13 November 2014

The Honorable Regina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Major General John Peabody
Deputy Commanding General
Civil and Emergency Operations
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314
Attn: CECW-CO-R

Re: Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act, 79 FR 22188 (April 21, 2014); Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and General Peabody:

The National Ready Mixed Concrete Association (NRMCA) was founded on December 26, 1930, and today represents more than 2,000 member companies and subsidiaries that employ more than 125,000 American workers who manufacture and deliver ready mixed concrete. The Association represents both national and multinational companies that operate in every congressional district in the United States. The industry is currently estimated to include more than 68,000 ready mixed concrete trucks.

The ready mixed concrete industry manufactures a construction material vital for constructing our built environment. From roads and bridges, to homes and high-rises, our built environment could not be realized without the use of ready mixed concrete. This important building material is created by combining fine and coarse aggregates, cement and water. In 2013 alone, the industry produced more than 300 million cubic yards of ready mixed concrete, representing a value of roughly $30 billion. Virtually every construction project in America uses at least some ready mixed concrete.

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NRMCA supports and is committed to smart practices and common sense methods for keeping our nation's waterways and their tributaries clean and healthy. Since its enactment, the Clean Water Act (CWA) has done a tremendous job restoring and maintaining the integrity of our nation's waters. NRMCA appreciates the opportunity to comment on the Army Corps of Engineers (the Corps) and Environmental Protection Agency's (EPA) (collectively the agencies) proposed rule "Definition of 'Waters of the United States' Under the Clean Water Act."[1] While NRMCA understands the need for strong laws and regulations, we believe that incentivizing and promoting environmentally conscientious practices will go significantly further to achieving the goals of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[2] than expansive new regulations.

The scope of CWA jurisdiction is incredibly important to the daily business of NRMCA members. Changes to how the agencies determine what features are considered waters of the United States will affect our members' ready mixed concrete operations, their ability to purchase raw materials for ready mixed concrete, and to sell to builders. Determining that a feature is a water of the United States subjects the feature to the full authority of the CWA. In addition to needing to get a permit prior to dredging and filling, under §404, the feature may also be subject to §402 National Pollutant Discharge Elimination System (NPDES) permitting, including stormwater and industrial point source permits, §311 oil spill prevention, as well as federal and state water quality standards under §401, §303, §304, and §305. Additionally, federal jurisdiction can also trigger obligations under other statutes such as the Endangered Species Act and the National Environmental Policy Act. Compliance with §402 requirements can often involve the purchase of costly new treatment technologies and infrastructure changes, and violations of the CWA can result in fines of up to $37,500 per day.

[1] 79 FR 22188
[2] Federal Water Pollution Control Act §101(a)

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NRMCA members interact with the CWA both at ready mixed concrete facilities, as well as on construction sites. Ready mixed concrete facilities that do have discharges are subject to NPDES permits and work with the appropriate federal and state agencies to ensure their compliance with their permit. In addition to ready mixed concrete facilities that are subject to stormwater regulations, drivers of concrete mixer trucks are also subject to permit requirements of construction sites when delivering concrete. NRMCA has worked extremely hard to ensure that our members understand these requirements and are complying with them.

NRMCA remains committed to helping our members understand current laws and regulations and promoting environmentally conscientious practices. Specifically, NRMCA and the industry, in collaboration with EPA, have developed the NRMCA Green-Star© Certification program for ready mixed concrete plants actively using environmental management systems (EMS) with specific goals to make continual improvements to water and stormwater management. These improvements are monitored over time through a strict auditing system which includes specific documentation and well over 100 accredited auditors. More than 400 plants have been Green-Star© certified nationally. NRMCA has partnered with the EPA Office of Enforcement and Compliance Assurance, and the Region III Green Highways Program to provide training to ready mixed concrete producers on the proper management of water and stormwater and has previously signed a Memorandum of Agreement with EPA Region III to implement a ready mixed concrete industry-specific EMS through the Green-Star© Certification.

NRMCA also provides an annual Environmental Certification Course for members and non-members nationwide, where water management is a major focus. NRMCA has partnered and worked extensively with the Maryland Center for Environmental Training on stormwater management at ready mixed concrete and quarry operations. NRMCA also has partnered with the National Association of Homebuilders to train ready mixed concrete truck drivers and homebuilders about proper chute rinse-off operations at the jobsite, and has produced similar training for both residential and commercial construction sites. NRMCA continues to promote EPA's

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Stormwater Webinar, which NRMCA helped review and provided industry specific comments on, to help educate our membership. As well, NRMCA member company facilities already are in compliance with Stormwater Pollution Protection Plans (SWPPPs) and petroleum Spill Prevention, Control and Countermeasure (SPCCs) plans.

