November 14, 2014

Submitted Electronically Via Regulations.gov

Water Docket
United States Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments of the State of North Dakota on the Proposed *Definition of Waters of the United States* (Docket ID No. EPA-HQ-OW-2011-0880)

Dear Administrator McCarthy:

The Governor, Attorney General, North Dakota Agriculture Commissioner, North Dakota State Engineer, North Dakota Department of Transportation, North Dakota Department of Health, and North Dakota Industrial Commission (collectively North Dakota) respectfully submit these comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) proposed *Definition of Waters of the United States* (WOTUS), published on April 21, 2014 (79 FR 2218).

The North Dakota Department of Agriculture is the lead state pesticide agency. The department also provides: a fertilizer program, pesticide enforcement, a pesticide water quality program, and a state Waterbank program that helps producers conserve water on their lands and promote water quality. By working with producers through our programs, we aim to monitor water quality and prevent pollution from pesticides.

The North Dakota State Water Commission (NDSWC) is responsible for water management and development throughout the State. The State Engineer is the secretary and chief engineer of the State Water Commission. Additionally, the State Engineer regulates water appropriation, dikes and dams, drainage, and sovereign lands.

The North Dakota Department of Transportation's mission is to safely provide for the movement of people and goods throughout the state. The construction, operation, and maintenance of transportation facilities necessarily impacts water resources and drainage.

The North Dakota Department of Health (NDDH) is the agency charged with implementing and enforcing the State's various environmental regulatory programs, including the federal Clean Water Act (CWA) programs. The Department also implements and enforces state laws relating to the protection of state waters – which is all water, including groundwater.

The Legislature created the North Dakota Industrial Commission (NDIC) in 1919 consisting of the Governor, Attorney General and the Agriculture Commissioner, to conduct and manage, on behalf of the State, certain utilities, industries, enterprises, and business projects established by state law. In addition the NDIC, through the Department of Mineral Resources, has regulatory authority over oil and gas, coal exploration, geothermal resources, paleontological resources, and subsurface minerals, including Class II, Class III, and potentially Class VI (primacy pending) injection wells.

North Dakota has reviewed the proposed rule and draft scientific assessment, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*[1] and *Scientific Evidence: Overview of Scientific Literature on Aquatic Resource Connectivity and Downstream Effects*.[2] North Dakota has serious concerns with the proposed rule's attempt to expand federal authority. The proposed rule would bring under federal jurisdiction waters that have traditionally been solely within the authority of states. This expansion of federal authority into areas of state control is neither legally nor scientifically justifiable.

Moreover, federal regulation of all waters is not necessary. Waters outside the scope of federal jurisdiction are already being regulated and protected by states. Federal regulation will not result in increased environmental benefits; it will only lead to increased confusion.

The State's position is that defects in the proposed rule are so extensive that EPA and the Corps must withdraw the proposed rule. Before re-proposing a rule defining WOTUS, EPA and the Corps should consult with the state co-regulators and officials knowledgeable in agriculture, water management, and water quality issues. Any such rule should bring clarity, not confusion, and be workable for state agencies and industries.

North Dakota has the following additional specific comments on the proposed rule:

1. The proposed rule is an unlawful incursion on state jurisdiction.

The proposed rule is an inappropriate and unlawful federal incursion on state jurisdiction and poses a serious threat to state and individual interests through federal over-regulation and overreach. The proposed rule redefines virtually all surface waters as WOTUS. While there are a few claims of exemptions and exclusions (groundwater, upland ditches, etc.), they are confusing and nearly meaningless under the proposed rule.

The proposed rule makes little hydrologic sense and frequently violates the sense of connectivity proposed in EPA's own scientific document. For example, the rule claims to exempt groundwater, but could use the groundwater connection to take jurisdiction over the surface water bodies on either end of the connection. It makes little hydrologic or jurisdictional sense that an upstream waterbody would be federally regulated because of a connection to a downstream waterbody when the hydrologic connection itself is not federally jurisdictional.

EPA has effectively given itself federal jurisdiction over waters that belong under state jurisdiction and is trying to achieve this by finessing the language of the Supreme Court in *Rapanos v. United States* and other rulings in which the Court's intent was clearly to restrict federal jurisdiction.[3] As reviewed in depth in the joint letter of the States' Attorneys General, the Supreme Court has clearly ruled that EPA has overreached its authority and must retract to limitations closely connected to waters navigable in the traditional sense. Furthermore, EPA has used the rulemaking process to effectively recapitulate the Oberstar bill, which attempted to nullify the *Rapanos* ruling and failed in

[1] Office of Research and Development, U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013) (Preliminary Draft).

[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, App. A (proposed April 21, 2014).

[3] North Dakota's legal concerns with the proposed rule are explained in more detail in the Comments of the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina submitted to the docket on October 8, 2014.

Congress.[4] In doing so, EPA has used rulemaking to subvert the intent of both the Supreme Court and Congress.

For example, EPA cites in their webinars spills in upstream tributaries to Tampa Bay and Texas to justify their incursions. These types of examples do not justify nullifying state jurisdiction over waters of the state. EPA's authority would be necessary and appropriate only at the point where upstream conditions had actually affected downstream WOTUS, which are navigable in the traditional sense at or in proximity to the confluence.

