The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency

Lieutenant General Thomas P. Bostick
Commanding General and Chief of Engineers
Department of the Army, Corps of Engineers

Water Docket - Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC 20460

Submitted via www.regulations.gov and via electronic mail to ow-docket@epa.gov and USACE_CWA_Rule@usace.army.mil

Re: Definition of ''Waters of the United States'' Under the Clean Water Act; Docket ID# EPA-HQ-OW-20011-0880.

November 12, 2014

Dear Administrator McCarthy and Lieutenant General Bostick:

Hackensack Riverkeeper, Hudson Riverkeeper, Milwaukee Riverkeeper, NY/NJ Baykeeper and Raritan Riverkeeper write to support the EPA's proposed rule defining "Waters of the United States" in the Clean Water Act. Congress intended the Act to cover the furthest reaches of its constitutional authority over American waters. The current uncertainty over which wetlands and streams are protected under the federal Clean Water Act has left millions of acres of wetlands and thousands of miles of headwater streams more vulnerable to drainage

and development, and these waters are indispensable to the health of our Nation's waters. As written, we feel that the definition proposed by the Environmental Protection Agency and Army Corps of Engineers (The Agencies) will greatly improve the state of clean water regulation in the county. With a few changes and additions, detailed below, the definition would be clearer and stronger.

Congress recognized that in order to accomplish its goal to eliminate water pollution, the new Act must cover all of the nation's waters. Because the hydrologic cycle connects many diverse waters, such a broad view was the only way to accomplish the Act's goals. How else was the Act to accomplish its primary mission that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983, and that the discharge of pollutants into the navigable waters be eliminated by 1985? 33 U.S.C. § 1251 (1-2).

The §1251 goals are a reliable laugh line for many reasons, and Agency and public confusion over the reach of the Act's authority is important among them. Unfortunately, inarticulate drafting, regulatory reticence and court rulings have limited the Act's reach. Confusion over Congress' intent and power has badly hamstrung our ability to attain the Act's goals. Since the Supreme Court ruled in 2003 that the definition of Waters of the United States does not include jurisdiction over ponds that are not adjacent to open water, and declined to extend deference to the Migratory Bird Rule in order "to avoid the significant constitutional and federalism questions" it raised, the scope of CWA jurisdiction has been a confusing muddle. See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 167-68, 173-74, 121 S. Ct. 675, 680, 683-84, 148 L. Ed. 2d 576 (2001), hereinafter referred to as SWANCC.

We feel that the status quo is untenable, and the Agencies must act swiftly to reestablish certainty over the Act's jurisdiction. We hasten to note that the Supreme Court agrees. Justice Breyer wrote "I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so." Rapanos v. United States, 547 U.S. 715, 811-12, 126 S. Ct. 2208, 2266, 165 L. Ed. 2d 159 (2006) While Chief Justice Roberts wrote "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress

employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority. The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency. … What is unusual in this instance, perhaps, is how readily the situation could have been avoided." Rapanos at 758.

From our perspective, the uncertainty over Waters of the United States has created regulatory confusion that resulted in fewer wetland acres being covered than are clearly warranted even under the most restrictive Supreme Court test. For example, the Army Corps of Engineers has ruled a wetland in Carteret, NJ non-jurisdictional despite its continuous surface connection to the navigable Rahway River. In our opinion, the Agencies are badly under-regulating the nation's waters. We feel that a clear and concise definition will give these agencies the clarity they need to once again fully carry out Congressional intent to protect wetlands, tributaries and other waters properly covered by the Clean Water Act.

In Order To Accomplish The Goals Of The Act, Waters Of The United States Must Include All The Waters Congress Intended To Regulate

In order to make a rule defining Waters of the United States, one must look both to the Act and to the case law. We can tell from the proposed rule that the Agencies have looked carefully at the case law, but by going through the analysis in these comments, we believe that we can show ways in which the rule can be clarified and strengthened beyond what the Agencies have proposed.

