Terry E. Branstad
GOVERNOR

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Kim Reynolds
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October 16, 2014

The Honorable Gina McCarthy
U.S. Environmental Protection Agency
EPA Docket Center
Enforcement and Compliance Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, DC 20310-0108

Attention: Docket ID No. EPA-HQ-OW-2011-0880 – Waters of the United States Proposed Rule

Dear Administrator McCarthy & Assistant Secretary Darcy:

The State of Iowa offers the following comments on the U.S. Army Corps of Engineers' and the U.S. Environmental Protection Agency's (EPA) joint proposed rule - Definition of "Water of the United States" under the Clean Water Act (CWA) - published in the Federal Register on April 21, 2014 (79 FR 22187). The Office of the Governor, Iowa Department of Agriculture and Land Stewardship (IDALS), Iowa Department of Natural Resources (IDNR), Iowa Economic Development Authority (IEDA), Iowa Department of Transportation (IDOT), Iowa Utilities Board (IUB), and Iowa Homeland Security and Emergency Management Department (HSEMD) herein provide coordinated comments following comprehensive stakeholder input. **The overriding concern of a diverse group of impacted stakeholders, including state leaders, is that the proposed rule will impose significant barriers to the advancement of innovative, state- and local-driven conservation and environmental practices that would actually advance our common goal of water quality.** Because the proposed rule is fatally flawed, we request that it be withdrawn and that future rulemaking be appropriately coordinated with States and relevant stakeholders. We agree that clean water requires good, clear, well-designed regulations – unfortunately, the ones currently being proposed are not.

The State of Iowa's comments are summarized below and more detailed comments are enclosed.

Abandonment of Cooperative Federalism: States, not the Federal government, have the lead for advancing water quality through the CWA and more importantly through state-local-private sector partnerships. Section 101(b) of the CWA clearly states that, "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..." Successful water quality efforts are driven by engaged stakeholders who have close relationships with state and local officials, not by Federally-prescribed directives. Given that state officials were not involved in the drafting of the proposed rule over the last few years, it is no surprise that the proposed rule will actually impede efforts to advancing innovative, state-based water quality initiatives, such as the State of Iowa Nutrient Reduction Strategy. As currently written, this rule is

nothing more than Federal encroachment on the states. Further, numerous stakeholders have expressed concerns that the Federal government is thwarting important requirements of the Administrative Procedure Act (APA) and undermining the public's opportunity for meaningful comment by repeatedly issuing and revising, outside of the APA process, explanations and information critical to the rule. **Many stakeholders believe the proposed rule is the most egregious example of Federal overreach in the last few decades – we unfortunately agree. The proposed rule confuses Federal control with environmental protection. The State of Iowa believes that environmental protection is best driven locally.** Nobody cares more about local water quality than those of us who drink it, fish it, boat it, and swim it. Farmers, ranchers and even water quality advocates have noted that the proposed rule is likely to curtail many voluntary water quality improvement projects if such projects would trigger the cost and delay of seeking Federal permits. Such unintended consequences are precisely why the Federal government needs to better engage state governments, local communities, and affected industries. The EPA itself has recently done a better job engaging state and local stakeholders as part of its Clean Air Act implementation and that proactive outreach stands in stark contrast to the approach taken on this CWA rule. The EPA Headquarters' approach on this rule also starkly differs from the very good relationship that State of Iowa leaders have had in advancing state-led and public-private partnerships with EPA Regional Administrator Karl Brooks.

Disconnect between Content and Intent: We do not doubt the Federal government's intentions to advance water quality throughout our nation; however, the Federal government's proposed approach, and the content of the proposed rule, would seriously impair advancements in water quality in the State of Iowa. As an example, too many Iowa farmers would be forced to gain Federal permits to advance water quality infrastructure projects, which would discourage agricultural producers from undertaking the very projects that would improve water quality throughout the State. Small towns, cities and private sector entities, most with limited resources, would face similar challenges.