North Dakota's primary concern is that this rule intrudes on state authority over waters and allows the federal government to assert federal jurisdiction over virtually all waters. It is ill-defined, overly broad, and scientifically unjustified. If a pollution event occurs, it must be dealt with; however, this rule creates the potential for federal permitting, penalties, and responsibility surrounding every waterbody, far beyond the federal jurisdiction in *Rapanos*. North Dakota's state water quality program currently provides protections and oversees pollution events on all waters of the state including those beyond traditionally navigable waters, and that authority must remain intact.

2. The definition of tributary in the proposed rule is expansive and unacceptable to the State of North Dakota.

The proposed rule attempts to establish a chain of nexus extending up endless orders of streams into ephemeral flows in washes, drains, and ditches feeding the higher order navigable streams. This federal jurisdictional claim violates the intent of the court outlined in *Rapanos*. Instead of regulating the water quality effects of distant tributaries on the navigable streams, EPA proposes regulating water quality within tributaries themselves.

Take, for example, if federal water quality standards specify that a certain nutrient may not exceed a specific amount in a navigable stream. The proposed rule would subject influent tributaries to that same standard, rather than regulating the tributary's contribution to the standard in the navigable stream. Next, the lower order tributary influent to the first tributary is regulated not by the effect on the navigable water, or even the first tributary, but is subjected to the same standard as the navigable water. This overreaching jurisdiction is applied up into washes, ditches, and drains, which are themselves subjected to the standard applied to the navigable waterbody itself.

The cumulative effect of the above outlined water bodies on receiving navigable water bodies is moderated by timing, freshwater influx from stream beds and seeps, and other minimally affected tributaries. These factors make it so any given individual tributary or drain may have little final impact on the major receiving waterbody. To claim authority and apply the same standard within a flowing agricultural or municipal drain as is applied to an interstate water--without reference to intervening moderating effects--allows federal micromanagement and interference with virtually all human enterprises and a blank check to apply standards in any manner it chooses. EPA and

[4] The Oberstar Bill attempted to expand EPA jurisdiction by separately and expansively defining "waters of the United States" as follows: "The term waters of the United States means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." (Sec. 4. Definition of waters of the United States, in H.R. 2421, CWRA of 2007, at: http://www.govtrack.us/congress/bills/110/hr2421/text, accessed Oct. 2, 2014). By separately defining "waters of the United States," the Clean Water Act attempted to separate EPA jurisdiction from the navigable constraint to be inclusive of virtually all waters.

cooperating federal agencies are appropriating for themselves the authority to become the arbiter of all economic enterprises and the power to impede or vet them at will.

EPA must limit its federal jurisdictional claims to a nexus that is defined by proximity, not remote connectivity.

3. The proposed rule is unnecessary because states already protect all state waters.

The fact that some waters that are not included within the CWA's current definition of WOTUS does not mean they are left unprotected. These state-only waters have traditionally been under state control. States have historically exhibited the ability to appropriately regulate them and address statewide and local concerns.

In North Dakota, the Legislature established a policy to protect all waters of the state, regardless of whether they fall within federal jurisdiction. N.D.C.C. § 61-28-01. Waters of the state is defined broadly and includes all surface and groundwater in the state. N.D.C.C. § 61-28-02(15).

North Dakota law not only protects more types of waters than the CWA, it also places greater protections on those waters. For instance, it is unlawful in North Dakota to pollute or place wastes where they are likely to pollute any of these waters. N.D.C.C. § 61-28-06. And protections are included for waters involved in water transfers. N.D.C.C. § 61-28-09.

The NDDH goes above and beyond merely implementing the federal CWA programs delegated to it by EPA. NDDH also implements a comprehensive state program to protect all waters of the state, addressing the protection of beneficial uses as defined in state law. As part of this program, NDDH has adopted extensive regulations to prevent and control water pollution. See N.D. Admin. Code art. 33-16. A person violating the state's water pollution control laws and rules is subject to an NDDH enforcement action, including the potential of substantial penalties. N.D.C.C. § 61-28-08.

4. The category of other waters[5] is expansive and confusing.

The attempts to classify other waters gives EPA and the Corps the ability to superimpose federal jurisdiction over state jurisdiction virtually at will. Rather than providing clarity, this catch-all classification establishes a platform for unending federal versus state litigation. North Dakota does not support attempts to classify other waters as federally jurisdictional.

5. The redefinition of WOTUS will be used by all federal agencies, not just EPA and the Corps, multiplying the jurisdictional overreach and leading to unanticipated consequences.

Not only is North Dakota concerned with the scope of jurisdiction EPA and the Corps could have under this rule, but the expansive definition of WOTUS will have ramifications far beyond EPA's water quality mandates. The proposed rule broadly defines federal jurisdiction, and that will likely be used or relied on by all other federal agencies, including the United States Fish and Wildlife Service (USFWS), Bureau of Land Management (BLM), and others. The combined jurisdictional applications will exceed EPA's actions in exponential ways that are unanticipated in the proposed rule's impacts analysis.[6]

[5] 79 Fed. Reg. 22188, 22211-22212.

