.* This determination is critical in understanding the proposal's aggregation of similarly situated "other waters." With a basic understanding of the agencies' proposed "other waters" category, we can now begin distinguishing Justice Kennedy's "significant nexus" standard from the standard proposed by the EPA and USACE.

b. Application of the "significant nexus" standard to non-wetlands misconstrues Justice Kennedy's concurring opinion.

In *Rapanos v. U.S.*, Justice Kennedy applied the "significant nexus" standard to a single category of water—wetlands. The agencies propose to extend this standard to "other waters," including wetlands. *Id.* at 22211. Examples of "other waters" are not provided, as the agencies instead remove a previous clarifying list of "other waters" for the adoption of a case-specific analysis approach to all "other waters." *Id.* at 22212. In his *Rapanos* concurrence, it does not appear that Justice Kennedy intended for the "significant nexus" standard to extend to waters other than wetlands.

Justice Kennedy opines that USACE has shown that wetlands "can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage." *Rapanos* at 779. Because wetlands have been shown to perform such critical functions, wetlands:

> [P]ossess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. When, in contrast, wetlands affect on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id. at 780.

The "other waters" category proposed by the agencies does not provide any examples of "other waters" and does not support the proposition that these "other waters" can perform critical functions such as pollutant trapping, flood control, and runoff storage. Under the agencies proposal, all waters that are not already jurisdictional by category are evaluated under a "significant nexus" standard even if they have not been shown to perform critical functions like those of wetlands. The agencies' reasoned that application of the "significant nexus" standard to "other waters" not previously identified to perform critical functions 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 . . . ." *Id.* at 781. This type of standard is what Justice Kennedy was seeking to avoid, as he stated that waters such as drains, ditches, and streams 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*." *Id.* at 782.Without a showing that the proposed "other waters" category can perform critical functions like those performed by wetlands, it would appear that the application of the "significant nexus" standard for waters other than wetlands is beyond the scope of what Justice Kennedy was proposing in *Rapanos.*

c. The agencies' use of "similarly situated" differs from Justice Kennedy's use of the phrase.

In *Rapanos*, Justice Kennedy opines:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with *similarly situated* lands in the *region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable". Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.

Id. at 780 (emphasis added). The agencies propose that "other waters" are similarly situated if those waters: "[P]erform similar functions and they are either (1) located sufficiently close together so they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, and biological integrity of a traditional navigable water, interstate water, or the territorial seas; or (2) located sufficiently close to a "water of the United States" for such an evaluation on their effect." *Id.* at 22211. The term "region" is proposed to be the "watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas." *Id.* Thus, "other waters" are similarly situated "when they are within a contiguous area of land with relatively homogenous soils, vegetation, and landform." *Id.* "Other waters" that are similarly situated under the proposed rule are required to perform similar functions pertaining to habitat, water storage, sediment retention, and pollution sequestration. *Id.* at 22213.

In light of Justice Kennedy's concurrence in *Rapanos* and past Supreme Court precedent established in *SWANCC,* this proposal for similarly situated waters in the region appears to encompass a much broader spectrum of "adjacent waters" than what Justice Kennedy envisioned in his concurrence. Justice Kennedy only mentioned the aggregation of similarly situated wetlands. Most wetlands will share functional characteristics to include any or all of the following: flow, pollutant trapping, flood control, and run-off storage. Because wetlands tend to perform this set of functions, Justice Kennedy felt, from an administrative convenience standpoint, that aggregation of similarly situated wetlands was appropriate. Under the "other waters" category, one may have many different types of waters that perform substantially different functions, yet still share some characteristics to others within the region. Classifying all "other waters" within a similarly situated region may result in many "other waters" being classified as "waters of the United States" when these "other waters" may actually lack the requisite nexus to have a chemical, physical, or biological impact on a traditional navigable water, interstate water, or the territorial seas.

d. The proposed rule misinterprets the "significant nexus" standard as being satisfied when the impact is more than speculative or insubstantial.

In the proposed rule, the agencies state, "[W]aters with a "significant nexus" must significantly affect the chemical, physical, or biological integrity of downstream navigable waters and the requisite nexus must be more than speculative or insubstantial." *Id.* With nothing further stated as to what is considered speculative or insubstantial, the proposed rule implies that "other waters" satisfy the "significant nexus" standard when "other waters" are determined to not be speculative or insubstantial. Justice Kennedy's use of the phrase "speculative and insubstantial," is as follows:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effect on water quality is *speculative or insubstantial*, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Rapanos, 547 U.S. at 780 (emphasis added). Justice Kennedy intended for the standard to be applied to determine if the waters significantly affect the chemical, physical, or biological integrity of navigable waters. The effect will not be significant if it is speculative or insubstantial. An interpretation of the agencies' proposal purports to create "speculative or insubstantial" as the only criteria that matters when determining whether the "other waters" have a "significant" nexus to traditional navigable waters, interstate waters, or the territorial seas, and does not place any weight on the effect the "other waters" have on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

Specific Comment to Representations in the Proposal

The Proposed Definition Of "Waters Of The United States" Is Dismissive Of The Clean Water Act Legislative Limit On Jurisdiction And Clean Water Act U.S. Supreme Court Interpretation.

One key error in the agencies' assumptions is the dismissal of the legislative intent of the CWA to limit jurisdiction to "navigable waters" as opposed to all waters. The other error is the failure to recognize the Kennedy test is a one of "significant nexus" to wetlands, not "other waters." Therefore, the combination of seeking to define "waters of the United States" with a broadly stated nexus test for all surface (and ground) water that is not informed by Congressional intent of "navigable waters" and the application of the significant nexus concept beyond wetlands, results in a proposed definition of enormous regulatory impact when implemented or applied. The proposal is designed to reduce time, but it only reduces time for the analysis of whether the water is addressed under the CWA because it now inappropriately presumes that all waters are covered. The time intensive portion of this proposal will be the administrative process of case-by-case analysis of "other waters" and the evolution of guidance on the numerous other terms used in the proposal. As will be discussed further, resource burdens on the state administrative agencies have been inappropriately ignored in this proposal. The efficiency of the rule is that the agencies are proposing to expand the list of jurisdictional waters. The

inefficiency of the rule is it sets a new series of regulatory actions to reach back and revisit existing decisions and forward to set new policy.