Increased Uncertainty: The proposed rule increases, rather than decreases uncertainty for various stakeholders. We are very concerned that this vacuum of uncertainty would be filled by an army of lawyers that would slow the advancement of water quality projects throughout the nation. A good regulation would be clear, so all stakeholders plainly understand what is allowed and when a permit is required. Instead, the proposed rule is more ambiguous than current law and promises to be tied up in litigation for years to come, creating uncertainty within conservation interests, industries and communities across the state.

Underestimation of Costs: The Federal government has greatly underestimated the costs of the proposed rule – both in permitting compliance costs and project delay costs. For example, permitting compliance costs will siphon finite resources that would better be used to advance conservation best practices and infrastructure in Iowa's countryside. Permitting delays would also increase the costs of conservation and economic development projects. We are extremely concerned that these increased costs will hinder the advancement of water quality projects and responsible economic development projects. Compliance costs would be borne by both private sector and public sector entities and the customers and citizens served. Additional costs would impact public transportation projects, renewable energy projects, electricity distribution, disaster recovery projects, mitigation projects, and so on. Every day those projects are delayed has real costs that are currently unaccounted for by the Federal government. There would also be additional enforcement costs that current staffing levels at both the Federal and State levels are not positioned to meet. The rule as proposed would essentially be an unfunded mandate on State agencies tasked with CWA enforcement. Such enforcement costs would drain significant finite resources that could better be utilized to actually deliver water quality best

practices and projects. **Until all the true costs are better accounted for, this rule is not ready for final deliberation and should be withdrawn**. Furthermore, the consensus among stakeholders is that the Federal government has significantly underestimated the percentage of land that will be impacted by the rule and expanded Federal jurisdiction. More accurate estimates of this rule conducted by third-party stakeholders demonstrate increased direct and indirect costs. **By its own admission, the Federal government's proposed regulations expand the scope of its jurisdiction by approximately 3 percent and likely by much more than that – through our analysis <u>we estimate that the Iowa stream miles subject to jurisdiction would increase from the current status of approximately 26,000 miles to an estimated 72,000 miles, an increase of approximately 46,000 miles or an increase of 176%</u>.** This scope difference alone would vastly increase the costs of the proposed regulation.

The Federal government's proposed rule seems to be more concerned with asserting Federal control over local water bodies than actually improving local water quality. Thus, we were encouraged recently by the bipartisan support in the United States House of Representatives to block the advancement of this flawed rule. Those concerns were similarly echoed in a bipartisan fashion by the National Association of State Departments of Agriculture members who **unanimously** called on the Federal government to withdraw the rule. We strongly urge you to listen to the consensus concerns of the States, including Iowa, and withdraw this rule. Proceeding with this rule, without true consultation with the States, would bring into question your commitment to the State-Federal partnership.

Sincerely,

Terry E. Branstad
Governor of Iowa

Kim Reynolds
Lt. Governor of Iowa

Bill Northey
Secretary, Iowa Department of Agriculture & Land Stewardship

Chuck Gipp
Director, Iowa Department of Natural Resources

Debi Durham
Director, Iowa Economic Development Authority

Paul Trombino III
Director, Iowa Department of Transportation

Elizabeth S. Jacobs
Chair, Iowa Utilities Board

Mark Schouten
Director, Iowa Homeland Security & Emergency Management

cc: Iowa Congressional Delegation
Tom Vilsack, U.S. Secretary of Agriculture
Tom Miller, Attorney General of Iowa
Dan Crippen, Executive Director, National Governors Association

State of Iowa Coordinated Comments
Regarding the Proposed "Waters of the United States" Rule

The State of Iowa comments are based on our experience implementing the CWA since its inception and, more recently, since the *SWANCC* and *Rapanos* decisions[1]. We have further informed our comments with the feedback of stakeholders who actively work to advance water quality efforts throughout the State of Iowa. The key objective of any proposed Federal rule should be the empowerment of the states to nurture water quality efforts and it is essential that any rule facilitate the implementation of existing state programs rather than raise new questions about the scope and meaning of the law.