[6] 79 Fed. Reg. 22188, 22219-22222.

For example, North Dakota farmers are concerned that the USFWS could use the expanded definition of WOTUS to impose greater regulation on North Dakota farmland. During the last half of the 20th century, the USFWS obtained in-perpetuity waterfowl management rights easements for wetlands on thousands of acres of North Dakota farms. These easements were purchased for a pittance, a few dollars per acre, under a promise not to drain. The demonstrable understanding of farmers and the hydrologic paradigm of the time was of literal drainage, not water use through pumpage, and with the understanding that the wetlands were relatively stable in our semi-arid climate. The potential future impacts of the federal easements were not understood until the 1990s when larger degrees of climatic variation were experienced in North Dakota and the large rains came.

USFWS now uses these easements in ways not anticipated by farmers. After unprecedented flooding began in 1993, USFWS refused to allow farmers to restore their newly flooded land. USFWS had written the easements to include all surface waters on the quarter section, but had not defined or delineated the boundaries. On this basis, USFWS claimed all of the newly flooded lands – assuming control over large tracts of land for which USFWS had paid nothing. They used federal legal strength to intimidate and sue landowners attempting to restore boundaries, access, and productivity. These actions caused severe financial burden on the farmers and strained the relationship between the local farming community and the USFWS.

Additionally, the BLM could use the proposed rule to deny grazing permits and limit access to grazing lands. Grazing lands contain a multitude of ephemeral waterways. This proposed rule makes producer access to lands questionable at best. Under this rule, it is conceivable that if grazing lands are within a floodplain, have tributaries in them as defined in the proposed rule, or are adjacent to a WOTUS, the BLM could deny permits and unnecessarily restrict the use of natural resources for agriculture.

Many federal agencies use the CWA's definitions for their own purposes. It is unclear how this rule will impact the way agencies conduct their operations and use the rule to regulate their interests. North Dakota is concerned that other agencies could co-opt these definitions without providing notice and opportunity for comment. Even if the rule specified that the definition of WOTUS can only be used within jurisdiction of the CWA, other agencies could use CWA-related claims to advance their jurisdictions. For example, it may be claimed that lowering a water table through pumping will have a water quality effect, and the EPA would then become involved in local groundwater use issues raised by other agencies. Even if found insignificant, the regulatory burden of delays will add severe hardship to water-using enterprises and solutions to farm management problems.

The ambiguities created by this rule and the unknown exponential impacts through use by other federal agencies is further reason that the EPA definition of WOTUS must be discarded. Additionally, if any other federal agencies wish to establish a definition of waters under their jurisdiction, it should be done under separate rule making processes pertaining only to individual agencies.

6. The connectivity report is insufficient to establish significant nexus on a local and situational scale.

In proposing this rule, EPA and the Corps inappropriately rely on the connectivity report to establish a significant nexus on a local and situation scale. There are several problems with relying on the document this way, including:

- It lacks specific spatial points of reference to clearly move from state jurisdiction of waters of the state to a transitional point of water with federal jurisdiction;

- It does not outline a set of standards, chemical or biological, that determine at what level a connection becomes relevant;
- There are no clear means for evaluating the situational relevance of the document's findings in a real world setting.

The connectivity report is a general literature review of a fundamental truism of hydrology and environmental science – that everything is connected to everything else. But in reference to real-world application and significant nexus interpretation, it says nothing of the situational significance of any given waterbody or the circumstances under which the proposed jurisdictional shift from State to federal jurisdiction is appropriate. The document demonstrates connection, but does so abstractly. It does little to quantify significance with respect to any specific hydrologic system or point of reference. In effect, the connectivity report is little more than an expansive, unpacked version of the federal jurisdictional justification cited in the findings of the failed Oberstar's Clean Water Restoration Act (CWRA).[7]

Contrary to EPA's claims, the connectivity report does not provide an appropriately scaled assessment of sufficient scale and depth that could be applied *a' priori* to local situations (i.e., the water quality significance of specific tributaries to their receiving bodies). The connectivity report also fails to consider the temporal and spatial variance effecting connectivity, which is a major factor within the wide climatic swings of the northern Great Plains and the natural hydro-chemical effects in the region.

7. The Prairie Pothole Region (PPR) experiences wide climactic swings that lead to variability of water levels and more uncertainty under this rule.

a. Prairie potholes should not be considered *per se* federally jurisdictional.

Under the proposed rule, small, ephemeral, prairie pothole wetlands are considered *per se* federally jurisdictional. In the PPR, these wetlands are situated throughout agricultural land, as well as the rest of the landscape. They pose a federal jurisdictional problem because of their variable nature. The proposed rule is not clear on how depressional prairie pothole wetlands that fill and spill into jurisdictional waters would be regulated by the Corps and how the Corps will determine if prairie pothole wetlands have subsurface flow to federal jurisdictional waters. The preamble states, "[w]ater connected to such flows originate from adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface. Surface hydrologic connections via physical features or discrete features described above allow for confined, direct hydrologic flow between adjacent water and (a)(1) through (a)(5) water that it neighbors."[8] This verbiage captures many prairie pothole wetlands as federally jurisdictional. The preamble cites research conducted on prairie pothole wetlands in North Dakota to support the decision.