NRMCA appreciates that "the goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment."[3] However, the proposed rule does not achieve these objectives. As currently written, it contains a number of new terms, which are imprecise, broad, and left largely up to agency discretion. This will result in continued subjectivity as to what constitutes a water of the United States, allows for a potentially expansive federal reach to waters that only have a marginal influence over traditionally navigable waters, and creates a host of confusing situations which will inevitably lead to increased federal regulation, permitting costs, litigation, and eventually an unnecessary patchwork of different enforcement actions across the nation.

NRMCA requests that the agencies withdraw the rule and work with their state and local co-regulators, and stakeholders, like NRMCA, to come up with a clearer definition of waters of the United States. The agencies are under no legal or statutory deadline for completing this rule, so there is ample time to work to get it right. As the agencies move forward, they should use the information they have gathered from this proposed rule and work from the finalized, peer reviewed "Connectivity of Streams and Wetlands to Downstream Waters" report. This will help the agencies to fix the imprecise, broad language that continues to leave the majority of determinations up to agency discretion and create a proposal that can be more easily understood by the stakeholders being governed. Finally, the agencies must do a better, more complete economic analysis of the

[3] 79 FR 22190

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rule and convene a Small Business Advocacy Review Panel to ensure that they are fully evaluating the impacts of the changes and considering less burdensome alternatives.

"Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" Report:

NRMCA previously submitted comments to EPA's "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013)." We are extremely concerned that the agencies promulgated the proposed rule before finalizing this report. This appears to be inconsistent with EPA's internal guidelines.[4] Because the report is so integral to the rulemaking, NRMCA asks that EPA extend the current comment period 90 days so as to provide ample time to read, digest and appropriately respond to the report.

As well, NRMCA asks that EPA transparently address how the final study will be integrated into the proposed rulemaking. While the report is an important tool, as NRMCA previously mentioned in comments on the report, we are concerned that an assessment of hydrological connectivity is not the same as an examination of what creates a "significant nexus" in line with the legal precedent from the Supreme Court. We expect EPA to use the report, with input from stakeholders and the public, to determine the line between "any nexus" and a "significant nexus" worthy of CWA protections. We suggest the agencies do outreach to stakeholder groups, similar to what they have done during the comment period on the proposed rule, and accept comments on how best to integrate the report and proposed rule, especially its use in addressing jurisdiction over "other waters."[5]

[4] EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-2008 (October 2002)
[5] 79 FR 22189

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NRMCA is encouraged to see that the agencies have not requested comments on the definition of "wetlands" as they are using the same definition as the current regulations.[6] However, in our comments on the report we noted that: "we are concerned that the report uses a greatly expanded lexicon of wetland types in the report including 'riparian,' 'flood plain,' 'geographically isolated,' 'bidirectional' and 'unidirectional' which are not in the current legal or regulatory framework. While the scientific literature may support these distinctions, we are concerned that they will add to confusion and greater legal and regulatory uncertainty."[7] We are uncertain about how the agencies will use the information regarding connectivity from these different types of wetlands, when they are not the same as the wetlands covered under the CWA. We are concerned that utilizing the report as a basis for their regulating will inadvertently include new types of wetlands.

Generally, we would like to note that both the report and the proposed rule treat all wetlands, and additionally all waters, as equally ecologically valuable, and worthy of full CWA protection without making the case that they are. NRMCA agrees that some wetlands and remote water features are worthy of protection and conservation. However, not distinguishing between waters of different ecological values has caused the agencies to write imprecise, broad language that creates absurd regulatory scenarios which impose the same requirements on features designed to protect water quality, such as stormwater ditches and ponds, as they do on the waters those features are designed to protect.

[6] 79 FR 22190
[7] NRMCA Comments to Docket-ID EPA-HQ-2013-0582 (November 4, 2013)

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Jurisdiction Over Adjacent Waters:

NRMCA has significant concerns with the agencies' categorical inclusion of "All waters, including wetlands, adjacent to traditional navigable water, the territorial seas, impoundment or tributary." [8] The proposed rule would extend jurisdiction by virtue of adjacency to non-wetland waters for the first time. This change is a significant one that NRMCA believes will incorporate waters beyond the authority of the CWA, create a number of impossible permitting scenarios, and require water quality standards and permits for stormwater management features.

The agencies propose asserting jurisdiction using the following definition: "The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent waters.'' The term neighboring, for purposes of the term ''adjacent'' in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[9]

The proposed language is extremely broad and will likely cover many features that have remote or insubstantial connections with traditional navigable waters. Rather than have to determine whether or not individual features are in fact "inseparably bound up" [10] with the "waters of the United States," this language will be used to assert jurisdiction over any wet area located in the broadly defined "riparian area" or "floodplain." These include on-site industrial ponds and impoundments frequently used at ready mixed concrete facilities.