The Term "[S]ignificant [N]exus" Is A Legal Term That Is Being Held Solely To A Broad Application of Existing Scientific Analyses Resulting In An Unlawful Regulatory Definition.

The term "significant nexus" means that "a water including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this definition), significantly affected the chemical physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this definition. For an effect to be significant, it must be more than speculative or insubstantial." *Id.* at 22263. The agencies immediately move away from the opening statement of the Executive Summary to the proposal stating that "significant nexus" is not itself a scientific term." *Id.* at 22193. Losing sight of the application of the concept of "significant nexus" within the context of the law, the agencies refer to their significant nexus analysis as an ecological rationale. *Id.* at 22204. The significant nexus test proposed is an improper and unlawful focus upon a selected science of "relative strength of influence" in combination with loosely defined ecological factors.

As described in the proposal, other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this definition. The analysis invited by the proposal for assessment of various types of waters within this definition is quite detailed and provides a very good example of the unlawful reach beyond the CWA goals of protecting "navigable waters." Specifically, the proposal requires the following analysis:

- "[W]etlands" are normal circumstance wetlands, therefore it would be a factual question as to what would constitute normal. If the goal is to regulate all waters, the decision as to what is normal would be determined based upon the factors that would default to a larger area which would lead to a more encompassing area for the purpose of a significant nexus interpretation.

- "[S]imilarly situated waters." The proposal provides the significant nexus test must consider a water "alone or in combination with similarly situated waters." This language invites a regulatory decision to combine waters in a manner that has not been typical for the CWA regulatory programs. Further guidance is offered in the definition that provides "other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a water of the United States, so that they can be evaluated in a single landscape unit..." The stated goal is that of creating a "landscape unit" to assess the water's effect on the chemical, physical, or biological integrity of the TNW. The definition suggests a "landscape unit" is to be created by the regulator and it will constitute one of the following:

(1) waters that perform similar functions and located sufficiently close together; or

(2) waters that are sufficiently close to a "water of the United States."

The regulator is invited to gather different, although similar, waters that are "sufficiently close" to develop a "landscape unit." The collection of waters for the purpose of determining the significant nexus provides for an inclusive identification of waters (to include separate water bodies) that are protected.

Then, cautioning against speculative or insubstantial conclusions about effect on those waters, the definition asks, "what is the chemical, physical or biological influence on integrity." Finally, once that analysis is completed one may then determine "significant nexus."

This labored analysis creates a presumption of gathering waters to identify a map of protected "water of the United States." That resulting map is expansive and therefore predicts a more frequent determination of "significant nexus." The proposed definition of "waters of the United States" has embedded within its defined terms a regulatory determination that is a remarkable expansion from the regulatory definition that exists today, and is in direct contravention to the statutory and Supreme Court case law.

The Connectivity Report Is Not A Sound Basis Upon Which To Justify The Proposed Definition of "Waters Of The United States."

The proposal makes reference to the fact that key to implementing this proposal is the effort of EPA's Office of Research and Development ("ORD"). *Id.* at 22190. The ORD has prepared a peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence*, (Washington, DC, U.S. EPA, 2013) (the "Connectivity Report"). As of October 24, 2014, the Science Advisory Board ("SAB") announced in the Federal Register it had reviewed its content and has completed a peer review of the proposed CWA rule's primary supporting document. 79 Fed. Reg. 63594 (October 24, 2014). The SAB letter has the same observations as the Associations, "[t]he SAB recommends that the EPA clarify in its general communications and in the preamble to the final rule that "significant nexus" is a legal term, not a scientific one." p. 4. This observation is the very point made herein, that the "significant nexus" test is a legal analysis and the scientific assessment of connectivity is irrelevant to the statutory definition of "waters of the United States."

The agencies suggest that the compilation of such information will inform about the scientific support for the rule. The scientific literature and its message must be interpreted with a view toward the goal of Congress and the CWA. The case law explores the role of science and, as cautioned by Justice Kennedy, that assessment cannot be "speculative or insubstantial" and that there must be a "reasonable inference of ecologic interconnection." (Emphasis added). The obvious risk in conducting broadly defined research is arrival upon the scientific conclusion that any and all waters of the nation influence one another affecting the function of each. The

agencies explain that the scientific research has an emphasis upon "strength of connections and effects to downstream waters." *Id.* at 22195. Presuming the body of scientific or technical studies in the Connectivity Report is relevant to the CWA is misguided. The fact that EPA has reviewed more than a thousand scientific papers is a measure of volume only. The Connectivity Report, which is described by the agencies as the tool for "how best to address jurisdiction over "other waters"" is a misstatement of huge proportion. *Id.* at 22189. The Connectivity Report sets forth a scientifically-based de facto connectivity analysis that would remove the need for the agencies to "rely less on case-specific nexus evaluations." *Id.* at 22192. It is apparent that the agencies are pursuing a broadly defined set of jurisdictional waters that drifts far afield from the "navigable" term of the CWA.

Additionally, the Associations reiterate their support for the comments to ORD as filed by the Waters Advocacy Coalition ("WAC") on November 6, 2013 concerning the draft Connectivity Report. In summary, those comments raised concerns that the draft Connectivity Report:

- Provides no scientific support to make distinctions between significant connections and non-significant connections.

- Assumes, with little scientific support, that all connections, no matter the kind, size, or frequency should be considered equal.

- Does not account for factors of variability in connectivity, such as climate, stream size, habitat, watershed characteristics, frequency and duration of flow, or proximity to navigable waters.