The proposed rule purports to provide more clarity to the definition of what is a "water of the U.S." primarily by expanding jurisdictional coverage to virtually all waters ranging from ephemeral to perennial in nature, and also by including any "other waters" deemed to have an effect on those waters. The rule contains a series of broadly inclusive approaches to assert jurisdiction over waters by considering them jurisdictional through categorical, adjacency, and significant nexus mechanisms. In contrast to the numerous pathways for establishing jurisdiction, relatively few jurisdictional exemptions are provided; and those that are listed must meet a narrow set of conditions which are not likely to be widely achievable as defined in the rule. **The new definitions within the rule also provide new areas of confusion by expanding the scope of "waters of the U.S." while simultaneously adding considerable uncertainty to how jurisdictional determinations will be made on a scientific**

Case Study: Regulatory Barriers to Conservation & Water Quality

Permitting delays and uncertainty will slow farmers conservation efforts. Bob Ausberger and his wife Joyce, have always worked to be good stewards of the land they farm in Greene County, Iowa near Jefferson. The Ausbergers want to build retention basins and other structures to slow the water flow in a three-quarter-mile-long ditch on their land that runs from a drainage district outlet in Buttrick Creek, and ultimately reaches the North Raccoon River. But like a lot of farmers in Iowa, the Ausbergers' conservation plans have been delayed by bureaucratic red tape as government agencies try to determine just what agencies have to approve plans, and which permits farmers need. "It seems like it should be pretty simple, but it seems to get complicated pretty fast with the different agencies," said Bob Ausberger. **The Ausbergers requested conservation planning assistance in early 2013, but were informed that before the NRCS office could begin to do any planning work, he would have to determine whether the project required a permit from the U.S. Army Corps of Engineers.** Bob filled out the paperwork required by the Corps and is waiting for a reply to determine whether or not the project will need a permit. But he **worries the jurisdictional determination process and then the permitting process, even if he is successful, will delay the project in 2015 or beyond.** Timing is important, Ausberger said, because construction on the conservation structures is limited by frozen ground during the winter and crops during the growing season."I really believe that farmers need to step up for the state's nutrient reduction strategy, and I think most people want to do that, " he said. "But sometimes when you try to do that, life just gets more complicated. There are probably thousands of small ditches like this around Iowa and the Midwest, and we could do a lot of good with this type of project on them."

Original story credit to Dirck Steimel Iowa Farm Bureau Spokesman

[1] *Rapanos v. U.S.*, 547 U.S. 715 (2006) and *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers,* 531 U.S. 159 (2001).

and consistent basis. Confusion arises from both the new definitions and the undefined terms therein. Interpreting the defined terms requires the interpretation of undefined terms such as upland, ditch, gully, rill and swale. It is unclear how anyone can differentiate between these categories of water-carrying features. As another example, while the proposed rule offers definitions of floodplain and riparian area that tie those terms to water bodies, the preamble indicates that uplands may occur in these riparian areas and floodplains. This implies an expansive interpretation of the defined terms and hence an expansive interpretation of the adjacency of waters. Without clearer delineation of ordinary high water mark and the various categories of geographic features, the proposed rule cannot be clearly understood. The failure to provide clarity moves jurisdictional determinations from the gray area that the State of Iowa was becoming familiar with to a new and more expansive gray area that is not understood.

The proposed rule focuses heavily on the clean water purposes of the CWA statute by relying on the assumption that whatever affects waters is waters. This **approach ignores another primary purpose of the CWA statute, which is the preservation of primary state responsibility for ordinary land-use decisions.** Maintaining the primacy role of states is critical to the protection of water resources at the State level, but this rule proposes to remove that role and replace it with Federal control. Given the rule's nationwide scope, it provides inadequate clarity to address the unique situations and geographic features found within individual states and regions. Any rule proposed must provide a clear extent of Federal jurisdiction focused on perennial and navigable waters while preserving a role for states to address their unique situations for waters beyond these areas.

Preliminary review of the actual rule language indicates that most every stream is covered, including ephemeral streams (i.e., road, drainage, and upland ditches), wetlands, and ponds. The content of the proposed rule directly contradicts EPA's verbal explanations and the non-binding statements in the preamble of the rule. EPA historically has implemented the CWA in Iowa in a manner that treated ephemeral waters as non-jurisdictional, but this new rule strays considerably from that approach to vastly expand CWA jurisdiction into areas that are dry land a majority of the time. EPA approved the Iowa water quality standard which applies the CWA section 101(a)(2) rebuttable presumption only to perennial rivers and streams or intermittent streams with perennial pools. Because the rebuttable presumption applies to all "waters of the U.S.," this approval was a specific finding by EPA that intermittent streams <u>without</u> perennial pools are non-jurisdictional. A change in this position would have far reaching impacts.

