MATTHEW H. MEAD
GOVERNOR

THE STATE OF WYOMING

STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

November 13, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310

Re: Docket Number ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy,

Thank you for the opportunity to comment on the proposed rule, Definition of "Waters of the United States" Under the Clean Water Act, referenced above.

The State of Wyoming has reviewed the proposal and objects to its promulgation as a final rule. The State has serious concerns, summarized in this paragraph, regarding the proposed rule. It does not stem from consultation with the State. It does not incorporate state comments or authorities or recognize state rights under the Clean Water Act (the Act). It attempts to expand the jurisdiction of the Environmental Protection Agency (the EPA) and the Corps of Engineers (the Corps) to new waters beyond the purview of the Act. It lacks quantifiable scientific support. It misapplies the "significant nexus" test. It does not adequately address economic costs and benefits. Further, the EPA has miscommunicated the content and effect of the proposed rule and released a scientific report late, preventing meaningful opportunity for review. The proposed rule is procedurally defective, and it exceeds the jurisdictional limits set by Congress as well as by the Commerce Clause of the U.S. Constitution. It should be withdrawn. A brief discussion of these concerns follows.

<u>The State of Wyoming should have been consulted, its views considered, and its regulatory role retained in any rule change</u>.

Most waters, with the exception of those that are interstate, navigable, or consistently and directly connected to navigable/interstate waters (as established in court decisions) are best regulated by the individual states. This important principle is consistent with the Act, and the proposed rule runs counter to it.

PHONE: (307) 777-7434

FAX: (307) 632-3909

The proposed rule relies on only one purpose of the Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and ignores the equally important purpose "to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources." *Compare* Definition of the "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22187, 22194-95 (proposed April 21, 2014) *with* 33 U.S.C. § 1251(a)-(b). The proposed rule overrides the jurisdictional responsibilities of states for waters within their boundaries and places almost every body of water in the country under the control of federal agencies. It takes away the primary rights of the states recognized in the Act.

States should be consulted for any proposed change in regulation under the Act and certainly should have been consulted early and continuously for a drastic proposal like this one. Yet state governments were not appropriately consulted.

On September 12, 2014, Administrator McCarthy hosted a meeting in Washington, D.C. During that meeting, EPA staff acknowledged that little was done to solicit input from policy makers in state government on the proposed rule. The EPA indicated it viewed public comments related to previously proposed and withdrawn guidance documents as sufficient input to move forward. The EPA has been visiting stakeholders to provide "information" during an extended comment period. At least one of these sessions occurred in Wyoming. The EPA announced the discussions were "not recorded, not for official comment, and only to provide information."

Public information presentations are an inadequate alternative to the consultation process that should have occurred specific to the proposed rule. Using comments received in 2011 on withdrawn guidance in lieu of new consultation for this rulemaking, is unacceptable and falls short of the requirements of Executive Order 13132. *See* 64 Fed. Reg. 43255 (August 10, 1999).

The proposed rule seeks to expand federal jurisdiction to new waters, cuts off the state's role in jurisdiction over its waters, and provides an inappropriate, new definition of a "tributary" for jurisdictional purposes.

The proposed rule recognizes that some ditches as well as associated features (such as artificially irrigated areas that would revert to uplands should irrigation cease) do not contribute to traditional navigable waters, interstate waters, the territorial seas or impoundments. The proposed rule recognizes that these ditches and associated features are beyond the scope of federal jurisdiction. However, the EPA and the Corps (the Agencies) also express intent to exercise jurisdictional authority over waters that contribute flow either "directly or through another water". 79 Fed. Reg. 22274. Although the first clause appears to exempt some waters, the second clause effectively nullifies the first.

The proposed rule makes return flows, shallow subsurface groundwater or tail waters (that create artificial wetlands and riparian areas at field bottoms) "waters of the United States" based on

potential for contribution. *Id.* While small streams and ditches can join larger "navigable" streams or interstate waters, it is at the point of joinder that they could be considered jurisdictional, not before. Putting these types of waters under federal jurisdiction could result in limiting or eliminating positive contributions of flow to waters of the United States. The proposed rule creates a disincentive to anything but the full consumptive use of these waters in ditches and small streams. This defeats one of the Act's purposes – to maintain and restore the Nation's waters.

In the western United States, a great number of streams and ditches can be legally managed at the discretion of the water right holder to prevent return flows. Ditches carry appropriated water to those with the right to beneficially use that water, and they are regulated by the states. Flows, level of input, and therefore connectivity to waters of the United States are controlled by state law. These waters are not (and should not be considered) "waters of the United States" subject to federal management. The proposed rule is an inappropriate effort to take these waters under federal control.

