November 12, 2014

Water Docket
Environmental Protection Agency
Attn: Docket No. EPA-HQ-OW-2011-0880

RE: Docket ID No. EPA-HQ-OW-2011-0880; Comment on Proposed Rule Definition of "Waters of the United States" Under the Clean Water Act

Thank you for this opportunity to comment on the Proposed Rule regarding the definition of "Waters of the U.S." under the Clean Water Act. We are respectfully submitting comments on behalf of the Montana Stockgrowers Association (MSGA), Montana Association of State Grazing Districts (MASGD), Montana CattleWomen (MCW) and the Montana Public Lands Council (MPLC). Since 1884, MSGA, MASGD, MCW and MPLC, have been dedicated to finding proactive solutions to the most difficult challenges facing Montana's cattle ranching families and effectively representing Montana public lands grazing users.

Since the settlement of the West, particularly in Montana, ranchers have been responsible, environmentally conscious land managers in partnership with our state, and continually work to improve that relationship with the environment. In turn, these lands help to create many viable ranching operations for rural families, contributing to our local economies and providing excellent wildlife habitat. Our members rely on clean water for their operations and are often at the front line of maintaining upstream water quality.

Many ranchers in Montana run their cattle during summer grazing seasons on high mountain ranges of private and/or public lands near the beginning of watersheds. Home places, where cattle typically winter, are often at lower elevations and thus farther downstream. Irrigation plays a critical role in ranching in Montana whether for growing forages or crops such as alfalfa, barley, grasses and others that can be fed to cattle during Montana's challenging winter season. Water developments and conservation by Montana ranchers benefits many different wildlife species, municipalities and enhances overall ecological integrity of our state.

Montana's laws regarding water quality and quantity are strong. Our state constitution, revised in 1972, states, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for

beneficial uses as provided by law." (Article IX, §3(3)). The Montana Department of Natural Resources and Conservation regulates the distribution of water, while the Montana Department of Environmental Quality regulates the quality of water in our state. Many ranchers engage in voluntary efforts, either on their own or with the help of agencies like the Natural Resources Conservation Service, to conserve water quantity and protect water quality on their ranches and leases. MSGA annually honors a ranch in the state that exemplifies environmental stewardship, conservation, sustainable practices and riparian area management, providing an opportunity for the beef industry to showcase these practices being implemented together on farms and ranches in our state.

The Executive Summary of the proposed rule states "this rule establishes as 'waters of the United States,' all tributaries (as defined in the proposal), of the traditional navigable waters, interstate waters, and the territorial seas, as well as all adjacent waters (including wetlands). This will eliminate the need to make a case specific significant nexus determination for tributaries or for their adjacent waters because it has been determined that as a category, these waters have a significant nexus and thus are 'waters of the United States.'" 79 Fed. Reg. at 22193.

Our associations have carefully considered the proposed rule change. We are concerned the agencies have vastly expanded the scope of CWA authority by this categorical jurisdiction determination. Under this proposal, ranchers have no opportunity to provide input on these determinations, because by default, they are all jurisdictional waters. As agricultural producers, we believe that regulation that expands the scope of the CWA will have grave impacts on the use of water for livestock and crop production and therefore are opposed to the broad expansion of the definition of the statutory phrase "waters of the United States."

The proposed rule represents a broad overreach of congressionally delegated powers and goes far beyond the guidance offered by the United States Supreme Court in the *Rapanos* and *SWANCC* cases. Because of Montana's strong water laws and voluntary efforts to protect water quality and quantity by landowners and ranchers in Montana, we do not feel that the proposed rule change is necessary, nor does it meet the stated goals of the EPA and Army Corps of Engineers to provide more clarity.

We have criticisms of this proposed rule on both a broader, more philosophical level, as well as on a discrete and specific level with certain aspects of the proposal and have accordingly broken our comments into two sections. Our broader criticisms involve the scope of the proposed rule, state's rights, the definition of navigability, and the broad construct of this proposed rule in response to *Rapanos*. Our specific concerns have to do with the proposed rule's handling of tributaries, including ditches; adjacent waters; the catch-all of "other waters;" implications for groundwater; and the potential regulation of "waters" that aren't actually waters but are land.

