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

Attention: Docket ID No. EPA-HQ-OW-2011-0880

**RE: Home Builders Association of Tennessee Comments to Proposed Rule
Defining Waters of the United States**

Dear Administrator McCarthy:

On behalf of the **Home Builders Association of Tennessee** ("HBAT"), we are providing comments to the above referenced Federal Register Notice of Proposed Rulemaking, Vol. 79, No. 76, April 21, 2014 by U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA") (together the "Agencies"). The Proposed Rule is an effort by the Agencies to better define the jurisdictional scope of waters of the United States within the context of the Clean Water Act ("CWA"). HBAT is a not-for-profit trade association comprised of approximately 4,000 Tennessee professional builders, developers and associated firms engaged directly or indirectly in home building, remodeling and light commercial construction in the State of Tennessee. HBAT members have been especially impacted by the Great Recession beginning in 2008. Recovery has been slow in most of Tennessee but is increasing each year. The Proposed Rule will negatively impact recovery of the home building industry without adding any appreciable environmental benefit. HBAT believes that the Proposed Rules are focused on blanketly imposing jurisdiction on nearly all waters physically present in the United States rather than waters that have a legal and constitutional relationship with navigable waters.

This letter contains our summary comments. We also join in with those comments of the National Association of Homebuilders. We strongly believe that the approach taken by the Agencies in defining Waters of the United States is government overreaching at its worst and request that the entire Proposed Rule be withdrawn.

I. Background

The attempt to accurately define the undefined CWA statutory term "Navigable Waters" continues to take a torturous road primarily because it is simpler to over define jurisdictional waters from a technical standpoint than to apply the legal standard established by the Supreme Court. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531

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U.S. 159 (2001) (“*SWANCC*”), and *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”) the U.S. Supreme Court ruled against the Corps’ expansive interpretation of the current rules that define waters of the United States. In *SWANCC*, the Court refused to defer to the Corps’ interpretation that the presence of migratory birds in an isolated intrastate wetland could be interpreted as a significant nexus to any traditional navigable water because such regulation was at the outer bounds of the ability of the government to regulate under the Commerce Clause of the U.S. Constitution. In the case of the wetlands in *Rapanos* the majority of the Court refused to defer to the government’s interpretation of adjacent wetlands and tributaries of traditionally navigable waters and interstate waters based on a “any hydrologic connection” to such waters. Suffice it to say the four Justice plurality believed that waters of the United States were wetlands *physically* adjacent to navigable waters that actually had flow and streams were relatively permanent waters. Justice Kennedy also did not provide deference to the government, but he did not agree with the plurality because he believed the proper test was whether a wetland had a significant nexus to traditionally navigable waters, interstate waters, or territorial seas.

Leaving aside the expansive reading of what constitutes a traditionally navigable water, the definition of “tributary” and “neighboring” in the Proposed Rule the proposal does not reflect either the Plurality test or the Justice Kennedy significant nexus test. The Preamble to the Proposed Rule reflects that the Agencies will ignore tests of speculative or insubstantial. Thus for tributaries there is not one such tributary that is speculative or insubstantial:

Consequently, 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. (Proposed Rule at 22,193).

In *Rapanos*, Justice Kennedy, however, framed the so-called “significant nexus” test as follows:

Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if 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.” When, in contrast, wetlands’ *effects on water quality are speculative or insubstantial*, they fall outside the zone fairly encompassed by the statutory term “navigable waters (emphasis supplied).

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547 U.S. at 780.

II. The Proposed Rule Greatly Expands the Jurisdiction of Waters of the United States.

The Proposed Rule through its use of the broad definition of tributaries greatly expands commonly understood notions of waters of the United States. The definition of "tributaries" through its broad one size fits all definition, by necessity, includes many conveyances that were not previously jurisdictional waters of the United States. We understand that the Agencies' position is that the jurisdiction is not being expanded; rather, it is being clarified. Such a position points out long standing frustration on behalf of the regulated community about the Agencies' continued overreaching on its jurisdictional determinations. While stakeholders have long sought clarification on the definition of waters of the United States, the reason for seeking such clarity was to assure that the Agencies can make jurisdictional determinations that more closely follow the existing rules and court interpretations. The Agencies have turned that concept on its head by stating that the Proposed Rule does not significantly expand their jurisdiction. Such a position validates our long standing concern over the Agencies past and present scope of jurisdiction. The Agencies should reevaluate the definition of "tributaries" so that traditional legal applications of federal jurisdiction are applied based on the Commerce Clause to the United State Constitution.