- Does not adequately address man-made modifications and natural or man-made impediments to connectivity in the landscape.

- Makes the unsupported conclusion that any wetland or water course within a riparian area or floodplain has a significant connection to downstream waters.

- Includes overly broad definitions of streams, floodplains, and riparian areas that would include entire watersheds, including uplands.

- Defines key terms, such as "stream" and "wetland," inconsistently with existing regulatory definitions.

- EPA and the USACE are already using the draft Connectivity Report to justify their proposed rule on the scope of their CWA authority, yet the report does not address the fundamental question central to that jurisdiction (namely, what connections between water bodies are significant) and is not yet final.

- As a result, the agencies should ask the correct questions first, evaluate the relevant science, and then prepare a proposed rule in keeping with the best known science.

Instead, the agencies' rulemaking approach is premature and does not take into account the independent scientific and technical input of the SAB on the connectivity of waters.

- Under the SAB authorizing statute, SAB review of the report should be informed by a simultaneous review of the proposed rule.

- EPA's charge questions are too narrow and fail to ask important questions that need to be evaluated prior to a rulemaking. Therefore, the SAB should exercise its prerogative to explore a broader list of concerns underlying connectivity.

Adjacent Waters (Neighboring, Riparian Area, and Floodplain) – The Layering Of Definitions Relative To Adjacent Waters Demonstrates The Need For Careful Analyses That Is Already Maintained In Best Professional Judgment Practices.

The agencies provide, "the rule would clarify that adjacent waters, rather than simply adjacent wetlands, are "waters of the United States."" *Id.* at 22208. The preamble discussed the undesirable uncertainty with allowing best professional judgment ("BPJ") when determining adjacency and solicits for comment on methods and refined definitions to eliminate variability. *Id* at 22208. The attempt at clarification is woefully inadequate. The combination of adjacent, neighboring, riparian and floodplain do very little to convince the reader that BPJ is an undesirable exercise. At least a BPJ analysis is a knowledge-based review, as opposed to the tortured regulatory flow diagram the agencies attempt to design with these stacked definitions. The rule is intended to clarify the meaning of "adjacent" by defining one of its elements "neighboring." The related terms of "riparian area" and "floodplain" are also defined in the rule. *Id.* at 22193. The term "adjacent" includes bordering, contiguous, or neighboring, as well as waters separated from "waters of the United States."

Upon reviewing each of the "clarifying" elements of this definition, the regulatory conclusion directs the reader to apply the concept of adjacency broadly. The definition invites an inclusive tone. Wetlands, in addition to other waters, are to be included. Natural and/or man-made structures that might be perceived as severing adjacency are to be ignored as changing the contiguous nature of the physical separation, again inviting a more inclusive determination of "waters of the United States." Finally, the preamble speaks to the important functions of adjacent waters borrowing from Justice Kennedy's discussion of the critical function of wetlands. *Id.* at 22194. The agencies fail to include the qualifier by Kennedy to avoid unreasonable application of the statute and instead suggest a far reaching adjacency test.

The term "neighboring" includes waters located within the "riparian area" or "floodplain" (defined terms in the proposal) of a TNW or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such jurisdictional water. Therefore, the agencies would have the concept of adjacency include a broadly applied meaning for neighboring (riparian area or floodplain). This layering of expansive regulatory guidance embedded within the definition of "waters of the United States" begs the question of the scope of the CWA and past case law that has determined the term "navigable water" does not mean all waters of the United States. *See, SWANCC.*

The term "riparian area" means,

> an area bordering a water where surface of subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

Id at 22263. This defined term again invites the regulatory determination that an adjacent water can be deemed to include transitional areas that impact plants and animals. The regulatory guidance within the riparian area definition could be interpreted to require a permittee's assessment of ecological processes relative to plants and animals in a manner that has never been previously applied. The agencies' suggestion that this language does not significantly impact the current "waters of the United States" regulatory program is either blatantly incorrect or naïve, neither of which is lawful.

The term "floodplain" is defined to mean "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows." The suggestion that variable climatic conditions will cause the regulatory analysis of what constitutes a "floodplain" to change, literally with the weather, presents a challenge to permitting and compliance strategies. The regulatory programs that build upon the definition of "waters of the United States" are based upon the mutual understanding of the regulatory elements that must be achieved. Leaving open whether an area is, is not or will become subject to all CWA "waters of the United States" regulatory programs with no guidance except sediment deposition by climate conditions creates an amorphous noun in the word "floodplain." The arbitrary and capricious nature of this term relative to the CWA "waters of the United States" statutory goals is unacceptable under law and policy.

There have been efforts by individual members of the Associations to develop a workable set of objective criteria to define adjacent waters relative to the shallow subsurface hydrologic connection or confined subsurface hydrologic connection, the floodplain or riparian area, surface connections and geographic limits. Relative to large order streams and smaller order streams it is recommended that the agencies work with commenters to develop implementation guidance that incorporates existing floodplain data and stream management experience to provide significantly more clarity for managing adjacent waters.

In conclusion, the Associations do not agree these definitions related to adjacency are of assistance in making an efficient or correct determination of jurisdictional waters and as such do not create a reasonable alternative to best professional judgment.

<u>The Term Wetlands Is Unlawfully Designed To Expand Jurisdictional Determinations Beyond The Authorities of the Clean Water Act.</u>

The term "wetlands" is defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that <u>under normal circumstances</u> do support, a prevalence of vegetation typically adapted for life in saturated soil

conditions." The phrase "under normal circumstances" should be expanded upon consistent with the *Bayview* decision as meaning "supports a prevalence of vegetation typically adapted for life in saturated soils conditions." Wetlands generally include swamps, marshes, bogs and similar areas. The qualifying phrase "under normal circumstances" presents regulatory guidance that directs the regulator to make the judgment as to what is a "normal circumstance." The definition of floodplain, discussed above, ignores the "normal circumstance" of sediment deposition and instead invites assessment of "present climatic conditions." The intentional design of invited regulatory analyses to deliver the most expansive "waters of the United States" is noteworthy. This choice of language positions the regulator to apply "waters of the United States" to default to the most inclusive footprint as possible.