PART I – Broad Concerns

Agencies' Powers as Delegated by Congress under the CWA and Commerce Clause Are Not Unlimited

Our largest overall concern with the rule is its broadness and lack of true limitations. The rule as written, whether the agencies intend it to or not, is open to the interpretation that just about every stream or body of water, no matter how small or remote—even a rain drop, if several raindrops taken in aggregate could have an effect downstream—would fall within the agencies' jurisdiction under the Clean Water Act. The United States Supreme Court has made it clear that the agencies' delegated powers under the Clean Water Act are not limitless (as stated clearly by the Court in *SWANCC* and repeated by the plurality in *Rapanos*).

United States Supreme Court Chief Justice Roberts in his terse, five-paragraph concurring opinion in *Rapanos*, referring to the *Chevron* deference, perhaps said it best: "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… 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 agencies." *Rapanos v. U.S.*, 547 U.S. 715, 758 (2006). We think that this proposed rule, in its current form, is another repeat of the efforts of the agencies to assert broad control over waters in the United States, which the Court has said it cannot do.

These limits come from the Clean Water Act itself as well as the Court's limits on Congress' powers under the Commerce Clause of the U.S. Constitution. In *SWANCC* the Court, citing *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), stated "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. 159, 173 (2001). Congress does not have, nor does it convey to the agencies through the Clean Water Act, unfettered and unlimited control over waters. Again, the Court's decisions in *Rapanos* and *SWANCC* point to some limit.

The current rule is vague and could be interpreted to include a number of waters that the agencies say they do not intend to regulate. The distinction between what is or is not regulated should be crystal clear and easily understandable by the people who might be regulated under the rule. Although encompassing all waters of any kind would be a very bright line, as we have mentioned we do not believe the agencies have the authority to do this, nor do we think it would be ideal given states' rights issues and practical, on-the-ground concerns.

States' "Primary" Rights to Water and Land Use Planning

Although, the Definition of "Waters of the U.S." proposal supplementary information states "this proposal does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state," 79 Fed. Reg. at 22189, our organizations have strong concerns that this proposal, much like the Migratory Bird

Rule at issue in *SWANCC*, goes too far in "impinging" on State's rights when it comes to regulation of water and land use. Any proposal of this nature must not infringe upon the rights of states to allocate quantities of water and the rights of individuals, acquired under state law, to use that water.

In *SWANCC*, the Court stressed the "States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The Court stated in that case that it found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* The Court chose to read the statute, 33 U.S.C. § 1251(b) as written rather than deferring to the agencies' interpretation, which the court felt raised "significant constitutional and federalism questions." In reading the statute, the Court said, "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)).

Scalia's Relatively Permanent/Surface Connection Test

It seems that the agencies in drafting this proposed rule, followed Justice Kennedy's "significant nexus test" from *Rapanos* (possibly in accordance with *Marks v. United States*, 430 U.S. 188, 193 (1977) regarding placing the highest weight on the narrowest position concurring in the judgment, a test that is not controlling and has been disfavored by some circuits on this topic.) This test has been described by applying the term "waters of the U.S." to wetlands that alone or in combination with similarly situated lands, significantly affect the chemical, physical, and biological integrity of other waters more readily understood as navigable. We would encourage the agencies to revise the proposed rule to more closely follow the plurality decision in *Rapanos* and Justice Scalia's "relatively permanent/surface connection" test which would apply the term "navigable waters"/"waters of the U.S." only to relatively permanent, standing, or flowing bodies of water, not intermittent or ephemeral flows of water, and only wetlands with a continuous surface connection to those waters. This test is more clearly understandable from the perspective of those who may be regulated under the rule. Justice Stevens in his dissent in *Rapanos* suggested lowers courts could use either Scalia's or Kennedy's test; and that has been the case as different circuits have applied different tests in cases that have arisen since *Rapanos.*

Navigable Waters

This proposed rule seems to define what was originally "navigable waters" in statute as "all waters, regardless of navigability." "Navigable waters" is defined in statute as "waters of the U.S." (33 U.S.C. § 1362(7)). In 1974, the Corps originally interpreted "navigable waters" in § 404(a) as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." *SWANCC*, 531 U.S. 159, 168 (2001) (quoting 33 C.F.R. § 209.120(d)(1)). The definition has changed or the agencies have attempted to change the definitions many times since.