The Proposed Rule establishes a one-size-fits-all designation for all tributaries to covered waters. The proposed deconstructed definition of tributary means a water:

[P]hysically 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 (1)(i) through (iv) of this definition.

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 (1)(i) through (iii) of this definition.

A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.

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A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition

The definition of tributary causes substantial concern for the construction industry. For example, jurisdictional waters may require lateral buffering, permitting and costly compensatory mitigation. When all tributaries are considered jurisdictional, even all ephemeral streams, including Tennessee's wet weather conveyances, they become federalized and not only create additional jurisdictional waters, but also cause significant land use determinations that now are within the sole province of the states. Construction projects require regulatory certainty particularly when platting subdivisions and making investment decisions. Identifying nearly all conveyances as jurisdictional may increase certainty, but hinders actual operations. For example, in Tennessee with the general permit for wet weather conveyances, excess material, such as rock and dirt, can be disposed of in wet weather conveyances. If, however, these wet weather conveyances are waters of the United States, as described in the Proposed Rule, the ability to use such features could be severely restricted if not entirely eliminated. This creates extra cost to the home builder with no appreciable environmental benefit as described in Paragraph III of these comments. Likewise, some wet weather conveyances may require construction buffers which would limit the footprint of a subdivision, and, in some cases make development impractical. Impacts to wet weather conveyances from moving equipment across a wet weather conveyance during construction will also become a substantial issue and create enforcement concerns. This results in notices of violations, agency orders, or even civil or criminal enforcement for what has been a lawful activity.

The Proposed Rule adopts the Kennedy test--not just for wetlands--but for all other jurisdictional waters stating that the "significant nexus" is the "touchstone" of jurisdiction under the CWA. (NPRM at 22,192). In that the Kennedy significant nexus test was only for wetlands, a threshold comment is whether such test should be limited to wetlands absent further clarification from the Supreme Court.

Since the Agencies have applied the significant nexus test to all other covered waters in addition to wetlands, in guidance and in the Proposed Rule, then it is essential that the Agencies properly define the limits of what constitutes a significant nexus not only from a scientific viewpoint but also from a legal and constitutional basis. The Agencies appear to be reframing Justice Kennedy's meaning of speculative or insubstantial by stating that the scientific application of speculative or insubstantial is not the same as a legal one. The following excerpt illustrates the issue:

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It is important to note, however, that where Justice Kennedy viewed the language “more than speculative or insubstantial” to suggest an undue degree of speculation, scientists do not equate certain conditional language (such as “may” or “could”) with speculation, not equate certain conditional language (such as “may” or “could”) with speculation, but rather with the rigorous and precise language of science necessary when applying specific findings in another individual situation or more broadly across a variety of situations. Certain terms used in a scientific context do not have the same implications that they have in a legal or policy context. Scientists use cautionary language, such as “may” or “could,” when applying specific findings on a broader scale to avoid the appearance of overstating their research results and to avoid inserting bias into their findings (such that the reader may think the results of one study are applicable in all related studies). Words like “potential” are commonly used in the biological sciences, but when viewed under a legal and policy veil, may seem to mean the same as “speculative” or “insubstantial.” Instead, potential in scientific terms means ability or capability. For example, when the term “potential” is used to describe how a wetland has the potential to act as a sink for floodwater and pollutants, scientists mean that wetlands in general do indeed perform those functions, but whether a particular wetland performs that function is dependent upon the circumstances that would create conditions for floodwater or pollutants in the watershed to reach that particular wetland to retain and transform. That does not mean, however, that this nexus to downstream waters is “speculative;” indeed the wetland would be expected to provide these functions under the proper circumstances.

Proposed Rule at 22,262.

It is clear from the express language that the Agencies are applying the significant nexus test differently than Justice Kennedy intended. As a result the Agencies have greatly expanded the universe of waters that Justice Kennedy had in mind by its reapplication of those terms.

III. The Proposed Rule Imposes Federal Jurisdiction Over Solely State Waters (e.g., Watercourses With No Designated Use) in Contradiction of the Congressional Intent of Cooperative Federalism In The Clean Water Act.