The Proposed Definition Of "Waters Of the United States" Will Not Promote Administrative Efficiency As Asserted By The Agencies.

EPA and the USACE describe the *SWANCC* and *Rapanos* decisions as resulting in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. EPA and the Corps have announced they are in the process of "developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case-specific determinations." 76 Fed. Reg. 22188. The agencies propose to define "waters of the United States" to mean:

> Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas: and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional "waters of the United States" by rule – no additional analysis would be required.

Id. at. 22189.

> "[O]ther waters" (those not fitting in any of the above categories) could be determined to be "waters of the United States" through a case-specific showing that, either alone or in combination with similarly situated "other waters" in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas.

Id. The agencies provide that a primary purpose for the proposal is to "reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and related public for identifying waters as "waters of the United States," and reduce time and resource demanding case-specific analysis prior to determining jurisdiction and any need for permit or enforcement actions." *Id.* at 22191. Of note is the agencies' emphasis on removing the burdens of permit writers using their best professional judgment when this proposal suggests use of best professional judgment for "other waters." These comments raise a question about the agencies' assertion that this proposal minimizes implementation efforts and provide consistency for "waters of the United States."

The Economic Analysis Of The Proposed Definition of "Waters Of The United States" Demonstrates The Significant Expansion of Jurisdictional Waters Under The Clean Water Act.

The scope of impact from this proposal is generally described in the *Economic Analysis of Proposed Revised Definition of Waters of the United States, March 2014* (the"Economic Analysis"). The agencies represent that their analysis of the USACE data indicate 17 percent of other waters category would be determined to be jurisdictional under this proposed definitional change. EPA arrived at the conclusion that 15 percent of other waters would become jurisdictional. *Economic Analysis*, at 12. "Overall, assuming all tributary streams and adjacent wetlands as well at 17 percent of other waters (based on the ORM2 records grouping) are projected to be jurisdictional under the proposed rule increases overall jurisdiction under the CWA by 2.7 percent (95.2% - 92.5%), or roughly 3 percent, over current field practices." *Id.*[10] Missing from this representation is a conversion of the 3 percent to acreage or stream miles. The implications of this proposed rulemaking represent a significant change from the existing regulatory program. Again, the Associations reiterate their belief that the 3 percent assertion is a gross underestimation of the waters that will become jurisdiction under the proposal. As evidenced by numerous maps and descriptions of significant regulatory and economic impact submitted by many representatives of the regulated community to include these comments of the Associations, the economic analysis of this proposal is insufficient and should be withdrawn and rewritten.

In the October 1, 2014 comments to this proposal by the U.S. Small Business Administration ("SBA"), it is noted that the limited economic analyses which the agencies submitted provides evidence of the significance of this proposal. The SBA urges withdrawal of the proposal and additional review by the Small Business Advocacy Review Panel. The Associations incorporate by reference the comments and recommendations of the SBA.

The Proposed Definition of "Waters Of The United States" Is Overly Broad And Will Result In Significant Resources To Implement.

The agencies assert that the inclusion of all tributaries "will eliminate the need to make a case-specific significant nexus determination for tributaries or for their adjacent waters, because it has been determined that as a category these waters have a significant nexus and thus are "waters of the United States."" *Id.* at 22193. [11] The definition of "tributary" includes terms such as "bed and banks" and "ordinary high water mark" which raise more questions about interpretation than provide clarity. Whether these physical characteristics are de facto evidence of significant nexus is a question of fact. There is no language in the proposal that would provide for any limit as to which tributaries (and most ditches) are part of the "navigable waters" as contemplated by Congress. Quite the contrary, the proposed definition of "tributary"

[10] The agencies also speak to a statistic of 60% of waters are not protected under current implementation of the CWA, which raises a question as to what is meant by the 3% increase of jurisdictional waters. Such varied statements can be perceived as very inconsistent and clarification is essential to educate the public on the impact of this proposal.

[11] The agencies remind the reader that "significant nexus" is not itself a scientific term and yet they treat the significant nexus analyses as satisfied upon scientific assessment alone, forgetting the scope of the CWA as defined by navigable waters.

and the preamble discussion go to great lengths to explain away potential distinctions that would result in a less inclusive jurisdictional result. As proposed, all tributaries would become jurisdictional. Absent from the proposal or the docket is a clear assessment of whether this definition delivers a jurisdictional water. The absence of this assessment demonstrates a significant nexus or "waters of the United States" that is more than speculative. The agencies' goal of "eliminating the need to make a case-specific determination for tributaries" is not a goal that is consistent with the CWA.

Within the discussion of tributaries is included the awkward discussion of the regulatory management of ditches. For upland ditches the agencies reference past policies, but express concern over flow and what regime should be defined, perennial or intermittent. Pursuant to the proposed rule, non-jurisdictional ditches become tributaries if they have beds and banks and ordinary high water marks and contribute flow. The preamble discussion lists those ditches that may be deemed jurisdictional. *Id.* at 22203. The proposal discusses flow relative to downstream traditional navigable waters. This proposed regulatory discussion is, again, part of the expansion of the scope of "waters of the United States." Rather than certainty, this regulation creates uncertainty as to current operations and future impacts on the status of ditches. It also represents significant expansion of the definition.

The Proposed Expansion Of The Definition of "Waters Of The United States" Fails To Acknowledge States' Jurisdiction As Exemplified in the Reach to Regulate Groundwater.