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Waters of the United States Should Include All Navigable-In-Fact Waters

The Agencies should note that Waters of the United States is itself a statutory definition of the Clean Water Act term of art "Navigable Waters." Clean Water Act §502(7). The term 'navigable waters'' means the waters of the United States, including the territorial seas." Waters of the United States explains what "navigable waters" are, and thus should, within its own definition, include traditionally navigable waters. i.e. "any stream is 'navigable in fact' which is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514 (1952).

It is common sense that that statutory term "Navigable Waters" includes traditionally navigable waters, and it is also common sense that has clearly been adopted by the United States Supreme Court.

In Riverside Bayview Homes, the Court found that the Act applied to wetlands adjacent to navigable waterways. The court stated that "(i)n adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133, 106 S. Ct. 455, 462, 88 L. Ed. 2d 419 (1985). The Court based its conclusion on the proximity of the wetlands to the traditionally navigable Lake St. Clair; Lake St. Clair effectively lent its jurisdiction to the near-by wetlands and it had that jurisdiction to lend because it was, itself, navigable.

In SWANCC, the Court found that the Act could not be construed to cover isolated abandoned quarries based on the presence of migratory birds because it lacked "the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." SWANCC at 121. The Court would not allow the Corps to simply eliminate the word "navigable" from the Act. "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.” SWANCC at 172, and “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.

Finally, in Rapanos, all of the opinions found that the question of navigability was important to the Act’s jurisdiction. According to Justice Scalia, the Court has “twice stated that the meaning of ‘navigable waters’ in the Act is broader than the traditional understanding of that term. We have also emphasized, however, that the qualifier ‘navigable’ is not devoid of significance.” Rapanos at 731. Justice Kennedy noted that “(c)onsistent with SWANCC and Riverside Bayview and with the need to give the term ‘navigable’ some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.” Rapanos at 779. Justice Stevens stated his view that “The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive's reasonable interpretation of a statutory provision.” Rapanos at 788.

The Supreme Court has always stated or taken for granted that the Clean Water Act applies to navigable waters. It is clear that the Clean Water Act also concerns at least some waters that are not traditionally understood to be navigable, but it cannot be argued that by using the term “Navigable Waters,” congress intended that the act cover waters that are navigable in fact. Because “any stream is ‘navigable in fact’ which is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes.” Muench, the Agencies’ rule should define Waters of the United States as including:

1. Waters that are capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes.

Waters of the United States Should Include All Waters Used In Interstate Or Foreign Commerce

Because Congress intended to extend its jurisdiction as broadly as possible, and because Congress has direct constitutional power over interstate and foreign commerce, the rule should apply to waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce.

Congress meant Waters of the United States to include all of our country's waters that Congress' power over commerce could reach; Congress made the definition simple because it intended to be clear and not because it intended to be cryptic. For example, the House Public Works Committee wrote, "The Committee fully intends that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. Rep. No. 92-911 at 131 (1972), 1972 Legislative History at 818.

Article 1, section 8 of the United States Constitution lists Congress' enumerated powers. Congress' most potent power is "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Thus, if Congress intended to have its broadest possible interpretation, Waters of the United States must include

2. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, or with the Indian Tribes

Waters of the United States Should Include Interstate Waters And Wetlands

The Clean Water Act was enacted to replace an ineffective state-by-state system of regulation. An important reason that the previous system was ineffective was because regulations in one state would frequently affect water quality in a downstream state. A uniform system of federal regulation helps prevent a race to the bottom, where states compete to enact laxer regulations in part because water quality is already poor because of neighboring states'

lax regulation. Waters that cross state boundaries are within the wheelhouse of congressional power and their restoration is a prime goal of the Act, §101. Therefore, if the Act is to function to protect interstate waters from a race to the bottom, Waters of the United States must include

3. Interstate waters, including interstate wetlands

Waters of the United States Should Include Waters With A Continuous Surface Connection to Other Definitional Waters

In Rapanos, the Supreme Court listed two ways to determine whether waters that were not themselves navigable nor susceptible to use in interstate commerce were nevertheless Waters of the United States. The Supreme Court had acknowledged since Riverside Bayview Homes that Waters of the United States was intended to regulate at least some waters that were not, themselves, traditionally navigable. In Riverside Bayview Homes, the Court found that wetlands near navigable Lake St. Clair were jurisdictional; in SWANCC, the Court found that isolated quarries were not.