More commonly known in the ready mixed concrete industry as settlement basins, these "ponds and impoundments" are a critical part of ready mixed concrete operations and for water conservation, recycling and

[8] 79 FR 22198
[9] 79 FR 22199
[10] 474 U.S. 121 (1985), 531 U.S. 159 (2001)

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reuse. Specifically, the basins are used to capture process water. Once captured in the basin(s) the water is then naturally separated from any solid particulates. Once this process is complete the water is then either reused in ready mixed concrete production operations or discharged off-site in compliance with all federal and state NPDES permit requirements. In some cases, ready mixed concrete facilities also include stormwater retention ponds to further recycle water.

Additionally, NRMCA is extremely concerned about the agencies' use of "shallow subsurface hydrologic connection or confined subsurface hydrologic connection," to assert jurisdiction. In our comments on EPA's "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013)" report we noted that "… we are concerned about the emphasis on groundwater connections between waters that are cited throughout the report. Groundwater has never been considered jurisdictional under the CWA and we are concerned that its inclusion in this report will again add to confusion and greater legal and regulatory uncertainty."[11]

While NRMCA appreciates that the agencies are explicitly exempting groundwater from coverage, [12] this exemption is virtually meaningless given the inclusion of "shallow subsurface hydrologic connections." As a practical matter, it is impossible to understand how CWA regulations can be effectively applied to two distinct surface waters connected only through a "shallow subsurface hydrologic connection" without ultimately expanding jurisdiction over the groundwater connection. Groundwater has never been regulated by the CWA and there are a myriad of state regulations concerning how groundwater is used and who has rights to the groundwater that do not distinguish between a "shallow subsurface connection" and groundwater. Furthermore, the agencies have been unable to articulate a clear distinction between groundwater and a shallow subsurface

[11] NRMCA Comments to Docket-ID EPA-HQ-2013-0582 (November 4, 2013)
[12] 79 FR 22199

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connection when asked in public forums.[13] The use of "shallow subsurface hydrologic connections" is too imprecise and broad to provide legal and regulatory certainty for establishing connections between waters, and will ultimately result in groundwater being regulated by the CWA.

Furthermore, the term "floodplain" is poorly defined. While the agencies have tried to come up with a clearly defined term - an area that actually has been inundated by, and was formed by sediment deposition from, actual waters – how often such inundation is necessary for coverage is not specified at all. There is a tremendous difference between a 10-year, 50-year, 100-year, or 200-year floodplain and leaving it up to the agencies' "best professional judgment" to answer this question on a case-by-case basis will result in increased regulatory uncertainty and confusion.[14]

NRMCA recommends that the terms "shallow subsurface hydrologic connection or confined subsurface hydrologic connection" be removed completely from the rule and the agencies revise the proposed rule so that only wetlands can be jurisdictional by virtue of adjacency, and thus consistent with Supreme Court precedent.[15]

Tributaries and Ditches:

The proposed rule determines that all tributaries have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas and therefore are worthy of categorical inclusion.[16] Because tributaries are identified in paragraphs (a)(1) through (5) as included waters, all waters and wetlands adjacent to tributaries will be automatically jurisdictional.[17] The new definition of tributary will make any channelized feature, including ephemeral streams, ditches and other man-made conveyances, no matter how remote from navigable waters, if they exhibit a bed, bank and ordinary high water mark.

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[13] Hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule" Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, 11 June 2014
[14] 79 FR 22209
[15] 474 U.S. 121 (1985), 531 U.S. 159 (2001)
[16] 79 FR 22201
[17] 79 FR 22263

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NRMCA is extremely concerned about the inclusion of ephemeral streams as waters of the U.S. These small features run for a short time, only after rain events, and their inclusion is an enormous expansion of jurisdiction. In Kansas, it would increase the amount of jurisdictional stream miles more than 400%, from 32,000 miles to 134,000 miles while having a negligible impact on environmental quality.[18] Because the agencies use the term ''water'' and ''waters'' in the proposed rule not just to "refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features, "[19] including ephemeral streams will inevitably result in regulating land use as they are dry most of the time.

Inclusion of ditches as waters of the United States triggers the full protection and federal requirements of the CWA for features that are designed, and often mandated, to protect the environment and public safety during rain fall. It is clear that the agencies intend that some ditches be regulated as waters of the United States under the proposed rule. While the agencies have provided exclusions for two specific categories of ditches: "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment,"[20] this exclusion is dependent on how agencies interpret "uplands." "Uplands" is used 94 times in the proposed rule. It is a key component of determining what is not a water of the United States, both for ditches and other features, and yet it has been left undefined in the proposed rule and thus open to interpretation. The "uplands" definition included in the 2003 Watershed Protection Glossary - "Uplands - an area of the terrestrial environment that does not have direct interaction with surface

[18] Letter to Nancy Stoner, Acting Assistant Administrator for Water, U.S. Environmental Protection Agency from Sam Brownback, Governor of Kansas (July 14, 2011)
[19] Footnote 3 – 79 FR 22191
[20] 79 FR 22193

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waters"[21] - is not adequate for ditch exclusion. Ditches by their very nature have direct interaction with surface waters as they are designed to channel and transport collected surface water during and after periods of rainfall.