The agencies' are remiss in not providing discussion on the limitations of their authorities over groundwater. The Connectivity Report analysis and the regulatory terms for "significant nexus" all involve groundwater impacts. The proposal presumes to assert that surface waters connected only through subsurface waters will be jurisdictional begging the question about the role of states and their respective authorities for regulating groundwater. The agencies' propose a distance metric to determine significant nexus via shallow subsurface connections, ignoring the role states would have in the jurisdiction of groundwater. *Id.* at 22207. The term "neighboring" waters as proposed would improperly include "water with a shallow subsurface hydrologic connection"[12] or "confined surface hydrologic connection" to "waters of the United States." *Id.* at 22263. There is no discussion of the role of groundwater monitoring relative to this proposal which is a significant expense. The agencies' must address these issues with specificity in order to solicit meaningful public comment. It is apparent that the states were not consulted during the development of this proposal, nor was their input solicited after publication. This proposal blatantly ignores the states, is incomplete and must be revised.

Allocation Of Water In Terms of Quantity Will Be Significantly Limited If The Proposed Definition of "Waters Of the United States" is Implemented.

The agencies suggest the new proposed definition is not intended to supersede, abrogate or otherwise impair states' authorities to allocate quantities of water. *Id.* at 22195. The agencies announce development of new tools to make jurisdictional determinations. Underlying the use

[12] The definition of "shallow subsurface connection" is confusing with reference to karst systems and soil vs. geologic profiles. *Id.* at 22208. Implementation of this defined term is not readily understood.

of helpful tools is the question of whether water quality (as defined by the states consistent with federal recommended criteria) become so broadly applicable to all waters of the United States, that the states will be unable to permit any discharges or withdrawals. A desktop default that concludes all waters are jurisdictional and therefore there are no allocations that are permissible is indeed an usurpation of state authorities. The agencies' unreasonable application of the CWA will result in unintended consequences such as a wholesale limitation on water quantity allocations. Again, consultation with the states must take place prior to amending the current regulatory program for waters of the United States.

The Agencies' Failure To Address Grandfathering Of Pending And Existing Clean Water Act Authorizations and Interpretations In The Proposal Is Unlawful.

The Associations have significant concerns with the resulting operational changes that this proposal represents. If the agencies conclude this proposal is the program they are going to implement, they must include a grandfathering provision that would acknowledge the validity of:

(1) past permitting decisions and currently pending applications for authorization, to include but not limited to jurisdictional determinations, individual permits, letters of permission, and general permits issued pursuant to Section 404 of the CWA;
(2) issued NPDES permits pursuant to Section 402 of the CWA; and
(3) current SPCC Plans and implicit or direct approvals, pursuant to Section 311 of the CWA, and that but for major modifications to such facilities, their regulatory status will remain compliant.

Existing authorizations must be deemed precedent for future assessments for facilities that continue to reflect operations as initially authorized.

The agencies must address grandfathering in an additional proposal that will be subject to an extensive opportunity for public review and comment. Failure to address this important issue that will have a significant impact on many is improper. Those adversely impacted include the regulated community and state and federal regulatory authorities whose increased administrative burdens within this proposal are significant. The result of this proposal is inappropriate and not supported by the CWA, the regulations or the federal Administrative Procedure Act.

The Proposed Expansion of Jurisdictional Waters Will Result In Efforts To Exercise Citizen-Based Litigation.

The agencies' attempt to develop certainty in the definition of "waters of the United States" will result in a new empowerment of all citizens to engage in the assumption that all waters of the nation are legally subject to Clean Water Act regulation. Creating such a false message relative to the jurisdiction of the Clean Water Act is irresponsible and will result in expenditure of valuable resources to re-educate litigants on the scope of the Clean Water Act. The Associations urge the agencies to address this valid concern.

Specific Comment to U.S. EPA and US Army Corps of Engineers Regulatory Impact Analysis.

Affected Acreage. EPA's analysis uses FY 2009/2010 as the baseline year to estimate impacts, which was a period of significant contraction in the market due to the financial crisis. EPA makes an assumption that the new rule will not affect the agency's overall workload. Under the new rules, jurisdiction will increase and more projects will likely be seeking permits. EPA assumes the incremental impacts to Section 404 permitting can be applied to other CWA programs. EPA's analysis ignores important state and size-specific variations in permit applications.

Costs. EPA's analysis uses data on permitting costs that are nearly 20 years old and are not adjusted for inflation or any other changes in the permit system. EPA analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses. EPA claims that they use the same methods as their 2011 analysis to estimate the amount of mitigation. However, the baseline mitigation level and per acre cost of mitigation does not match the 2011 analysis. Further, the upper bound mitigation costs estimates used in the 2013 analysis are significantly lower than the 2011 analysis, without any explanation as to why. Costs to some programs, like Section 303 (state water quality standards and implementation plans) and Section 402 (NPDES), are assumed to be "cost-neutral or minimal" without providing any analysis to support this conclusion. The effects of a definitional change are likely to vary significantly from program to program, however careful assessment of program-specific effects is omitted in lieu of simplistic, generalized estimations. EPA suggests that additional permit applications may require increased consultation with other agencies, which would drive up the costs of a definitional change. These costs are omitted from this analysis.

Benefits. EPA utilizes third-party studies to estimate an average willingness to pay for wetland mitigation that are outdated and do not provide accurate estimates of benefits. Nine of the ten studies relied upon by EPA are more than a decade old (the oldest is nearly 30 years old) and many were not published in peer-reviewed journals. Benefits are calculated based on an unstated and improbable assumption that all of the incremental wetlands affected by the definitional change would be filled (destroyed) if federal jurisdiction is not expanded.

EPA presumes that benefits calculated for a specific geography and time can be readily applied elsewhere, forcing a comparison between different types of wetlands being considered. Even the studies cited in their analysis provide evidence of highly-localized impacts that are not broadly applicable beyond the study site. EPA makes little effort to account for changes in economic trends, recreational patterns and state preferences over time. Benefits to some programs that may be affected are explicitly omitted due to lack of data. EPA suggests there may be "across the board" savings in program enforcement related to increased clarity in the CWA. While there may be some legitimacy to this claim, it remains unquantified and thus plays little value in the economic analysis.

