April XX, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable John M. McHugh
Secretary
Department of the Army
The Pentagon, Room 3E700
Washington, D.C. 20310

Dear Administrator McCarthy and Secretary McHugh:

We write to express our serious concerns with the proposed rule re-defining the scope of federal power under the Clean Water Act (CWA) and ask you to return this rule to your Agencies in order to address the legal, economic, and scientific deficiencies of the proposal.

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) released a proposed rule that would assert CWA jurisdiction over nearly all areas with any hydrologic connection to downstream navigable waters, including man-made conveyances such as ditches. Contrary to your agencies' claims, this would directly contradict prior U.S. Supreme Court decisions, which imposed limits on the extent of federal CWA authority. Although your agencies have maintained that the rule is narrow and clarifies CWA jurisdiction, it in fact aggressively expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity. Moreover, the rule is based on incomplete scientific and economic analyses.

The rule is flawed in a number of ways. The most problematic of these flaws concerns the significant expansion of areas defined as "waters of the U.S." by effectively removing the word "navigable" from the definition of the CWA. Based on a legally and scientifically unsound view of the "significant nexus" concept espoused by Justice Kennedy, the rule would place features such as ditches, ephemeral drainages, ponds (natural or man-made), prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under federal control.

Additionally, rather than providing clarity and making identifying covered waters "less complicated and more efficient," the rule instead creates more confusion and will inevitably cause unnecessary litigation. For example, the rule heavily relies on undefined or vague concepts such as "riparian areas," "landscape unit," "floodplain," "ordinary high water mark" as determined by the agencies' "best professional judgment" and "aggregation." Even more egregious, the rule throws into confusion extensive state regulation of point sources under various CWA programs.

In early December of 2013, your agencies released a joint analysis stating that this rule would subject an additional three percent of U.S. waters and wetlands to CWA jurisdiction and that the rule would create an economic benefit of at least $100 million annually. This calculation is seriously flawed. In this analysis, the EPA evaluated the FY 2009-2010 requests for jurisdictional determinations – a period of time that was the most economically depressed in nearly a century. This period, for

Comment [A1]: All the comments below are those of the Natural Resources Defense Council

Comment [A2]: This is incorrect. The most fundamental limit on the Clean Water Act is that it applies to water bodies, not areas or floodplains.

Comment [A3]: Actually, the Supreme Court rulings impose very modest limits on the Act's protections, specify that the law protects waters that science shows have important effects downstream, and repeatedly call on EPA & Corps to issue clarifying rules.

Comment [A4]: This is a gross overstatement. If the proposal is adopted, the net result will be fewer waters protected than during the Reagan administration.

Comment [A5]: No Supreme Court justice – not one, ever – has ruled that the Clean Water Act can only protect physically navigable waters, because the Act defines "navigable waters" broadly to include "the waters of the United States."

Comment [A6]: See above re: the law's limitation to water bodies.

Comment [A7]: In fact, many key terms will be defined for the first time, making the rule far more predictable.

Comment [A8]: During the most recent Supreme Court case, over 30 states joined the Bush administration in arguing for continued protection for wetlands near non-navigable streams, in part because states depend on the federal act to protect their own waters and to guard against pollution flowing between states.

Comment [A9]: The agencies' economic analysis estimates that the "proposed rule would provide an estimated $388 million to $514 million annually of benefits to public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about $162 million to $279 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways." This analysis was developed by experts in the field and reviewed by staff of the Office of Management & Budget. But, anyone who has remaining criticisms has an opportunity to put them forward as part of comments on the proposal.

example, saw extremely low construction activity and should not have been used as a baseline to estimate the incremental acreage impacted by this rule. In addition, the derivation of the three percent increase calculation did not take into account the landowners who – often at no fault of their own – do not seek a jurisdictional determination, but rather later learn from your agencies that their property is subject to the CWA. These errors alone, which are just two of many in EPA's assumptions and methodology, call into question the veracity of any of the conclusions of the economic analysis.

Compounding both the ambiguity of the rule and the highly questionable economic analysis, the scientific report – which the agencies point to as the foundation of this rule – has been neither peer-reviewed nor finalized. The EPA's draft study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," was sent to the EPA's Science Advisory Board to begin review on the same day the rule was sent to OMB for interagency review. The science should always come before a rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked.

For all these reasons, we ask that this rule be withdrawn and returned to your agencies. This rule has been built on an incomplete scientific study and a flawed economic analysis. We therefore ask you to formally return this rule to your agencies.

Sincerely,

/s/
CHRIS COLLINS
Member of Congress

/s/
KURT SCHRADER
Member of Congress

CC: Dr. Howard Shelanski, OMB Office of Information and Regulatory Affairs

Comment [A10]: The implication of this suggestion is that because there are pollution dischargers that today take advantage of the legal confusion and pollution control authorities' inability to effectively enforce the law, clarifying the rules is unfair to dischargers that pollute waterways and violate the law.

Comment [A11]: The report in fact has been subjected to significant review already. The report was first reviewed by a group of academic, government, nonprofit, and industry scientists, then independently reviewed by an 11-person expert panel. Moreover, the report itself is based on more than 1,000 peer-reviewed scientific pieces. EPA's independent Science Advisory Board is now providing a final review, on which the agencies will base the final rule.

Comment [A12]: This would mean having the agencies withdraw the proposal from public consideration before people are allowed to weigh in on it.