The issue of the definition of "navigable waters" receives much attention in *Riverside Bayview*, *SWANCC* and *Rapanos*, and the agencies would be well served to pay closer attention to the concerns expressed in those cases. Justice Scalia, in the plurality opinion of *Rapanos* stated that in that case "the Corps' expansive interpretation of [the phrase "waters of the U.S."] is . . . not based on a permissible construction of the statute. *Rapanos v. U.S.*, 547 U.S. 715, 716 (2006) (citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Chevron deference issues aside, removing any clear meaning from the phrase "navigable waters" is extremely confusing to those who must operate under these regulations. Perhaps most important in Scalia's opinion, from the perspective of the regulated public, is his insistence on making sure that words in the regulations mean what they say. We would urge the agencies to stay within the bounds of the original language of the Clean Water Act.

PART II – Specific Concerns

Use of Draft Report Is a Procedural Flaw

One of our first concerns is the use of the Draft Report: Connectivity of Streams and Wetlands to Downstream Waters, as a basis for the foundation for the development of the proposed rule. Even though the Report is under review by EPA's Science Advisory Board, and will not be finalized until that review and the final Report are complete, this clearly presents a procedural flaw. We believe it is premature to develop a rule based on a Draft Report and not provide an adequate opportunity for the public to comment on the "Final" Report prior to its utilization in the development of this rule.

Exemption Questions Remain

We are concerned about the exemptions from Section 404 permitting under 33 U.S.C.A. 1344(f)(1) for "normal farming, silviculture, and ranching practices" as well as for "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," and "construction or maintenance of farm roads or forest roads." Following the release of the interpretive rule/guidance document regarding the 56 NRCS conservation practices, it remains unclear whether the exemptions have been narrowed to just the 56 practices. We have numerous members who will fund their own conservation practices on their own ranch, but not strictly follow the NRCS standards. This situation, places a great burden on producers trying to make improvements, but who would then be unsure of whether or not they are in compliance with regulations. Our general questions are: What activities are prohibited? What happens when a violation is *suspected*? What happens when a violation is *determined*? Can enforcement decisions be challenged?

Impacts to Ranching

When analyzing how this proposed rule may affect Montana ranching families we looked to the language of the Clean Water Act and the definitions within. There seem to be two applicable inquiries:

1. Is there a discharge of a pollutant from a point source into navigable waters (thus potentially requiring a NPDES permit, 33 U.S.C. § 1311(a))?

2. Does the landowner intend to fill a navigable water or adjacent wetland with dredged or fill material (thus requiring a § 404 permit, 33 U.S.C. § 1344, *Riverside Bayview*)?

For the first inquiry, we look to the specific definitions in statute of "discharge of a pollutant," "pollutant," "point source," "navigable waters" and "waters of the United States." The Clean Water Act defines "discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source" (33 U.S.C. § 1362(12)). Pollutant is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water" (33 U.S.C. § 1362(6)). Especially relevant to ranching in Montana would be "biological materials," "rock," "sand," and "agricultural waste." "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture" (33 U.S.C. § 1362(14)). Of special interest to our members are "ditch" and "channel" as well as "concentrated animal feeding operation." The exemption within the definition for "agricultural storm water discharges and return flows from irrigated agriculture" is also obviously applicable.

This brings us to the existing "Waters of the United States" definition and the agencies proposed rule to change that definition.

Here is a sample scenario, under the current definition of the Waters of the U.S. if a rancher's cow crosses his irrigation ditch (possibly a "point source" according to the definition above) and drinks ("discharging rock or sand, a pollutant," according to the above definitions) into the water and the ditch flows into a stream several miles away that is not considered a WOTUS, then this activity would be clear of the NPDES permitting system. If the proposed rule redefining and expanding WOTUS were to come into effect, then that stream would now be considered a WOTUS meeting the threshold for a rancher needing a NPDES permit. Our organization is concerned this additional regulation will significantly burden livestock producers and our state agency that administers the NPDES program.