Conclusion

The EPA's and USACE's proposed definition of "waters of the United States" purports to follow the guidance of Justice Kennedy's concurrence in *Rapanos v. U.S.* in creating an "other

waters" category that will be analyzed on a case-specific basis. It is not apparent what dilemma the agencies have identified that warrants proposal of a new definition. The Associations do not support the conclusion that a new definition is warranted.

The proposal misconstrues many aspects of Justice Kennedy's "significant nexus" standard, ignores the plurality opinion, and creates a very broad assertion of jurisdiction over "other waters" that were not previously classified as jurisdictional under the CWA or under U.S Supreme Court case law.

The proposed rulemaking fails to acknowledge the significant administrative burden it will impose on the federal and state regulatory agencies and the regulated community.

The proposed definition represents significant departure from the existing regulatory definition and program for "waters of the United States."

The economic and energy production impacts of this proposal are not adequately presented or assessed.

The proposal – by asserting a mere 3 percent increase in jurisdictional waters – grossly underestimates the total number of waters that will be affected.

In conclusion, additional work must be completed by the agencies for presentation to the public justifying this proposal and its impacts before any effort is made to finalizing a new definition of "waters of the United States." In addition to the above comments, the Associations endorse the comments of the American Petroleum Institute, the Waters Advocacy Coalition, the U.S. Chamber of Commerce and any comments submitted separately by any associations listed as supporters of these comments. The Associations appreciate the opportunity to provide comments on the proposed rulemaking and would welcome the opportunity to further discuss with the agencies the issues raised above. Please contact us or Matt Kellogg (with IPAA at 202.857.4722) if you have questions regarding these comments.

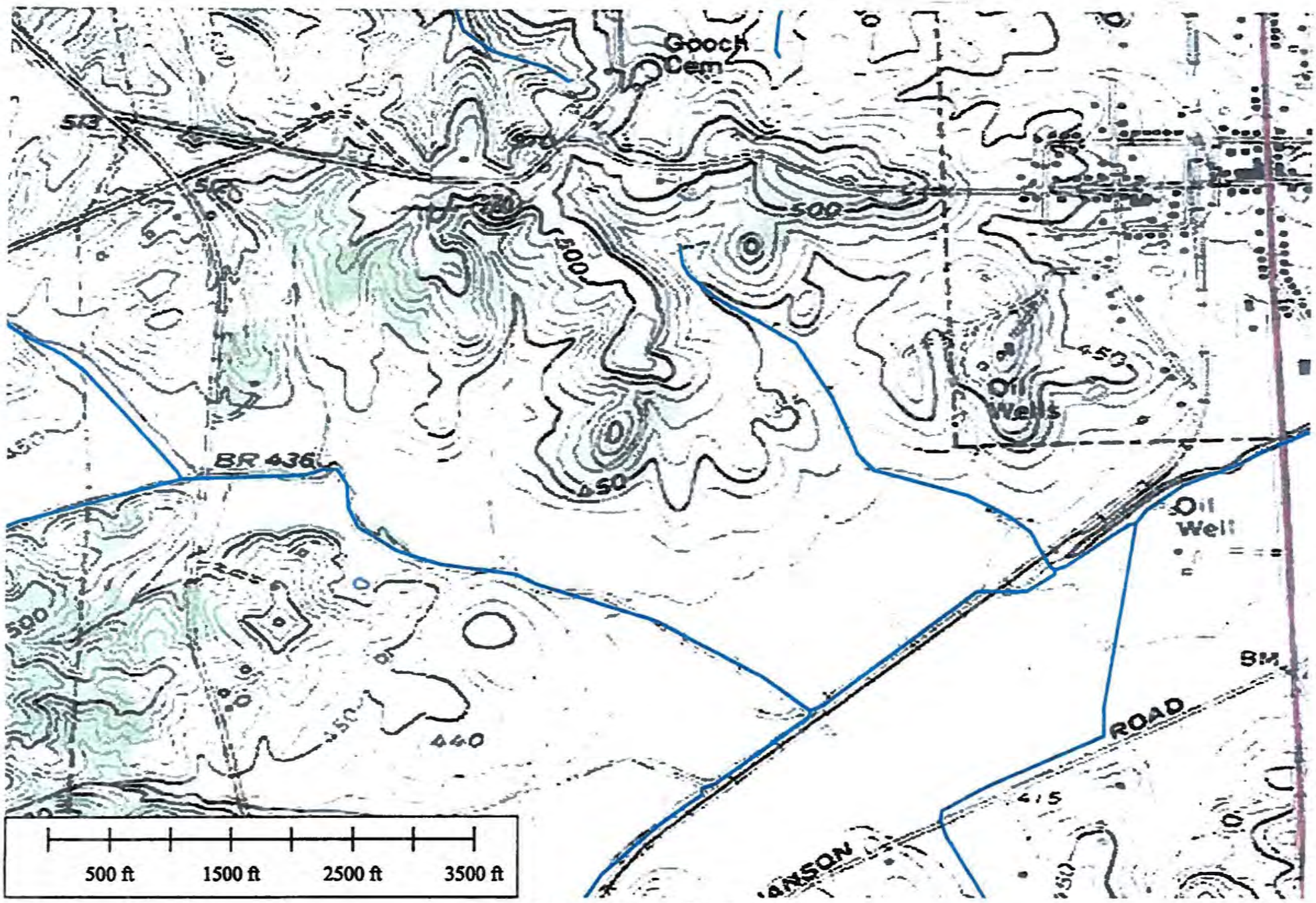
Sincerely,

Lee O. Fuller
Executive Vice President
Independent Petroleum Association of America