To resolve the ambiguity, Justice Scalia and seven other justices found that the Act applied to 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 the two, are 'adjacent' to such waters and covered by the Act." Rapanos at 715.

Thus, if the definition of Waters of the United States is to include those waters found jurisdictional under Justice Scalia's test, it must include

4. Waters and wetlands with a continuous surface connection to bodies that are Waters of the United States in their own right

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Waters of the United States Should Include Bodies With A Significant Nexus to Other Definitional Waters

Justice Kennedy and four other justices found that waters possessing a "significant nexus" to navigable waters, meaning that "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.'" Rapanos at 715.

Determining whether two waters share a significant nexus is a process that the Agencies are well suited to resolve. We support the agency expertise and data contained in the Science Advisory Board Report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (SAB) report, as it accords with our experience on the water. Particularly

- "Wetlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open-waters in riparian areas and floodplains) are physically, chemically, and biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus (P). They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters." SAB Report at 1.2.
- "(Wetlands) remove and transform excess nutrients such as nitrogen and phosphorus. They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in

the integrity of downstream waters because they also act as sinks by retaining floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters." SAB Report at 1.4.2.

- Riparian areas act as buffers that are among the most effective tools for mitigating nonpoint source pollution. The wetland literature shows that collectively, riparian wetlands improve water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants—such as pesticides and metals—that can affect downstream water quality. Id.
- Many studies have documented the ability of riparian and floodplain areas to reduce flood pulses by storing excess water from streams and rivers. One review of wetland studies reported that riparian wetlands reduced or delayed floods in 23 of 28 studies. For example, peak discharges between upstream and downstream gaging stations on the Cache River in Arkansas were reduced 10−20% primarily due to floodplain water storage. Id.

These impacts on navigable waters are among the reasons that our organizations prioritize the protection of wetlands. We all work in watersheds where many of the native wetlands have been destroyed or altered by development. We find that losing wetlands causes additional flooding and lower water quality that we can see in our every day work. It is vital that the definition of Waters of the United States include as many wetlands as are scientifically justified and permissible under Supreme Court case law. Thus, if the definition of Waters of the United States is to include those waters found jurisdictional under Justice Kennedy's test, it must include

5. Waters and wetlands possessing a significant nexus to navigable waters, meaning that 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.

Waters of the United States Should Include Tributaries to Other Definitional Waters

It is the most basic common sense that tributaries to Waters of the United States possess a significant nexus – if not a continuous surface connection – to Waters of the United States, and are thus subject to regulation under Rapanos. The accompanying SAB Report supports common sense with scientific data.

Per the SAB Report, tributary waterbodies – including wetlands, low order streams, seasonal bodies and ephemeral bodies possess a significant nexus to bodies that are waters of the United States in their own right, and are thus subject to the act. "All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Headwater streams (headwaters) are the most abundant stream type in most river networks and supply most of the water in rivers. In addition to water, streams transport sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers." SAB Report at 1.2

Consequently, the definition of Waters of the United States should include,

6. Tributaries that contribute flow to above listed waters

The Definition Should Be Sufficiently Flexible To Include Other Waters On A Case-By-Case Basis

The rule should explicitly acknowledge that not every water of the United States flows to the ocean. The SAB Report shows that waters can have significant impact on Waters of the United States based on their *disconnection* from a greater watershed. For example, "reducing wetland water storage capacity by connecting formerly isolated potholes through ditching or drainage to the Devils Lake and Red River basins could enhance stormflow and contribute to

downstream flooding." Additionally, a unidirectional wetland may still affect interstate commerce, as could a prairie pothole, an isolated basin, a playa lake or a vernal pool – particularly if these features are hydrologically connected to each other.