[7] The "Findings" of the Oberstar CWRA stated the following to justify the bill's definition of virtually all waters as waters of the United States (see Footnote 3 above for CWRA definition). "(4) Water is transported through interconnected hydrologic cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system… (6)The regulation of discharges of pollutants into interstate and intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States. (7)Small and intermittent streams, including ephemeral, and seasonal streams, and their start reaches comprise the majority of all stream and river miles in the conterminous United States. These waters reduce the introduction of pollutants to larger rivers and streams, affect the life cycles of aquatic organisms and wildlife, and impact the flow of higher order streams during floods." And other statements in Sec. Findings, of H.R. 2421, CWRA of 2007, at: http://www.govtrack.us/congress/bills/110/hr2421/text, accessed Oct. 2, 2014.

[8] Fed. Reg. 22188, 22208

The wide climatic swings and trends of the central plains, including an approximate 200-year cycle, causes conditions where many surface depressions are functionally dry uplands[9] or isolated wetlands for most of the period of record, but then connect and coalesce during extended wet periods. Many of these are remote from currently jurisdictional waters and connect only through a series of water bodies. The attenuated connections render the probability of water quality effects on the federally jurisdictional water negligible.

North Dakota does not accept federal jurisdiction over water bodies only remotely and indirectly connected to waters navigable in the traditional sense based on the concept of fill and spill. Only those wetlands that are abutting or adjacent to navigable waters as defined by *Rapanos* should be considered federally jurisdictional. Prairie pothole wetlands that fill and spill or have a subsurface hydrological connection are currently not considered jurisdictional by the North Dakota Corps Regulatory Office. The proposed rule will dramatically increase the wetland acreage and basins considered jurisdictional in the PPR of North Dakota and throughout the United States.

The hydrologic expansion and contraction, spillage, flooding, and disappearance of prairie potholes has a large influence on farming. Prairie potholes require special management, and making these wetlands per se federally jurisdictional will prevent farmers from managing these waters on their land. This will prevent weed control, pest control, and could impede input applications. Prairie potholes are abundant in this region, and during the extremely wet climate cycles that we are currently experiencing - this rule will only compound existing management problems.

b. The rule's inclusion of recreational use or potential future recreational use as jurisdictional will have unduly large effects in the PPR.

Virtually any pothole that could float a duck boat could be claimed as a potential future commercial waterborne recreation resource. Although EPA specifies that claims must be substantial, the mere filing of claims for federal jurisdiction would provide a tool for special interests to interfere with local water and land management. Further, there is inherent ambiguity in the term substantial.

8. The proposed rule's treatment of wetlands is inconsistent and overly broad, making virtually all wetlands jurisdictional.

Connectivity of wetlands under federal jurisdiction should be limited to those immediate or proximate to major flowing water bodies that are navigable in the traditional sense. Extended connections should be exempted.

a. When defined as tributaries with ephemeral flow, the widely varying climactic regimes in North Dakota will inevitably make almost all wetlands jurisdictional.

The proposed expansive definition of tributaries includes anything with a bed and banks and ordinary high water mark that ever sends any flow, and waters that contribute flow – either directly or through another water – even if the flow is ephemeral.[10] The chain of waters included under the tributary definition[11] is expanded even further by including adjacent

[9] Ex. Tappen Slough in Kidder County was hayland with dugouts for horse watering during the 1930s – it is several feet underwater today. Many converted lands, farmed as dryland for many years, have wetlands on them since the mid-1990s.

[10] 79 Fed. Reg. 22188, 22263.

[11] 79 Fed. Reg. 22188, 22198 ("All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary.").

waters and including other waters [12] by situation. This expansive definition means that almost all surface waters will be jurisdictional under various climactic scenarios. Under these proposed definitions, few wetlands would be exempt in a realistic field setting.

Depending on the year, climactic changes allow wetlands to overtop and connect with waters that would be tributaries or are completely dry. There are many large prairie potholes that in the 1930s were mostly dry and disconnected from any outlet. During the half century following the 1930s multi-decadal drought, many wetlands remained isolated. Following the wet shift in the 1990s, these wetlands have increasingly coalesced or connected with other wetlands and to larger water bodies. Which waters are connected varies depending on time and the current climate regime.

Under EPA's proposed rule, recent climatic events would authorize broad federal authority over depressional areas that are often isolated from the navigable water or even dry, but periodically connected. As above, it would be one thing to regulate a water quality component at the point of entry to a clearly navigable water during the time of physical connection. To use that temporary connection as a pretense to redefine that waterbody itself permanently as WOTUS represents a massive inflation of federal jurisdictional claims.

b. Wetlands on flood plains should not be in themselves regulated as WOTUS unless a clear, substantial, and ongoing effect on the flowing waterbody can be demonstrated. EPA refers to the appropriateness of its federal jurisdiction in relation to wetland effects on flooding.[13] In flat areas like the Red River Valley, virtually all wetland and depressional areas are connected with the Red River of the North or its tributaries during the frequent flood events of recent years. Virtually all wetlands in the Valley would be under EPA jurisdiction.