The Proposed Rule imposes federal control of state land use practices and is contrary to the principle of cooperative federalism inherent in the Clean Water Act. The Clean Water Act is

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based on principles of cooperative federalism. *Ohio Valley Envtl. Coal. v. Coal-Mac, Inc.*, 775 F. Supp. 2d 900, 920 (S.D. W. Va. 2011). Congress intended for states to develop water quality standards ("WQS") for all waters within its jurisdiction. 33 U.S.C.S. § 1313(c)(1). Water quality standards include designated uses, criteria to protect the uses, and an antidegradation statement. These WQS are evaluated triennially by the states, and EPA is required to review and approve them, or it may reject some or all of the WQS. See also *Alaska Clean Water Alliance v. Clarke*, 1997 U.S. Dist. LEXIS 11144,45 ERC (BNA) 1664,27 ELR 21330(W.D. Wash.1997). In fact, where EPA is not satisfied that the state has properly developed WQS, it may itself issue WQS for such a state. The language of 303(c)(3) clearly and unambiguously states that "if" EPA approves state standards, they shall "thereafter" be the applicable standards. 40 C.F.R. § 131.21.

The State of Tennessee's longstanding jurisdictional practice is that if a watercourse, even one characterized by a bed, bank and high water mark, does not have established uses, or where it has removed the classified uses, then the jurisdiction of such water shifts entirely to the state (even if it formerly had federal jurisdiction). As part of its WQS Tennessee has designated certain watercourses as wet weather conveyances and has done so since at least 1986. Tennessee intentionally removed all CWA required uses from wet weather conveyances (fish and aquatic life, recreation, irrigation, livestock watering and wildlife) during triennial review of water quality standards in 1986. EPA has approved Tennessee's WQS at every opportunity including the designation of wet weather conveyances with no established uses.

The application of the definition of waters of the United States cannot be read in absence of the water quality standards set out in Section 303 of the Clean Water Act. Particularly where a statute is ambiguous, such as the CWA, rules of statutory construction allow courts to read them *in pari materia*. Where a state, as part of the triennial review of water quality standards, has removed all designated uses for a tributary, and EPA has approved the Water Quality Standards, as a practical and legal matter, the Agencies' jurisdiction is limited to the State's regulation of such tributaries. An interpretation to the contrary reads out Section 303(c) of the CWA. Thus, even if the definition of tributaries encompasses Tennessee wet weather conveyances, such water courses are regulated as waters of the State rather than of the United States. Accordingly, when the Tennessee Board of Water Quality, Oil and Gas adopted the wet weather conveyance rule, which was approved by the United States Environmental Protection Agency ("EPA") in 1986, it removed any established uses for such waters in Tennessee. The Proposed Rule causes confusion with this federal/state partnership by painting such a broad brush on all tributaries, including wet weather conveyances.

In 2009, the Tennessee General Assembly enacted legislation to establish a legal mechanism for making jurisdictional calls on streams. In doing so, the statute refined the regulatory definition of wet weather conveyance to reflect additional biological requirements. In Tennessee, a stream is any watercourse that is not a wet weather conveyance. A wet weather conveyance has hydrogeological and chemical considerations (must be above the groundwater table, flow only in response to precipitation in the immediate locality, and not suitable for

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drinking water) as well as hydrological and biological aspects (due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate logic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months). The Board of Water Quality, Oil and Gas has promulgated rules that set out criteria for making the determinations and defining the aquatic organisms that qualify a watercourse as a stream. In addition, the Tennessee Department of Environment and Conservation has developed guidelines to assist in interpreting the statute and the rules. Finally, TDEC has a certification program to train and certify individuals who qualify based on education and experience as well as classroom and field testing to make stream determinations.

When EPA Region IV approved Tennessee's water quality standards, those standards took effect for CWA purposes within the State of Tennessee. Those standards included the Wet Weather Conveyance rule which, pursuant to the Tennessee's classification of surface waters, are not assigned any designated uses, including CWA § 101(a)(2) uses required for all "waters of the U.S." Therefore, while wet weather conveyances are waters of the State, by definition they are not "waters of the United States" because they do not support the CWA § 101(a)(2) uses, a statutory requirement for all waters of the U.S.

Based on the foregoing it is clear that designated wet weather conveyances in Tennessee should not be subject to federal jurisdiction. However, the expansive definition of tributary usurps Tennessee's classification of wet weather conveyances and ascribes federal jurisdiction in its place. This usurpation creates substantial uncertainty in the regulated community as to jurisdictional limitations of projects under both Section 404 and Section 402. The action by the Agencies relegates states to merely contract administrators of a federal program rather than a full partner in how our nation's waters will be protected, which contradicts Congressional intent of the Clean Water Act.

We request that the Agencies address the basis for their jurisdiction, if any, over wet weather conveyances in Tennessee. If the Agencies believe such jurisdiction exists, then please state the basis of authority to impose compensatory mitigation on watercourses with no uses.