It's also important to note that "other wetlands" (e.g., those not adjacent to traditional navigable waters and tributaries) often have a significant cumulative effect on the health of downstream waters, and thus impacts to a wetland area should be considered in aggregate. This conclusion is well and thoroughly supported by the contents of the SAB Report. Where appropriate, the Agencies should apply generally accepted principles of wetland and watershed science to determine when the connectivity and cumulative effects of "other waters" meet the threshold for Clean Water Act protection. Further, the Agencies should apply generally accepted economic principles to determine whether "other waters" meet the threshold for Clean Water Act protection as commercial waters.

Because, as per the SAB Report, broad conclusions about unidirectional or disconnected waterbodies are impossible to draw, the definition of Waters of the United States should include,

7. Such other waters the disruption of which may impact above listed waters, or interstate commerce

Summary of Our Proposed Definition

Any definition of Waters of the United States, particularly after Rapanos, must acknowledge that the term, at a minimum, includes

1. Waters that are capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes.
2. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, or with the Indian Tribes
3. Interstate waters, including interstate wetlands

4. Waters and wetlands with a continuous surface connection to bodies that are Waters of the United States in their own right
5. Waters and wetlands possessing a significant nexus to navigable waters, meaning that 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.
6. Tributaries that contribute flow to above listed waters
7. Such other waters the disruption of which may impact above listed waters, or interstate commerce

We Support The Agencies Proposed Definition Of Waters Of The United States, §401.11(1), But Feel It Would Benefit From Several Changes

Having read the proposed Rule, and the accompanying Science Advisory Board Report, and the relevant Supreme Court caselaw, we believe that rule the Agencies propose would significantly improve on the current situation and with a few minor adjustments, would represent a fair reading of the limitations of that power as the Court currently understands it.

The Definition Should Include Waters That Are Navigable-In-Fact

The Agencies' definition largely accords with our definition; the largest differences are that it does not specifically include waters that are navigable-in-fact, but it does include the Territorial Seas. We suggest that the Agencies add specific coverage for waters that are navigable in fact. We believe that Agencies' intent is to clearly cover all of these waters within the rule. In your final rule you should ensure that your intention is clear and unmistakable. Specifically including the territorial Seas in the definition of Waters of the United States is unnecessary because the Territorial Seas are already in the statutory definition of Navigable Waters at 33 U.S.C. §1362(7).

The Definition Should Not Exclude Waters Based Upon The Type Of Water They Impound, To Which They Are Tributary, To Which They Are Adjacent Or To Which They Possess A Significant Nexus

Waters of the United States include all tributaries to navigable or commercial waters, and all wetlands contiguous to navigable or commercial waters and all wetlands possessing a significant nexus – including a significant nexus to tributaries – to navigable or commercial waters. We thus recommend that type (vii) waters, i.e., those waters that "on a case-specific basis" that "alone, or in a combination with other similarly situated waters, included wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (l)(1)(i) through (iii) of this section" be amended to include other waters with a significant nexus to a water identified in paragraphs (l)(1)(i) through (vi).

The Agencies clearly intend that tributaries to tributaries, tributaries to covered wetlands and wetlands with a nexus to tributaries are definitional Waters of the United States -- especially when considering the SAB Report. However, the text of the definition introduces the possibility that type (iv), (v), (vi) and (vii) waters will not be ruled jurisdictional if their direct connection is only to other type (iv), (v), (vi) and (vii) waters. Therefore, we recommend that the Agencies rewrite the definition to read:

§401.11 General Definitions

(iv) All impoundments of waters identified in this section;

(v) All tributaries of waters identified in this section;

(vi) All waters, including wetlands, adjacent to a water identified in this section; and

(vii) 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 region, have a significant nexus to a water identified in this section.