There are three key concepts of the rulemaking that lead us to believe that the proposed rule serves to expand coverage -- **Adjacency, aggregation, & connectivity:**

Adjacency – According to the proposed rule, waters bordering, contiguous, or neighboring a "water of the U.S." are "waters of the U.S." This appears to expand the scope of waters subject to CWA jurisdiction in Iowa. Under the proposed rule, an upland pond or wetland situated next to any water-created land feature would appear to be jurisdictional. Adjacency is also considerably expanded by the rule defining wetlands, lakes and ponds as tributaries which are categorically jurisdictional. Adjacency considerations will now be expanded to include types of

water features, which in the past were not considered categorically jurisdictional. This extends jurisdiction far into the upland areas where it was not understood to reach in the past.

Aggregation – The proposed rule allows the aggregation of many "similarly situated" small water bodies which individually do not have a significant nexus with traditionally navigable waters until the insignificant connections add up to some unknown minimal level of significance. Because the number of waters, geographic span to be aggregated, and level of similarity needed are undefined, it would appear that small water bodies could be aggregated with a sufficient number of other water bodies to become jurisdictional. In fact, they do not have to be water bodies at all. Because tributaries are defined as having a bank and bed and ordinary high water mark, there is no requirement under the rule for the existence of water in a tributary. This is much broader than the interpretation EPA has actually enforced up to now, and we cannot support the concept of "similarly situated waters" in performing significant nexus analyses if that results in an expansion of jurisdiction.

Connectivity – Ground water remains exempt, but is proposed to be used as a basis for establishing jurisdiction over other waters under the definitions in the rule. In the rule preamble, EPA asserts that both the existence of a groundwater connection and the lack thereof can justify a jurisdictional determination. In Iowa, NPDES permits do not consider hydrologic connections from groundwater to surface water. Under the new definition would NPDES permits need to consider these connections and regulate them accordingly? If yes, how is that accomplished? The rule does not place any limits on distance, rate of flow, volume of flow or any other variable regarding the degree of hydrologic connection or lack thereof necessary to support a jurisdictional determination. Iowa staff expertise and resources do not exist to implement such considerations for water body classification or NPDES permitting.

Through the combination of these three concepts, the CWA will be expanded to reach all water-created landscape features and virtually all water bodies within the watersheds of such water-created landscape features, regardless of whether these features actually contain water for significant periods of time.

The proposed redefining of the phrase "waters of the U.S." is undertaken with disregard for the applicable statutory and constitutional framework and the case law that has arisen from the interpretation of this phrase. EPA and the Corps have ignored the Supreme Court's prior admonishments and attempted to expand Justice Kennedy's significant nexus test to the ultimate extent of its logic. As Justice Scalia points out in *Rapanos*, the significant nexus test is susceptible to the interpretation that anything that affects "waters of the U.S." is "waters of the U.S." *Rapanos,* 547 U.S. at 755. The proposed rule takes that idea and runs with it.

In doing so, the proposed rule untethers from any rational tie to the language of the CWA and the constitutional underpinnings thereof. The CWA is premised upon the Federal government's authority to regulate commerce, which is why the act specifically applies to "navigable waters" which it then defines as "waters of the U.S." The Supreme Court has acknowledged in *SWANCC and Rapanos* that the traditional term "navigable waters"—even though defined as "the waters

of the United States"—carries *some* of its original substance: "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC,* 531 U. S. at 172. That limited effect includes, at bare minimum, the ordinary presence of water. *See* Plurality Opinion*, Rapanos*, 547 U.S. at 734. The proposed rule's expansion of jurisdiction without attempting to provide a foundation in the regulation of commerce or impacts on actual navigation ignores the case law that has been developed to date and the origin of Federal jurisdiction - the Commerce Clause.