Definitions

Many important words or phrases are not defined in the actual text of the rule. For instance, "upland," "significant" in "significant nexus," "other waters," "through another water." Although the agencies have provided some definitions or references to possible definitions in the prefatory materials of the Federal Register document, this is not adequate to analyze fully the scope of this proposed rule. Each one these terms we have identified needs a full definition and needs to be included in the actual text of the CFR or be removed.

Tributary

"Tributary" is defined as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly

or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through(3). This also includes ephemeral, intermittent or perennial, streams. This definition will greatly expand the scope of the waters that will be now be jurisdictional, with no real limits on waters that will be included in this definition. To add to the confusion of this definition, it also allows for the banks of the tributaries to "disappear at times." It is specifically mentioned this may be the case in the arid west. In Montana, this will create significant concerns for landowners, where countless situations as this will exist. This definition does not provide for a clear distinction between the exempted waters or features, such as gullies, rills and non-wetland swales.

In reviewing documentation by the Montana Department of Environmental Quality (DEQ), this uncertainty also exits between potential jurisdictional waters and erosional features. The DEQ, *Guidelines on Erosional Features,* states: *Swale: -In cross section, a generally broad, shallow feature where runoff may become concentrated. A thalweg and a floodplain are generally not discernable*. A swale is specifically excluded as a WOTUS, but waters within a floodplain would be considered a WOTUS. If these two features are "generally not discernable," landowners will be faced with considerable uncertainty and face potential ramifications as they conduct their operations on a daily basis. In addition, this same document defines a gully as: *Gully: -An erosional feature caused by concentrated but intermittent flow of water usually during and immediately following large runoff events.* Once again, gully is exempted, but an intermittent stream is considered a WOTUS. Our organizations assert that only stream features with "relatively permanent, standing or continuous" flow, pursuant to Justice Scalia's plurality opinion in *Rapanos* should be included in the definition of "tributary." This would limit the number of features that can be considered "tributaries" to those that could actually have a significant impact on the water quality of downstream waters, pursuant to the decision in *Rapanos*. It would also provide needed clarity to the ranching community.

We assert that intermittent and ephemeral features should NOT be considered "waters of the U.S." because these features are best regulated by states and localities, and were not intended by Congress to be regulated by the federal government. We recommend the agencies should include in the exclusion, water features that have a bed and bank and in which water flows only briefly during and following a period of rainfall in the immediate locality. In addition, the term "tributary" to most landowners in Montana is going to be a flowing feature like a river, creek, or stream. Ponds and wetlands are not what most would consider a "tributary" and therefore we request the agencies to remove ponds, wetlands and any other non-flowing feature from inclusion in the definition of "tributary."

Ditches

Ditches by definition of "tributary" are included as jurisdictional waters. The proposed rule provides for exceptions, however, our organizations are unable to see where any of the exclusions would apply or reflect any realistic relief from regulation on the landscape.

The first exclusion is for ditches that are (1) excavated wholly in uplands, (2) drain only uplands, and (3) have less than perennial flow. It is our understanding that all three criteria must be met for a ditch to be excluded. The rule does not provide a definition of "uplands," which is critical to a practical understanding of when and where this exclusion might apply. Most diversions are within a stream and thus within the high-water mark which would necessarily make the ditch not "excavated wholly in uplands."

The second exclusion is for ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water. This exclusion must be broadened or the agencies must provide clarity on the extent or degree of separation meant by "or through another water." The use of this phrase could remove all ditches from the excluded categories and make them jurisdictional because most will be connected eventually, leading to some other jurisdictional water. Many irrigators must necessarily divert more water into their ditches than will actually be applied to create the force necessary for water to reach the last turnout on the ditch. This means the ditch will drain return flow directly back into the stream the water was diverted from or another stream. Many irrigators down the line rely on such return flow and this is important for in stream fish, wildlife and recreational purposes as well. Our prior appropriation system of water use in Montana and most of the West requires that water not be wasted and any excess water be returned to the stream so others may use it.

Making ditches jurisdictional would place great economic burdens on Montana ranchers and farmers by requiring permits to conduct many routine activities potentially no longer exempt under different sections of the CWA due to the agencies' new interpretation of the 404(f)(1)(A) exemption for "normal farming, silviculture and ranching activities."

It is our recommendation that ditches should not be per se jurisdictional tributaries.