The Agencies Should Specifically Acknowledge That Type (i) Commercial Waters Include Non-Navigable Waters That Are Important to Commerce

This rule marks the Agencies' unavoidably recognition that Clean Water Act jurisdiction does not extend as broadly as we had hoped before the Supreme Court decided SWANCC. The Court's decisions in SWANCC and Rapanos are broad, but are limited to their facts. We recognize that Paragraph (l)(1)(i) in part seeks to remedy the current limitation by applying to waters susceptible to use in interstate commerce. We would clarify this intention so that it is clear that non-navigable intrastate waters are also commonly used in commerce. It should thus be clear that Waters of the United States include, among other things, large intrastate basins that attract tourism, or prairie potholes that are so important to both duck watchers and duck hunters or quarries used for boating, swimming and recreation of a significant interstate nature. Waters like these are easily differentiated from the non-commercially important man-made quarries and gravel pits because they in themselves are actually used or susceptible to use in interstate commerce.

Subsection (2) Must be Rewritten to Ensure Jurisdictional Waters are Not Needlessly Excluded

We recognize that there are parts of the United States that are not and should not be definitional Waters of the United States. No one believes that swimming pools or public fountains are Waters of the United States – though they may be point sources under certain circumstances. We therefore support the some of the exclusions under subsection (2), but we are concerned that, as written, as written, other exclusions may remove jurisdiction from waters that should clearly be deemed jurisdictional.

First, the Agencies should strike "**notwithstanding whether** they meet the terms" of the definition of included Waters of the United States at §401.11(2) and replace it with "**unless** they meet the terms" of the definition of included Waters of the United States. If a groundwater feature, wastewater pool or impoundment, or ditch meets the definition of a Water of the

United States [as defined, Waters (i) to (vii)], it should be covered by the Clean Water Act as a Water of the United States.

Second, for the same reasons discussed above, §401.11(2)(iv) should read "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (l)(1)(i) through (vii) of this section;" instead of the as-written limitation of this exemption to ditches that discharge to just waters identified in paragraphs (I)(1)(i) to (iv). As written, the definition may be read to exempt ditches that drain to tributaries, wetlands, or waters that have a significant nexus to the main waterways [e.g., ditches that discharge into (v), (vi) or (vii) waters]. We trust that such an exemption is not the Agencies' intent, but there is no reason to invite confusion through the Agencies' language.

Finally, the Agencies should clarify what "groundwater" features will be excluded from the definition of Waters of the United States. Under the proposed language, §401(l)(2)(v)(f) exempts "Groundwater, including groundwater drained through subsurface drainage systems" from the definition. However, in the accompanying materials contained in the Federal Register notice, the agencies twice differentiate "deep groundwater" from shallow groundwater that can be shown to be hydrologically part of surface waters (and thus can be deemed jurisdictional). The Agencies should clarify what groundwater, if any, they intend to include or exclude from the definition.

The Regions And Districts Must Understand That This Definition Must Be Applied Liberally So As To Accomplish The Goals Congress Wrote Into The Clean Water Act

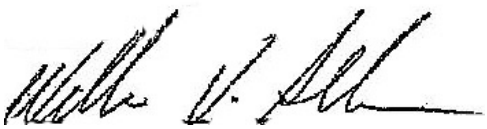
Finally, it is important that the Agencies make clear to the Regions and Districts that the plain language of the Waters of the United States rule is meant to apply broadly. Water quality ought not continue to degrade because Regions and Districts are afraid to exert jurisdiction over clearly jurisdictional waters such as the above referenced wetland in Carteret. The Agencies must continually reinforce to the Regions and Districts that their primary mission is to

restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It is the Agencies' duty to protect these waters as far as the law will allow.

We support the suggestion, made by the Southern Environmental Law Center, that the Agencies would benefit from a database of significant nexus determinations. Such a database would help Regions and Districts develop a uniform standard for nexus determinations that would benefit everyone.

We look forward to a new era when the mission of the Clean Water Act is foremost in regulator's minds.

Sincerely,



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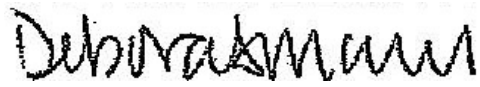

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