V. Bruce Thompson
President
American Exploration & Production Council

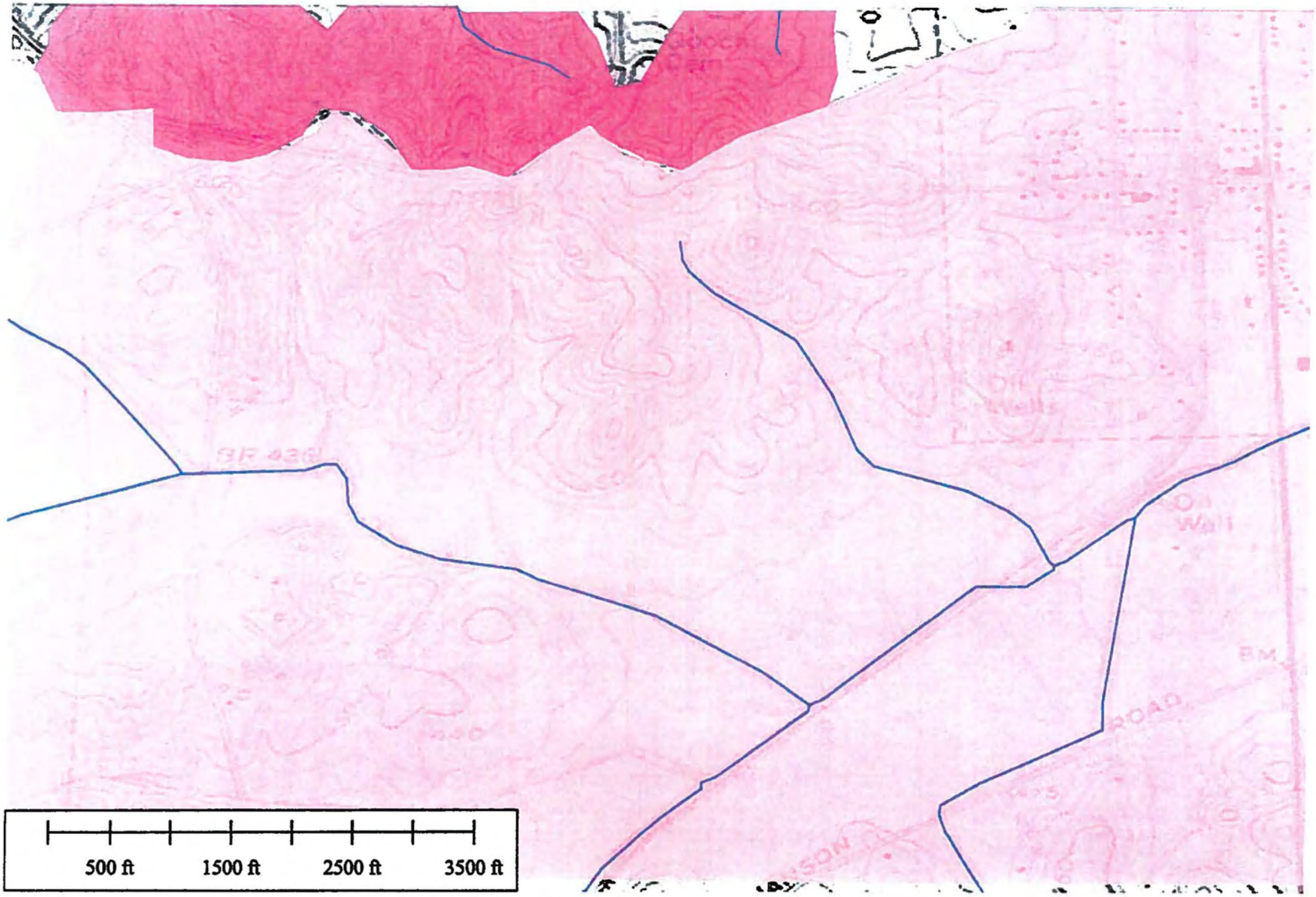
Kathleen Sgamma
Vice President of Government & Public Affairs
Western Energy Alliance