The Agencies should start over with respect to the proposed rule. They should not try to exert regulatory authority over shallow subsurface groundwater, irrigation ditches, small, intermittent or ephemeral streams, or other small water bodies. They should defer to the states for the regulation of these and all other waters that are intrastate with only minimal or temporary hydraulic conductivity to traditional waters of the United States.

The proposed rule unlawfully enlarges the scope of federal jurisdiction with the proposed definition of "tributaries." The U.S. Supreme Court, in a plurality opinion in *Rapanos v. United States*, indicated that federal jurisdiction should be constrained to "relatively permanent, standing, or continually flowing bodies of water," specifically excluding "channels through which water flows intermittently, or ephemerally, or channels that periodically provide drainage for rainfall." 547 U.S. 715, 739-42 (2006) (Kennedy, J., concurring in judgment). Even Justice Kennedy, on whose opinion the Agencies rely, did not agree the Agencies have jurisdiction over "remote and insubstantial" waters that "may flow into traditional navigable waters." *Id.* at 778-779.

Justice Kennedy objected to an interpretation of the Act that extended jurisdiction to remote features carrying little and even no water. *Id.* In contrast, the proposed rule defines tributaries, for jurisdictional purposes, to include any feature, carrying water or not, with a "bed and bank and ordinary high water mark . . . which contributes flow, either directly or through another water." 79 Fed. Reg. 22274.

The Agencies have disregarded the opinion of the plurality, as well as Justice Kennedy's interpretation. They act *ultra vires,* under the proposed rule, in trying to take jurisdictional authority over more waters in contradiction to the case law.

The proposed rule makes a number of claims about connectivity to justify asserting federal regulatory authority over all connected waters, regardless of size. The Agencies claim the "scientific literature clearly demonstrates that streams, regardless of their size or how frequently they flow . . . influence how downstream waters function." 79 Fed. Reg. 22196. This claim is used to arrive at the Agencies' position that, essentially, all water is connected and thus under the Agencies' jurisdiction. But saying this does not make it so. The Agencies have given insufficient consideration to quantity and the need to establish "relatively permanent" connections. Likewise, they have incorrectly discounted state primacy.

The Agencies' proposed definition of tributaries is flawed. It includes any geomorphic feature capable of carrying water (if it can physically be characterized as having a bed, banks and ordinary high water marks) that contributes flow either directly or through another water. It is overbroad, ambiguous and greatly expands federal jurisdiction beyond the scope of the Act. It incorporates dry washes, arroyos, seasonal water bodies, and ephemeral streams (that rarely have sufficient flow and volume to significantly affect more permanent water bodies). Congress clearly intended to limit the Act's jurisdiction to waters – not to landscape features which can transmit waters or lands which can affect waters.

The Agencies have ignored the Supreme Court's plurality decision on the need for relatively permanent, standing, or continually flowing bodies of water. The proposed definition of a tributary and the intent to federally regulate tributaries must be reconsidered. Only waters with significant and measureable flows and relatively permanent, continual hydrologic connections to navigable or interstate waters should be included. This would be consistent with Justice Kennedy's assessment that there must be "some measure of the significance of the connection for downstream water quality." 547 U.S. at 784-785.

Defining virtually all waters as connected and thus waters of the U.S. is an error. The basis for this approach appears to be Justice Kennedy's statement that a wetland could be a jurisdictional water if the wetland alone or "in combination with similarly situated lands in the region" had significant nexus to a navigable water. Under the proposed rule, the Agencies have incorrectly determined that Justice Kennedy's "region" is a watershed. 79 Fed. Reg. 22274. Without any limiting definition, a watershed is far too broad a concept to insert into Justice Kennedy's "region" calculus. Watersheds are nested and can cover small acreages or thousands of square miles. The watershed approach also disregards Justice Kennedy's standard which opposes using remote waters with minor flows that may be separated by many miles to establish a significant nexus. 547 U.S. at 778-779.

The proposed rule replaces the Act's jurisdiction over "waters" with jurisdiction over "watersheds." This dubious approach extends the federal hook beyond what the law allows, invites contention, ignores states' regulatory roles and is contrary to the guidance of the courts. The Agencies should work with states to define a quantitative threshold for waters where the authorities of the state and federal government are separated.

Justice Kennedy stated that the Agencies could, through rulemaking, "identify categories of tributaries" that were jurisdictional. 547 U.S. at 781. He specifically identified "volume of flow," "proximity" and "other relevant considerations" as factors on which to base and limit the categories. *Id.* The Agencies have disregarded both the plurality and Justice Kennedy in their attempt to expand the definition of tributary to include everything.