Depressional areas on vast expanses of land are connected with rivers during floods of varying magnitude in almost all of the Red River Valley. This is not to say their potential effect on major flowing water bodies should not be regulated – rather, they themselves should not be included as WOTUS, subject to the same federal jurisdiction as the major body itself. In effect, wetlands should not be considered *de facto* adjacent waters under the proposed rule.

9. EPA's adjacent waters definition is overly simplistic for the prairie pothole and central plains regions, creating federal jurisdiction where it is impractical to determine water boundaries and define connectivity.

a. EPA does not provide meaningful clarification on how adjacent waters will be determined.

The preamble fails to indicate how the agencies will determine if a shallow subsurface flow exists for adjacent waters. The examples provided on page 22208 of the preamble are speculative, stating "shallow subsurface connections may be found both within the ordinary root zone and below the ordinary root zone (below 12 inches) where other wetland delineation factors may not be present" (emphasis added).[14] The preamble continues: "a combination of physical factors may reflect the presence of a shallow subsurface connection, including (but not limited to) stream hydrography (for example, when the hydrograph

[12] Id. ("d.1. 79, No. 76/Monday, April 21, 2014/Proposed Rules, impoundment, impoundmenttate water, the territorial seas, impoundmentcluding wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas").

[13] 79 Fed. Reg. 22188, 22191, and 22193.

[14] 79 Fed. Reg. 22188, 22208.

indicates an increase in flow in an area where no tributaries are entering the stream), soil surveys (for example, exhibiting indicators of high transmissivity over an impermeable layer), and information indicating the water table in the stream is lower the in the shallow subsurface"[15] (emphasis added). No field indicators are required to make this determination.

The Natural Resource Conservation Service (NRCS) soil survey web site states that soil surveys can be used for general farm, local, and wider area planning. NRCS soil surveys are considered an Order 3 soil survey and are made for land uses that do not require precise knowledge of small areas or detailed soils information. Such survey areas are usually dominated by a single land use and have few subordinate uses. The information can be used in planning for range, forest, recreational areas, and in community planning. But this is not a tool that will be accurate to determine a subsurface flow connection from wetlands to federal jurisdictional waters.

b. Using floodplains to create *per se* federal jurisdiction is ill-defined and will result in expansive federal jurisdictional claims.

Floodplains vary across the country based on climate and geography. In parts of the west, floodplains may be limited to the bed and bank of the flooding body where this regulation could possibly make more sense. However, in the Red River Valley of North Dakota and Minnesota, the flatness of the land allows the floodplain to be miles wide. Using a vague definition of floodplain would allow the EPA and Corps to have federal jurisdiction over miles of land after the flood recedes; not to mention the potholes, wetlands, and streams filled by the flood.

Defining floodplains by a set number of years event is also ineffective because floodplains can change dramatically with climactic and meteorological changes. Rather, water in floodplains should only be jurisdictional within the riparian area of the flooded zone. This pragmatic approach acknowledges that flood spillovers can cause pollution problems, but also realizes that large realms of federal jurisdiction are not the solution.

c. The rule's supposed ditch exemptions are unrealistic and negate the purpose of ditches.

Section 328.3(b)(3) states, "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" would not be WOTUS. However section 328.3(b)(4) states, "[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a) (1) through (4) of this section" would also not be WOTUS. As written, paragraph three of the proposed rule excludes qualifying ditches yet, if those same ditches contribute flow, they would be not be exempt under paragraph four. These conflicting examples demonstrate the uncertainty of the proposed rule's ditch exemptions.

In an effort to provide clarification, the rule explains that ditches are not jurisdictional if they are "excavated in uplands, rather than in wetlands or other types of waters, [and] for their entire length are not tributaries."[16] In North Dakota, there are very few ditches that would not intersect water at some point in their path due to our wide stretches of agricultural land and flat topography. This exclusion could be interpreted very literally, such that any downstream connection – no matter how miniscule or indirect – would prevent the exclusion from being applied. Ditches are designed to drain – this requirement makes the above exemptions useless, especially in an agriculture or transportation scenario.

[15] 79 Fed. Reg. 22208

[16] 79 Fed. Reg. 22188, 22203.

In an agriculture scenario, if ditches cross between or within farm fields, pastures, or grazing lands, farmers could be forced into a situation where they need to get a CWA permit for insect and weed control or certain farm activities (left ambiguous by the poorly written Interpretive Rule)[17] if there is a discharge in or near an ephemeral drain, ditch, or low spot.

In a transportation setting, all highway ditches that take stormwater runoff somewhere would potentially meet the definition of WOTUS under the proposed rule. If applied or interpreted in this manner, the permitting requirements for highway construction and maintenance activities would be unduly burdensome.