IV. The Agencies Have Confused The Connectivity Study With The Legal Test Of "Significant Nexus."

The Agencies premise its blanket significant nexus findings for tributaries on the draft EPA report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (the "Connectivity Report") Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms. (Proposed Rule 22,223). The report goes on to state five functions that streams, wetlands and open waters influence. They include net export of materials such as water and food resources as well as removal or storage of materials such as sediment and contaminants. The study states that

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functions are actual and potential, and that both actual and potential functions are part of the connectivity equation.

The Science Advisory Board ("SAB") in concurring with the Agencies' approach stated:

Tributaries, *as a group*, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes (emphasis supplied).

See Letter to Gina McCarthy, EPA-SAB-14-007, from Dr. David T. Allen, Chair, Science Advisory Board, September 30, 2014.

Apparently the concept that the Agencies and SAB embrace is not whether a particular tributary has a significant nexus to tributaries of traditional navigable waters, interstate waters, and the territorial seas, as well as all adjacent waters (including wetlands) ("Jurisdictional Waters"), but whether they do "as a group." We believe that concept is an over expansive reading of the Clean Water Act and the relevant court decisions. We understand that the significant nexus test includes waters either alone or "in combination with similarly situated lands," but all conveyances to covered waters cannot blanketly be included so as to usurp state or local land use laws. In other words "tributaries as a group" does not mean the same as "similarly situated."

The Agencies' scientific basis of the definition of tributaries is based almost entirely on the Connectivity Study. While we believe much additional third party review (not just the Science Advisory Board) is necessary to properly evaluate the proposal, it appears that the Connectivity Study is not what Justice Kennedy intended as a test of "significant nexus." The Proposed Rule does not provide any criteria as to when a specific tributary can be removed from a group or can be evaluated on its own for contribution to a significant nexus. On the one hand the Agencies state that "significant nexus is not itself a scientific term." (Proposed Rule at 22,193) and then turn around and state that terms such as "speculative" and "insubstantial," though part of the definition of significant nexus have a different scientific meaning than that attributed to Justice Kennedy. The Agencies have re-framed the legal definition and meaning of significant nexus by placing scientific meaning to terms such as "speculative" and "insubstantial." For example, the Agencies apply a scientific meaning to "potential" in distinguishing these terms. However, Justice Kennedy did not use the term "potential" in his opinion and the Agencies have ascribed broad meaning to such terms to expand those terms. The Agencies must clarify what constitutes "speculative" and "insubstantial."

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The Agencies' Proposed Rule definition of "significant nexus," which attempts to adopt Justice Kennedy's "significant nexus" test, properly includes the exclusion from the significant nexus test where a water's contribution to covered waters is speculative or insubstantial. However, the Proposed Rule gives short shrift to the actual evaluation of waters that are speculative or insubstantial. While the Proposed Rule provides some express exclusions from the Proposed Rule, some of which are statutory, the Agencies do not describe why such waters are excluded and, if so whether the reason was that they are speculative or insubstantial. If the list of exclusions was intended to be an complete list of what constitutes speculative or insubstantial, then the Agencies should so clarify. Under the Proposed Rule all tributaries, no matter how insignificant, are jurisdictional under the Proposed Rule and, without any further evaluation, declared to have a non-speculative contribution or a substantial contribution to covered waters. We believe that the agencies should develop scientific criteria that more empirically evaluate when a water contribution to covered waters reaches the level of substantial and consequential.

While the Connectivity Report addresses the perceived value of upstream waters and wetlands, the Proposed Rule does not provide any scientific benchmark as to what constitutes speculative or insubstantial. The Proposed Rule declares that tributaries and adjacent waters always significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. *See, e.g.,* Proposed Rule at 22,205 and 22,210. Therefore, the Agencies determined that tributaries and adjacent waters as defined by the proposed rule have a significant nexus with traditional navigable waters, interstate waters, and territorial seas and, therefore, are jurisdictional waters. For example, a very small natural ephemeral ditch that may meet one of the criteria for a tributary, might not have the same impact downstream as an intermittent or perennial stream. While it might carry water as well as nutrients, the Proposed Rule omits no such water course on the basis of "speculative or insubstantial." Indeed, the Connectivity Report, if read literally, would include many of the tributary exclusions in the Proposed Rule, such as manmade upland ditches draining only upland areas.

Without getting into the details of the Connectivity Report, it is axiomatic that water naturally flows downhill and contributes whatever is located in channels including flow. Further, it is axiomatic that a wetland, wherever located, has certain value depending on the type and quality. This should not be a surprising scientific finding. However, the rules must consider the existing jurisdictional legal test set out in *Rapanos* and its progeny.