EXAMPLE #1 Current



Current EPA regulated area

EXAMPLE #1 Proposed



Proposed EPA regulated area

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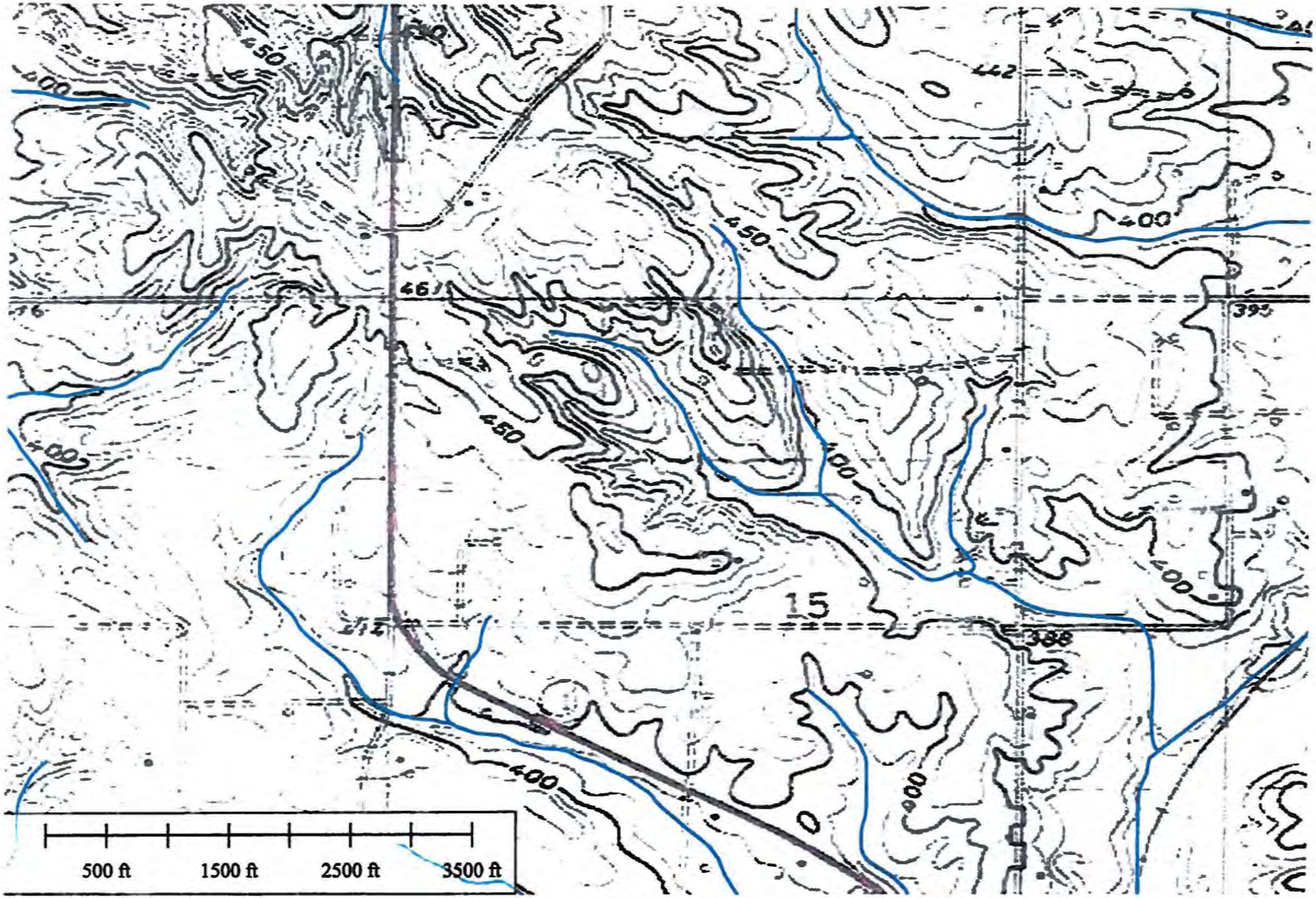
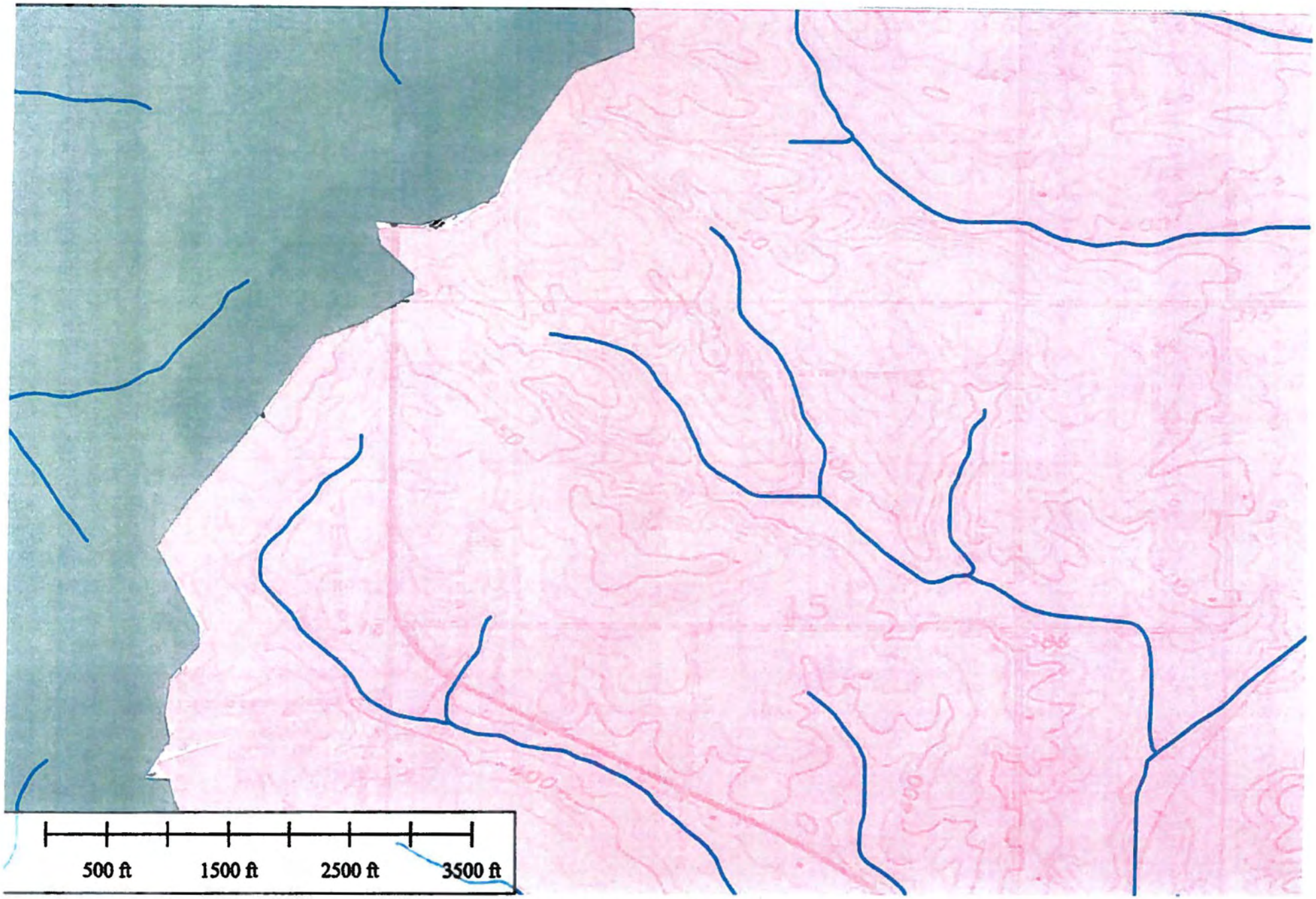


Current EPA regulated area

EXAMPLE #2 Proposed



Proposed EPA regulated area