In addition, few ditches draining only uplands for any purpose are confined only to uplands. To do so floods other lands. Almost all drains go somewhere and release water to navigable streams at some point. Since they do, they would be included in the definition of a tributary, and therefore jurisdictional in the same sense as the navigable water itself. As with wetlands discussed above, the presence of perennial flow is dependent on climate regime and fluctuations in normal rainfall. There are many drains with perennial flow now that were not perennial 25 years ago.

The effect of a drain on a navigable water is an area of possible legitimate federal jurisdiction. But the water within the drain above that confluence should not be. The drain should only be jurisdictional at the point of confluence with a navigable water and within a clearly defined set of standards. The drain itself should remain within state jurisdiction and should not be treated as a tributary.

10. The shallow groundwater connection criteria is not appropriate.

If EPA and the Corps retain the shallow groundwater connection criterion, it will inevitably result in federal interference in state water appropriations and agricultural land management.

a. The inclusion of wetlands connected through shallow groundwater in the proposed rule is highly invasive of state water-management authority and needs to be removed.

The relationship between ponded waters overlying shallow unconfined aquifers and surface waters is strongly mediated by the management of the intervening waters. This management can include disconnection – or partial/total depletion by pumping. All pumped ground water in these aquifers must be recovered from discharge to rivers or evapotranspiration. Pumping in some cases may remove poor quality waters, as when waters from evaporative discharge areas are drawn toward wells. Discharge areas may be converted to recharge areas by pumping. Moreover, the effects of management will vary with fluctuations in the climatic regime, which may enhance, moderate, or negate management impacts. These shallow aquifers are major sources of water for irrigation, towns, and industries in the northern Great Plains – in fact, one of the largest sources.

Given past attempts by federal agencies in attempting to control water-table surfaces, it is highly probable that federal agencies will attempt to interfere with state groundwater appropriation using the proposed rule as justification. They will simply assert that the state has the right to appropriate groundwater for pumping and beneficial use, but local water table exposures are all WOTUS by virtue of groundwater connection with gaining streams they

[17] North Dakota's concerns with the Interpretive Rule and its effect on agriculture are explained in more detail in the comments from the North Dakota Department of Agriculture submitted to the Interpretive Rule docket on July 7, 2014.

claim to be jurisdictional, and their water-levels cannot be altered by pumping – a hydrologic impossibility. Definition of these waters as WOTUS will inevitably result in federal incursion on state groundwater appropriation jurisdiction, either through direct intervention of agencies using the WOTUS claim or indirect intervention through appeal for EPA involvement.[18]

In short, federal involvement through indirect claimed jurisdiction can be expected in almost all state water appropriations from shallow systems in North Dakota. This would render the aquifers virtually unavailable for beneficial use. Shallow unconfined glacial aquifers are a major source of water for irrigation, homes, industries, and municipalities in North Dakota and other states. State groundwater appropriation jurisdiction will mean nothing if permit holders are threatened by federal intervention if they pump. This is not to say that wetlands of major importance overlying aquifers should never be protected – the State does consider and implement protective measures for major resources like the Chase Lake refuge – only that these decisions belong to the State.

b. Using shallow groundwater connections to claim a nexus would allow EPA to inappropriately intervene in agricultural management.

Due to the rapidly changing climate and frequent spring flooding in agriculture areas, North Dakota farmers need to frequently pursue temporary ditching and manipulation of the land to enhance water movement and allow for planting. Most of these areas contain shallow, unconfined aquifers that are connected with streams or drainageways to streams. This means that virtually any ponded area overlying shallow unconfined aquifers, which are major areas of agriculture, could be considered jurisdictional when EPA or other agencies decide so. A dangerous opportunity for EPA intervention, to the harm of the farmers, is created in the proposed rule.

A generic definition of all waterbodies connected through ground water as WOTUS is a large and unjustified federal jurisdictional encroachment.

c. The connected surface water through shallow groundwater inclusion must be removed from this rule, disallowing EPA and the Corps from using these connections to determine federal jurisdiction.

EPA and other agencies cannot interfere with state authority to not only appropriate ground water, but assure the use of the water appropriated. The shallow groundwater nexus can only apply to the confluence of a surface waterbody with a navigable stream. In addition, these waters are protected through state jurisdiction.

11. The proposed rule would result in unprecedented federal intervention in agricultural management and practice.

a. The expanded tributary definition does not provide clarity and could act as a roadblock to normal agricultural practices.

The definitions of tributaries and their riparian lands are so expansive, that vast areas of agricultural land will be contained within areas defined as jurisdictional. The statement that EPA is not managing land is nonsensical. The most fundamental management practice of agriculture is water management – its retention, conservation, or removal. This rule claims

[18] The U.S. Fish and Wildlife Service during the 1990s challenged virtually every water permit application for ground-water pumping in Kidder County, ND and other areas based on what they considered to be unallowable impacts on their wetland easements. They were essentially claiming the right to control the water table, hence the aquifer itself.

jurisdiction over anything from fields to tributary drains at field outlets, and leverages authority over agricultural practices smaller than field scale. Conditions and climatic events that impact farmers are highly variable and even erratic, making state jurisdiction appropriate over federal.