The result is a rule that treats Justice Kennedy's concurring opinion in *Rapanos* as overruling the prior cases of *Riverside Bayview*[2] and *SWANCC*. Justice Kennedy took pains to avoid that very result and wrote at length to explain the test in the context of these prior decisions. See *Rapanos,* 547 U.S. at 766-774. Even if the agencies are able to craft a rule that provides the clarity sought by all parties, that rule must continue to comply with the existing legal framework.

We offer these additional comments for consideration:

- To be effective, CWA jurisdiction should be clearly apparent to all including the landowners and stakeholders it impacts, rather than discovered only through case-by-case agency determinations. These types of determinations rely too much on site by site determinations and use of best professional judgment by administrative agencies, which given the vagueness of this rule are likely to be unclear and inconsistent. The categorical and significant nexus approaches are similarly undesirable, due to their vaguely-defined, all-inclusive means which provide no basis of clarity or consistency for making agency determinations. **None of the approaches of this rule, whether case-by-case, categorical or significant nexus, will serve to increase clarity and consistency**. That uncertainty will slow conservation projects from advancing across the State and thus have negative impacts on improving water quality.

- CWA jurisdiction should have a clearly defined extent that provides for balance between Federal jurisdiction and preservation of primary state responsibility for ordinary land-use decisions. The proposed rule is incompatible with this goal due to the approach it takes to broadly define what jurisdictional waters are. **A more compatible approach would be a rule that limited CWA jurisdiction to more clearly defined extents of navigable streams having**

Potential Burden on Iowa's Small Towns

There are 946 cities across the State of Iowa and over 500 of those cities are under 500 in population. Many of these communities are utilizing controlled discharge lagoons for their wastewater systems and have a system of roadside ditches to control storm-water. These small cities move water away from the community and to a low lying area. These ditch systems have never been regulated and the communities have never considered them to be point sources that would come under the jurisdiction of the EPA. These small cities are concerned that the proposed rule could impact these storm ditches and would request that these ditches be excluded under the rule.

[2] U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121(1985).

perennial flow, and leave remaining waters and landscape features as defined under this rule to state responsibility.

- The definitions for floodplain, wetlands, tributaries, significant nexus, and riparian area are overly broad and vague. When these vague definitions are applied to the mechanisms within the rule for establishing jurisdiction, they will not serve to provide clarity or consistency in making accurate determinations. Instead, **the definitions will increase confusion and invite inconsistency of approaches for making jurisdictional determinations**. For example, tributaries are defined as "contributing flow" to other waters. It would be more appropriate to clearly state that tributaries should have perennial or relatively permanent flow in order to be considered jurisdictional, to avoid the potential expansion of jurisdiction which such a broad definition invites.

- **"Other waters" is an expansive "catch all"** area with numerous nuances and provisions for asserting jurisdiction. This will result in significant jurisdictional expansion in Iowa as described above and will create a situation in which no member of the public can be assured of the jurisdictional status of their property.

- In the proposed rule, all interstate waters are deemed jurisdictional. Although this is not a change from prior rule, it is not consistent with the holding in *Rapanos*. The fact that a water crosses a state border in no way predicts whether it will have a significant nexus with a traditionally navigable water, a continuous surface connection with a traditionally navigable water or otherwise be used in interstate commerce. **In light of the Supreme Court's holding, EPA can no longer treat every interstate water as jurisdictional.**

- Ditches –

    - ***Upland Ditches are not considered "waters of the U.S***." We support the intent of this exemption; however the wording in **the rule should be revised in any future rule to provide more clarity and less narrow conditions for meeting this exemption**. A ditch meeting **<u>any</u>** of the listed conditions should be exempt, as opposed to having to simultaneously meet all three conditions listed in the rule in order to achieve exemption. The statement that these ditches have "less than perennial flow" could be worded more explicitly to include ephemeral or intermittent flow or simply say that they do not carry a relatively permanent flow of water. In Iowa, ditches located in relatively flat terrain are known to develop wetland characteristics simply because the water does not drain. The preamble to the rule indicates these types of ditches would not be jurisdictional; it would be better to clearly state this in the rule.
    - ***Ditches that do not contribute flow to another water are not considered "waters of the U.S."*** We support the intent of this exemption, but it is highly unlikely that any ditch in Iowa does not contribute flow to downstream waters at some point, and as such this exemption is not truly an exemption at all.