The Agencies have also failed to provide needed clarity in defining key terms used in the proposed rule. Floodplains, riparian, and upland, are examples defined in scientific literature that need to be likewise spelled out in the proposal. *See* T. Dunne and L.B. Leopold, Water in Environmental Planning (W.H. Freeman & Co., 1978). Failure to adequately define these key terms further increases the possibility for regulatory creep.

The Agencies should establish not if there is a connection but rather at what level waters become relatively permanent or continually flowing bodies that contribute significantly to interstate or navigable streams. They should then develop appropriate categories leaving significant room for the states. Given the science, the Agencies are derelict in failing to propose alternative, quantifiable, and objective measures. The Agencies should withdraw the current proposal and work instead on a quantifiable, standards-based approach, like that suggested by Justice Kennedy.

The lack of a timely release of the science report and the lack of concrete and applicable conclusions are serious problems.

After withdrawing the 2011 guidance, the Agencies appeared to recognize the need for a scientific approach. A "scientific report" was the result. *See* Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Washington, DC: U.S. Environmental Protection Agency (preliminary draft 2013). Yet the Agencies failed to wait for the final scientific report prior to issuing the proposal, calling into question the integrity of both the report and the proposed rule.

The Agencies put the cart before the horse. They released a rule supposedly backed by science before the science was known and without time for analysis by commenters. When pressed, the EPA has indicated that the conclusions of the science report were unnecessary to those developing comments as the science was already "known." The draft report included information that essentially described the hydrologic cycle. The reasoning – all water is connected according to the laws of physics so a nexus exists and therefore all waters should fall under federal jurisdiction – is not sound and falls short. It is a faulty bootstrap by which to snatch jurisdiction over all waters. Such a conclusion does not answer the question of relative significance and fails to acknowledge that Congress already recognized the states' authority over certain waters.

Insufficient consideration has been given to establishing and quantifying metrics for "relatively

permanent" connections within the report. The report should be revised to address quantity and significance and made available for comment prior to another proposal. An adequate report, which does not currently exist, could be the basis for the states and the EPA to discuss the thresholds for state versus federal jurisdiction.

The proposed rule misapplies Justice Kennedy's "significant nexus" test.

Justice Kennedy used the "significant nexus" test to define the limits of connectivity. The Agencies use it to reach beyond jurisdictional limits.

"Rivers, streams, and other hydrographic features" identifiable as "waters" are the focus of the Act. Justice Kennedy used "nexus" to address wetlands that were relatively close, while refusing to find jurisdiction over "remote and insubstantial waters" that "may flow into traditional navigable waters." 547 U.S. at 778. The concept of connectivity was used to "trim" the tributaries and wetlands that were under federal jurisdiction (not enlarge them), so only those with a "significant nexus" to traditional navigable waters would be federally regulated. This is consistent with the plurality opinion, which declined to find jurisdiction beyond "relatively permanent, standing or continuous flowing bodies of water," specifically excluding "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739.

The proposed rule uses "nexus" differently. 79 Fed. Reg. 22204. Any relationship that can affect the chemical, physical, or biological condition, no matter how minute, is used by the Agencies to claim connectivity and therefore federal jurisdiction. This approach disregards Justice Kennedy's opinion. Whereas Justice Kennedy held that the *nexus must exist and be significant* for jurisdiction, 547 U.S. at 779-80, the Agencies' stance is that a *nexus exists (no matter how remote), so it must be significant.*

The Agencies' misapplication of the "significant nexus" test is a defect in the proposed rule.

The costs and benefits of the proposed rule are not properly addressed.

The Agencies state that the proposed rule "saves businesses time and money" and "provides more benefits to the public than it costs." These statements are grossly inaccurate.

The Agencies note savings in Agency expenditures based on an assumption that there will be less field-based, case-specific determinations for jurisdictional authority. While the proposed rule may save some administrative cost if the Agencies assume certain jurisdiction over more waters, it creates an expectation for more services elsewhere. The Agencies have failed to incorporate the weight of additional responsibilities they assume in this proposal.

Under the proposed definitions of waters of the United States, specifically those related to tributaries and the "watershed," the Agencies would become responsible for significantly more

Section 404 permitting. Additional resources will be required to complete requisite environmental analysis under the National Environmental Policy Act. The cost for those in business and the economic effects of delayed permitting would be staggering.

The Agencies also fail to address the cost to individuals, landowners, businesses and states whose water and property rights will be affected and diminished if the proposed rule is finalized and implemented. The loss of rights is a significant "cost," which should alone doom this proposal.