For example, North Dakota has experienced a wet cycle during the last two decades in which water lying in fields drastically changes throughout the year. In the eastern part of the state, where the landscape is flat, water may sit in a field from April through June, and then dry up for the end of the planting season. Under the proposed rule, this depressed area – if it develops a bed, bank, and ordinary high water mark or reaches an actual navigable water – could be considered a WOTUS. This could be anything from a tire track that sits with water too long to a low area where rainwater channels.

Additionally, the federal jurisdictional inclusion of intermittent streams and tributaries and ephemeral streams means agriculture management will be further impeded, as farmers will not know which water on their lands is jurisdictional. The broad scope of these regulations creates a scenario where the farmer is going to have to prove that they did not discharge rather than federal agencies proving that there is a problem. This is a backwards scenario. If there is a discharge into upstream waters, it is regulated by the state and is appropriately handled at the state level. It is the state's responsibility to address pollution events until they impact waters within EPA's jurisdiction as defined by the Supreme Court. Current state oversight makes it unnecessary and unjustified for EPA to regulate all waters as a just-in-case senario.

b. Agriculture drains should not be regulated as WOTUS; rather, states jurisdiction should address pollution concerns.

The agriculture drainage exemption conflicts with the inclusion of ditches as tributaries. Similarly, exemptions of drains wholly in uplands or that do not discharge into EPA's expansively defined tributaries are trivial. Agricultural waters flow into drains that invariably go somewhere. For example, the exemption of subsurface drains as claimed by EPA is trivial because subsurface drains generally flow directly into surface drains that are claimed jurisdictional in the proposed rule. Very seldom do drains, including tile drains, flow into a waterbody that would not be considered tributary under the proposed expansive definitions. If use of the drains themselves is impaired by regulatory overreach by EPA or others with respect to drains, exemption of water removal at the land location will have little meaning.

Agricultural drains should not be regulated as WOTUS. While the cumulative effect of drains on navigable interstate waters at discharge points should be subjected to state-based requirements, the oversight should not be on the drain. Instead, states should be allowed to focus on the receiving waterbody if there is a pollution problem.

c. The storm water runoff exemption is ill-defined.

EPA needs to clarify if the stormwater runoff exemption refers to tile and surface drainage practices that remove those waters. If not, the exemption provides little protection to agriculture producers. It is important to understand that EPA's definition of tributary would not only authorize it to regulate water quality or limit discharge of agricultural chemicals (as with a TMDL) into a major natural waterway affecting downstream interests, but within the drain itself – within which waters would be under direct EPA jurisdiction. This offers an opportunity for micromanagement of the land itself at the field exit point, discounting downstream dissipation factors within the ditch or intervening wetlands.

North Dakota is particularly concerned with the impact to farmers during the current wet cycle. Within the wet climate scenario, many depressional areas flood. North Dakota is currently dealing with situations that involve the expansion of waters into farmsteads, farm fields, and towns. Many of these would be connected naturally under some scenarios; others would need to be artificially connected (drained) to protect the flooded parties. This authority would offer a powerful tool for federal interests to interfere with farmland water management, causing farmers hardship and delay as they are forced to spend more money and time on the permitting process.

12. Most fundamentally, EPA's definition of nexus makes no sense with respect to actual federal jurisdiction over remote waterbodies.

The significant nexus criterion makes sense in recognizing a federal jurisdiction over the quality of tributary water or neighboring waters at the confluence with navigable waters related to interstate commerce, and which affect the quality of those waters. EPA's proposed definitions do not provide jurisdictional clarity, they only expand jurisdiction.

However, it is difficult to argue that CWA jurisdiction does not allow federal regulatory limitations (with reference to specific standards) on entry of pollutants into clearly delineated federal (navigable) waters at the confluence of the tributary with those waters. It is quite another matter, however, to claim federal jurisdiction over the influent tributary upstream of the confluence, and apply the same standards to that waterbody as to the navigable stream – and then subsequently expand the federal jurisdiction and the same standards to tributaries feeding the influent tributary in a chain of dependent jurisdictions all the way up to and including agricultural ditches. It is the cumulative effect of upstream management, which affects navigable streams related to interstate commerce and which affects federal interests, not the individual upstream tributaries themselves. Upstream tributaries, which are not directly influent to navigable waters, belong under State jurisdiction to allow for flexibility in managing upstream water-use impact problems and their effects on State and local priorities.

13. North Dakota requests that the WOTUS rule be withdrawn. At a minimum, the states must be consulted, the rule must be amended, and then the rule must be put out for a second round of comments.

North Dakota believes the EPA and the Corps must withdraw the proposed rule. This rule was proposed before the final connectivity report was published, failing to give EPA and interested parties the chance to understand any science that may support the definitions.

If the EPA and Corps insist on proposing new definitions, a new draft and a second round of comments is needed following outreach with the state co-regulators and affected agencies. While EPA did conduct hearings, webinars, and meetings on this rule, states should have been consulted prior to the rule's release to avoid instances of federal overreach and to gain an understanding of what water features are like in different regions. Further compounding this problem is that the Corps, an issuing agency of the rule, did no outreach on this rulemaking process. The Corps has authority over determining what is federally jurisdictional. If this is the agency that is going to be issuing guidance and be on the ground during implementation, they need to hear from affected individuals, groups, and industries to fully understand the extent of the harm the rule as proposed could cause and how it can be made better in the future.