- ***Maintenance of ditches***. Ditch maintenance remains exempt in the proposed rule. We support this exemption due to the significant and on-going volume of ditch maintenance performed in Iowa each year.

- Private ponds – EPA has historically felt that ponds with outlets are jurisdictional. The new rule could also include ponds without an outlet to a stream (see aggregation and adjacency discussion above). "Solely used" ponds are exempt, but private ponds are typically multi-use. This would raise concerns over whether or not these ponds would be designated under the state's water quality standards. **The proposed exemptions based upon purpose or use of the pond would appear to be unworkable because the jurisdictional determination is dependent upon the intent of the owner.** Because the owner can change his use of the pond or sell the pond, the water body can shift between being jurisdictional and being non-jurisdictional yet the ponds impact on interstate commerce would not have changed. The power to regulate these waters arises solely from the Federal government's power to regulate interstate commerce and from no other basis. All aspects of the rule must be premised upon an actual impact on the ability to use traditionally navigable waters in and for interstate commerce and not upon any other factor.

- Utilities Impacts – Iowa utilities have expressed the following concerns, which could ultimately lead to higher utility bills and slow the development of renewable energy projects:
    - Permitting requirements will increase as the number of water bodies classified as "waters of the U.S." increases. **The need to obtain permits could affect siting of utility infrastructure including electric distribution and transmission lines and wind farms.** Specific examples of the potential related impacts to utilities include the possible classification of ash and cooling ponds as "waters of the U.S."
    - **Language in the rule designed to preserve the "waters of the U.S." exemption for waste treatment is not clear enough to ensure the continuation of the exemption**.
    - The proposed rule **creates uncertainty as to whether utilities will be able to continue to use current right-of-way maintenance practices**. Clarity is needed to ensure that these practices maintain current permitting exemptions.

Anticipated Impacts for Iowa:

The proposed rule will slow and restrict conservation stewardship and environmental advancement to address nutrient and sediment discharges to water resources in Iowa and nationally. If CWA jurisdiction is expanded, more private landowners will need to obtain CWA section 404 permits from the U.S. Army Corps of Engineers. **This would mean more 404/401 permitting technical issues, longer turn-around-times, and increased costs for a variety of projects.** This would be expected to slow the issuance of Corps permits and thereby delay projects. These projects include conservation projects designed to implement the Iowa Nutrient

Reduction Strategy, which is intended to address both local and national water quality issues, including the Gulf of Mexico Hypoxic Zone. It will become harder and costlier to implement nutrient best management practices on the landscape as a result of this rule. A good regulation would also be undertaken only after a thorough and forthright analysis of all of the costs and benefits involved. Instead, the Federal government's economic analysis is skewed heavily in favor of the benefits of regulation and neglects to account for some of the most basic and predictable costs, such as the economic impact of permitting delays. Large industrial projects can calculate to the dollar how much revenue will be lost per day while a plant sits idle. Housing developers and landlords can amortize the financing cost of bridge loans and lost rents for each day they cannot recoup their investments. Yet the Federal government cannot be troubled to make even rudimentary estimates as to the economic impacts of their permitting processes.

Iowa's Nutrient Reduction Strategy: An Innovative Public-Private Partnership to Improve Water Quality

Iowa's Nutrient Reduction Strategy

The Iowa Nutrient Reduction Strategy is a science and technology-based framework to assess and reduce nutrients to Iowa waters and the Gulf of Mexico. It is designed to direct efforts to reduce nutrients in surface water from both point and nonpoint sources in a scientific, reasonable and cost effective manner. Working together, the Iowa Department of Agriculture and Land Stewardship, the Iowa Department of Natural Resources, and the Iowa State University College of Agriculture and Life Sciences developed this proposed strategy, which has been championed and applauded by both State and Federal leaders.

The Iowa strategy outlines a pragmatic approach for reducing nutrient loads discharged from the state's largest wastewater treatment plants, in combination with targeted practices designed to reduce loads from nonpoint sources such as farm fields. This is the first time such an integrated approach involving both point sources and nonpoint sources has been attempted.