V. The "Significant Nexus" Tests Applies Only To Wetlands As Described In *Rapanos*.

A significant portion of the Proposed Rule is set aside to justify and describe regulation of tributaries. The regulatory basis of this jurisdiction is Justice Kennedy's opinion in *Rapanos*. However, the context for which Justice Kennedy rendered his opinion, as well as his express ruling on significant nexus related only to wetlands and not streams or tributaries. While we

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understand at least three United States Circuit Courts of Appeal have extended this theory to non-wetland features, the Supreme Court has not provided any further legal guidance. Therefore, to the extent the Significant Nexus test is used, the Agencies must apply it only to wetlands and not tributaries.

VI. The Agencies Should Identify Specific Instances Where Waters Of The United States Not Otherwise Discussed In The Proposed Rules Would Constitute "Other Waters."

Since the Proposed Rule defines nearly anything that is wet as jurisdictional, we are concerned that the Agencies have not identified criteria that would allow further jurisdiction for so-called "Other Waters." For example, the Proposed Rule states that under certain circumstances intrastate rivers, lakes and wetlands not otherwise jurisdictional under the Proposed Rule, could have a significant nexus. (Proposed Rule at 22,197). Before we can adequately comment on such "other waters," the Agencies need to identify specific types of "other waters: that Agencies believe it is authorized to assert jurisdiction that are not listed in the Proposed Rule other than the specific exclusions and more precisely the scientific basis it will use to make such a determination.

VII. The Agencies Have Attempted To Impose A Federal Common Law Definition Of Traditional Navigable Waters When That Determination Is Largely Made By States.

The term traditional navigable waters ("TNW") is not well defined in the Proposed Rule. Apparently the Agencies believe the term is commonly understood or accepted. Such is not the case. The Agencies rely on one United States Circuit Court of Appeals cases and a handful of United States District Court cases as they have for many years. In reality, states have always made determinations of navigability. The Proposed Rule should require the Agencies to apply the state common law on navigability in determining whether a water is a TNW, rather than that currently used by the Agencies. The state common law definition of navigability defines land use components and legal boundary descriptions. Such deference is entirely compatible with the CWA. Therefore, where the Agencies use the term "traditional navigable waters" they should defer to long established state common law on navigability.

VIII. Many Terms Simply Are Not Well Defined And As Written Are Either Ambiguous Or Assert Greater Jurisdiction Than Permitted By The Clean Water Act.

Many of the defined terms need additional clarification in the regulatory process to better understand the implications of the Propose Rule. In addition to the definition of "tributary," other newly defined terms such as "neighboring," "riparian area," and "floodplain," appear to expand the universe of wetlands. The definition of "adjacent" waters or wetlands must be read in the same context as that described in *United States v. Riverside Bayview Homes*, 474 U.S. 121

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(1985) which determined that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent. Since the wetlands themselves are not navigable, the Court took the occasion in that case to read the CWA broadly to cover such adjacent wetlands physically adjacent to the traditional navigable waters of Saginaw Bay. However, the newly defined terms appear to go much further than that permitted under any of the Supreme Court decisions.

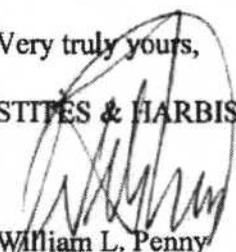
In attempting to clarify waters that would not be subject to jurisdiction, the Agencies included ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. The term “upland” is not defined in the Proposed Rule. While the Agencies issued a clarifying description in September 2014, such clarification was not part of the rulemaking process and likely invalidates the rulemaking procedure. Nevertheless, assuming uplands are water features that are not jurisdictional waters, then the question remains as to when an upland excavated ditch drains a jurisdictional feature. For example, a roadside ditch in certain areas of Tennessee may drain areas that could be wetlands or prior converted croplands, and contribute less than perennial flow to a jurisdictional water. Likewise an upland excavated ditch could drain an ephemeral stream with less than perennial flow to a jurisdictional water. In that event, it could mean that the entire drainage system takes on the jurisdictional component.

IX. Conclusion

For the reasons stated above, in addition to all those of similar business groups, the Proposed Rule should be withdrawn. Moreover, the Agencies should begin to work with stakeholders to properly apply the true meaning and intent behind the definition of waters of the United States. It is only through such a collaborate process that definitions will be refined and understood by stakeholders. If you have questions, please let me know.

Very truly yours,

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