Additionally, the negative effects of the Agencies' Interpretive Rule (IR) for Agricultural Exemptions have not been adequately addressed in terms of economic impact. *See* MEMORANDUM OF UNDERSTANDING Among the U.S. Department of Agriculture, The U.S. Environmental Protection Agency, and the U.S. Department of the Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards, 2014. The time and cost increases for landowners to comply with new requirements could have devastating impact with far reaching consequences, yet the Agencies do not address them. The Agencies cannot ignore impacts by mislabeling a rule as interpretive.

I have written you previously about the IR. It is substantive. It undercuts the agricultural exemption provided in the Act. It adds a third federal agency, the Natural Resources Conservation Service (NRCS), as a regulator and enforcer. Its implementation would significantly increase costs for multiple federal agencies. What has been an exemption for farming expressly set forth in the Act is no more under the IR. NRCS standards, specifications and certifications, previously inapplicable, take the place of the exemption provided by law. The IR is part of this jurisdiction-expanding rulemaking attempt and it too should be withdrawn.

The economic burden of the proposed rule has been inadequately evaluated. It was based on a narrow perception of those affected and failed to look at the full cost of implementation. Costs to even those industries such as agriculture, that the Agencies claim to have intended to hold exempt, are increased. Costs to other industries will likewise increase. Costs in lost rights, as noted above, are also involved.

<u>The Agencies have not been forthright about the proposed rule</u>.

The proposed rule clearly expands federal jurisdiction over water and diminishes state rights and property rights. Claims are being made publicly by the Agencies to the contrary. For example, EPA has claimed that this proposal does not broaden coverage. *See* EPA Waters of the United States Website. However, on this public website urging support for the proposal, the EPA identifies the lack of existing federal authority to regulate small tributaries as an impediment to its compliance and enforcement efforts and as justification to broaden its authority under the proposed rule.

On its website, the EPA also lamented discontinuing enforcement actions in Arizona because non-point source pollution on small tributaries to the San Pedro River were beyond its regulatory reach. EPA then offered the content of the proposed rule as a solution. It therefore stands to reason that the EPA views the proposed rule as giving the agency jurisdictional tools to control waters previously beyond their reach.

Different messages for different audiences. It is one thing to propose a rule that is excessive, onerous, and in derogation of states; it is another entirely to assure the public that they have misunderstood the proposal and then saddle those same people with the burden of a rule the content and intent of which was misrepresented by the Agencies.

The lack of sincerity, clarity, and the variety of interpretations from the Agencies themselves is troubling and frames the problematic nature of the proposal.

The proposed rule exceeds the jurisdictional limits set by Congress as well as the Commerce Clause of the U.S. Constitution.

The definition of the waters of the United States identifies "navigable" and interstate waters as critical, relying heavily on the Commerce Clause for authorities. *See* 33 U.S.C. §1251 et seq. (1972); U.S. Const. Art. I, Sec. 8, Clause 3. A water, together with other water bodies, forms an interconnected highway to carry commercial goods in interstate and foreign commerce. 547 U.S. at 730-35, 760-61; 79 Fed. Reg. 22271. However, the agencies have ignored the navigability aspect of the Act in its entirety in their tributaries and "watershed" approach.

The proposed rule expands jurisdiction beyond what the Corps has already termed the "outer limits of Congress's commerce power." 42 Fed. Reg. 37122, 37144 (July 19, 1977). If the Agencies have been operating at the outer limits of constitutional authority under the current regulatory scheme, Congress should provide a clear indication that the Agencies can go beyond. The Agencies cannot determine on their own to do so.

The remote waters the proposed rule would consider as "waters of the United States" do not have the "substantial [economic] effect on interstate commerce" necessary to sustain Commerce Clause authority. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

Conclusion

The Agencies have been remiss in the assumptions used to create the proposed rule. The lack of collaboration with the states to develop the proposed rule is disappointing. Expanding federal jurisdiction into areas that belong to the states, cherry picking science, and spinning court decisions are unacceptable – they do not withstand scrutiny.

The Agencies are aware of the problems that have plagued this process. They have an opportunity to revisit their decisions and direction on this issue. Doing so would be responsible,

beneficial, and respectful of the states – their regulatory partners – and the public. The problems with the proposed rule, and the collaborative process to correct them, will require major revisions and a greatly expanded effort to work with the states.

There are many waters in Wyoming that have not been federally regulated and should not be federally regulated under the Act. They should be left to the State. It is in the best interests of the Agencies – in everyone's best interests – to withdraw the proposed rule. The State of Wyoming asks you to withdraw it.

Sincerely,

Matthew H. Mead
Governor

MHM:mdm

cc: The Honorable Michael B. Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Cynthia Lummis, U.S. House of Representative