EPA Administrator Gina McCarthy had the following to say about Iowa's Nutrient Reduction Strategy:

"I will tell you that this state, in stepping up on the hypoxia board, of developing a nutrients strategy, that we can all be proud of and hold up to those other states to think about; it is a gigantic step forward. The way you have used innovative approaches to protect your soil and protect your water, it is, for me it's heartening."

Water quality standards, including future nutrient standards, will apply to "waters of the U.S.," which through this rule are moved closer to and in many circumstances into cropped fields, road ditches, and other upland areas adjacent to cropped fields. One example is continuously-cropped farmed wetlands which outlet to subsurface drainage tiles and that are located within cropped field boundaries. Another example is the many road ditches that the guidance categorically defines as waters. Science assessments in Iowa indicate achieving future nutrient water quality standards and other nutrient reduction targets through in-field management practices alone is unachievable, and will require them to be used in conjunction with edge-of-field conservation practices in between the fields and receiving streams to trap and remove nutrients. However, **this guidance moves jurisdictional "waters of the U.S." into cropped fields upstream of where edge-of-field practices can be placed, rendering these technologies inoperable to achieve future water quality nutrient standards**.

NPDES general permitting may be impacted by greatly increasing the number of facilities needing to submit a Notice of Intent to be covered under the general permit. This would result in much heavier workloads and resource demands for Iowa's counties and the State – **the rule as currently proposed would be an unfunded mandate on local, state, and private sector entities**. Further, stakeholders are concerned that collaborative relationships, such as the relationship between the Natural Resources Conservation Service (NRCS) personnel and land owners would be jeopardized, as NRCS personnel would shift their focus from the promotion of best practices to the enforcement of Federal permits. **Such a chilling effect would have negative consequences on advancing water quality efforts.**

If the scope of the "waters of the U.S." expands to include all intermittent and ephemeral waters, this would appear to expand the application of the rebuttable presumption that CWA section 101(a)(2) uses to apply to these waters. If so, Iowa may have 46,000 intermittent and ephemeral stream miles which are suddenly presumed to be fishable and swimmable after EPA has previously approved a determination that they are not. This would create an incredible burden on our Water Quality Standards, NPDES Permitting, Water Quality Assessment (305b), Impaired Waters Listing (303d), and Total Maximum Daily Load (TMDL) programs in Iowa and across the country. Permits would be delayed for years while use attainability analyses were completed and streams re-designated, often back to their current designations.

In conclusion, we believe that the proposed rule would be a significant expansion of Federal jurisdiction over Iowa waters and upland areas. We do not believe such an expansion is justified or appropriate. **Most importantly, the proposed rule would slow the advancement of water quality initiatives. <u>The State of Iowa requests that the proposed rule be withdrawn and returned to the agencies to address the critical concerns outlined in these comments prior to advancing any new proposals for defining "waters of the U.S." Any new proposal should embrace an approach to clearly define waters covered by the CWA as those that are perennial in nature and directly impact interstate and foreign commerce.</u>**

Thank you for letting us express our questions and concerns. Below please find a list of enclosures containing further information regarding this rule and the "Interpretative Rule." We encourage Federal leaders to take a more consultative and productive approach of actively consulting with State officials before advancing significant rules in the future, especially in areas where Congress has specifically empowered the states. We look forward to your response and the opportunity to engage in a true State-Federal dialogue once you withdraw the currently proposed rule.

Enclosures:

1. **Letter from State Attorney Generals Expressing Concerns about the "Interpretive Rule."**
2. **Letter from Secretary Northey Expressing Concerns about the "Interpretative Rule."**
3. **Press Release from the National Association of State Departments of Agriculture (NASDA) Urging Withdrawal of the Proposed "Waters of the U.S." Rule.**

4. **Letter from Iowa State University Dean Wintersteen Expressing Concerns about the Proposed "Waters of the U.S." Rule.**
5. **Letter from Eleven State Attorney Generals and Six Governors Expressing Concerns about the Proposed "Waters of the U.S." Rule.**