A new draft appropriately considering the constraints of proximity to waterbodies specified in the plurality decision of *Rapanos* is needed.

EPA has admitted in regional and national conference calls and webinars that many mistakes were made in this rulemaking process. Reopening a draft for comments will help states, their constituents, and industries know that EPA is listening to concerns and willing to work in a manner that will get this rule right.

Furthermore, throughout the public comment period, the federal agencies have continually released new documents, blog posts, Q&A documents, and webinars, offering explanations of key terms and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this new information is inconsistent with material provided in the official rulemaking docket. These additions inhibit public comment as the agencies keep changing their story and adding new (and often conflicting) information as the comment period progressed.

For example, the term upland is not defined in the proposed rule, but is necessary when determining whether a ditch is exempt. Throughout the comment period, the agencies acknowledged that they do not have a proposed definition of upland. Now, a recent Q&A document, issued by the agencies on September 9, 2014, provides a new definition of upland: "Under the rule, 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction." This new definition of upland is not included anywhere in the rulemaking docket. The public cannot adequately comment on a proposed rule if critical components continually change and are not posted in the Federal Register.

THE STATE'S POSITION

The proposed rule does not simplify CWA applications for the regulated population. Rather it increases confusion by proposing a one-size-fits-all framework that glosses over the real complexities of local hydrologic systems and enables federal micromanagement where it is inappropriate and problematic. The proposed rule also raises broader issues concerning the boundaries of jurisdiction between elected governments of states and the legitimate limits within which federal bureaus and agencies can define their own jurisdictions over state resources, and thereby the economies of states. The proposed rule needs to be withdrawn and reconsidered. A major rewrite and structural modification of the proposed rule is needed to resolve the critical issues described above.

To summarize the State's position, the Constitution of the State of North Dakota, Article XI, states that:
"All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation and manufacturing purposes."

It is North Dakota's position that waters within its boundaries belong to the State and are allocated and protected under state jurisdiction. Within these waters, those related to interstate commerce under the commerce clause of the U.S. Constitution may be subject to additional federal protection under the CWA. As discussed briefly in the introduction to this letter and as reviewed in depth in the joint letter of the States' Attorneys General, the Supreme Court has clearly ruled that EPA has overreached its authority and must retract to limitations closely connected to waters navigable in the traditional sense. Waters beyond these are under state jurisdiction, a real jurisdiction not subsidiary to federal control. It is the State's position that EPA and the Corps have ignored Court mandates and attempted to use the rule making process to make a massive, dangerous, and illegal claim of federal jurisdiction over the waters of the state – a claim that extends far beyond any reasonable extension of nexus related to jurisdictional allowances of the Court.

The State of North Dakota, through its laws and agencies, is responsible for and protects the waters of the state, both surface water and groundwater, under provisions that prevent degradation below the level

related to the highest potential use. Pollution prevention and correction are conducted under state water quality regulations administered by the NDDH and by agricultural chemical restrictions administered by the Department of Agriculture. In addition, water quality impacts of stream depletions are considered in both NDDH discharge standards and water appropriation evaluations administered by the State Engineer. The water quality impacts on major wetland resources and wildlife refuges are also considered and weighed in the water appropriation process, but not so completely weighted as to lock up the use of aquifers, which comprise one of the most vital sources of water for the State's citizens. It is the State, through its close proximity and intimate knowledge of both State resources and the needs of its people, that is best positioned to weigh, balance, and implement water quality protection measures in a sensible and effective manner, without unnecessary and undo harm to the State's citizens.

It is the State's position that EPA and the Corps must retract their proposed rules. If the EPA and Corps continue to propose new definitions, this must be done in consultation with the states, be respectful of state jurisdictions, and be in conformance with Court rulings.

In conclusion, both state and federal agencies understand the importance of environmental water quality and protecting our vital water resources against pollution that will render it unsafe or unusable for wildlife, recreation, and human consumption and use. State interests also understand the collective responsibility for stewardship of waters that affect downstream users and resources and the importance of local contributions toward efforts in their protection. However, the Constitution of the United States, the State Constitution, and two centuries of legal precedent have long established that states have jurisdiction over their waters and are not just a subsidiary executive functioning for federal agencies and bureaus.

We look forward to working cooperatively with EPA in delineating the appropriate boundary of federal and state jurisdiction and developing programs to adequately protect both WOTUS and waters of the state, both within and across jurisdictions.

Sincerely,

Jack Dalrymple
Governor

Wayne Stenehjem
Attorney General

Doug Goehring
Agriculture Commissioner

Todd Sando, P.E.
State Engineer

Grant Levi, P.E.
NDDOT Director

Terry L. Dwelle, MD, MPHTM, FAAP, CPH
State Health Officer

Karlene Fine
North Dakota Industrial Commission