Adjacent Waters

The agencies have expanded the category of "adjacent wetlands" to "adjacent waters" and expanded the word "adjacent" to mean any open water within a floodplain or riparian area, the size and scope of both are undefined in the proposed rule and left to the "best professional judgment" of the regulator. The agencies have made the new category of "adjacent waters" virtually limitless, violating the CWA and contradicting the Supreme Court decisions. We recommend the agencies change the "adjacent waters" category to "adjacent wetlands" and not to finalize their definition of "neighboring."

We have concerns over this category being too vague and broad and ultimately being used as a "catch all" category. We do not believe this is supported by either the plurality or Kennedy's concurrence for jurisdiction in *Rapanos*. In addition, in the Preamble, "other waters" is defined as "not insubstantial or speculative." These phrases are not adequate for the regulated community or landowners to be ensured they are not in violation of the CWA. It is our recommendation that this classification be removed from the rule.

Groundwater/Subsurface Connection

While the EPA claims this rule does not regulate groundwater (and the CWA itself specifically states it does not) the new rule proposal includes language about "shallow subsurface hydrologic connection" between two bodies of water. That phrase is not defined and leaves confusion about the role of groundwater, whether it is regulated under this proposal, or if it can be used to establish a connection between two bodies of water with no surface connection for the sake of regulation. It is hard for a reasonable person to see how "groundwater" is different from "shallow subsurface" flow, and the agencies have failed to distinguish the two. It is also unclear how a landowner working on a project would know whether they are obstructing "shallow subsurface" flow or groundwater. Based on the intent of Congress to regulate only surface water via the CWA, it follows that the agencies should not use shallow subsurface flow, shallow subsurface hydrologic connections or the like to serve as the basis for determining jurisdiction. We recommend the agencies remove from the rule consideration of groundwater as the source of any connection, as there is too much confusion regarding whether it is part of the regulated water. Additionally, landowners have no logical way to know whether these connections exist, unfairly placing them in potential situations of a regulatory enforcement action without any knowledge.

Land

In our interpretation, this rule is classifying land that has water on it only temporarily or intermittently as a "water of the U.S." This goes beyond the scope of the CWA. As landowners, we would question if the rule determines the land itself is a WOTUS or just the water when it is there. Land regulation is clearly in the realm of the States and not the federal government and any attempt to regulate land through the guise of regulating water quality is an overreach.

Uplands

The term "uplands" is used throughout the proposed rule. It is a very significant legal term, especially as it applies to ditches and ponds, yet the agencies have failed to provide an adequate description of this important legal term within the proposed definition itself. We recommend the agencies provide this definition and allow additional comment to be included from the public.

Significant Nexus

Our organizations have concerns over the process of how the significant nexus test will be applied in the field. For a livestock producer, the lack of clear process provided in the rule, does not provide an adequate test that a producer can apply on the ground. We are also concerned with the ambiguity of the term "significant" in significant nexus, as being, "For an effect to be significant it must be more than speculative or insubstantial." We request the agencies **remove** the following words from their definition of significant nexus: "either alone or in combination with other similarly situated waters in the region (i.e. the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3) of this section." We recommend a definition that reflects the plurality decision of *Rapanos* and provides clarity, which recognizes that the water needs a physical connection and makes the feature indistinguishable from a water, identified in paragraphs (a)(1) through (3). *Rapanos*, at 755 (J. Scalia, wetlands are waters of the United States if they bear the "significant nexus" of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.").

Conclusion

Due to the proposed rule ambiguities and uncertainty, we request the agencies withdraw the rule and reconsider a revised rule that clearly respects the states' rights and abilities to regulate land and those traditionally "non-navigable" waters. The inconsistencies between EPA's promotion/education efforts, supplementary documents, and the proposed rule change itself, have created a large degree of confusion and distrust by the people who will be directly affected by this proposed rule change. We would encourage the agencies to engage in meaningful discussions with the states to better define the areas, if there are any, that states feel are deficient in meeting water quality standards. Thank you for considering these comments and recommendations.

Respectfully Submitted,

Jay Bodner
Natural Resource Director
Montana Stockgrowers Association
Montana Association of State Grazing Districts
Montana CattleWomen
Montana Public Lands Council