Drainage ditches ensure that stormwater is properly channeled away from facilities and land where it would otherwise accumulate, causing damage to land and property and endangering public safety. Ditches are an integral part of creating a proper drainage system to flooding. Use of drainage ditches offers a way to remove excess water from roads, facilities, and helps reduce erosion rates and pollution transport. Nearly all ready mixed concrete plants will have a ditch somewhere on or near their property.

Ditches should not be considered waters of the United States. Instead, the agencies should continue to use existing NPDES and stormwater management programs for the regulation of ditches, rather than including the ditches themselves as jurisdictional.

At a minimum, NRMCA cannot stress enough, the agencies need to clarify that point sources that are covered by NPDES permits, such as ditches and ponds that are part of a stormwater management plan, are *not* waters of the U.S. The agencies need to work with stakeholders and state regulatory agencies to fully understand the implications on other regulatory programs and revise the rule to avoid duplication and conflicting requirements.

New Economic Analysis:

NRMCA has concerns that this rule will greatly increase the cost of doing business for ready mixed concrete producers, as well as raise the cost of all construction projects across the country to unacceptable and unnecessary levels. As mentioned above, ready mixed concrete is a mixture of cement, aggregates and water. Both aggregates and cement, essential ingredients, make up a large part of the volume of concrete. NRMCA

[21] Glossary of terms from Watershed Analysis and Management Guide for States and Communities (EPA 841-B-03-007) http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do;jsessionid=FtPMa3PSra2atonIaEvgjdbD1ezkZqVN4tizdHJMZ4yWdGCIOk5i!1587641512 accessed 10/01/14

suggests EPA take great consideration of the economic analysis of both materials prepared by the National Stone, Sand and Gravel Association (NSSGA) and the Portland Cement Association (PCA), respectively.

Because many aggregate deposits were created by water, the deposits are often located near water. Any change in what is considered jurisdictional will have a significant impact on the ability to obtain the necessary high quality aggregates used for producing ready mixed concrete. Without a readily available supply of aggregates, our members' ability to produce concrete will be impacted leading to delays and other issues with the construction of highways, public works projects like locks and dams, and residential and commercial building projects. We understand that the aggregates industry is extremely concerned about this rule. One aggregate producer estimates that the increase in wetland mitigation costs alone for their operations will increase nearly 14 times, from $200,000, to nearly $2.75 million.[22] Furthermore, the Portland Cement Association estimates that this rule would add nearly $73 million in compliance costs over a five year period. Depending on the variables considered, these costs could be as low as $55 million or as high as $103 million.[23] These raw material costs will have a significant impact on ready mixed concrete producers and their customers.

NRMCA members are extremely familiar with the costs associated with compliance with new CWA rules, and the agencies are as well. When EPA promulgated Phase II stormwater requirements under §402 in 1999 – EPA estimated that the cost per construction site for the program would be between $2,143 and $9,646 for sites between one and five acres.[24] Clearly if more features like ditches, ephemeral streams, and all adjacent waters are jurisdictional, costs like these will need to be incurred on more construction sites in more places.

[22] Comments of the National Sand Stone and Gravel Association to Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act; Docket No. EPA-HQ-OW-2011-0880
[23] Comments of the Portland Cement Association to Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act; Docket No. EPA-HQ-OW-2011-0880
[24] United States Environmental Protection Agency, Economic Analysis of the Final Phase II Stormwater Rules ES-4 (1999)

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NRMCA estimates significant compliance costs being associated with the proposed rule in its current form. When taking into consideration materials costs increases, new permit costs, physical plant infrastructure changes, and then the necessary continued associated maintenance costs, the ready mixed concrete industry places compliance well into the hundreds of millions of dollars annually. NRMCA believes this would be a devastating cost to the industry and with no proven improvement to the environment or waters of the United States.

The Agencies estimate that compliance costs for the rule are between $163 million and $279 million. NRMCA requests that the Agencies redo their cost estimates now that they have received additional economic analyses during the comment period.

Small Business Regulatory Enforcement Fairness Act:

Additionally, the agencies certified that this rule would not have a significant economic impact on small entities. This is simply not the case. Since releasing the proposed rule there has been substantial evidence that small entities believe the rule will harm them, including multiple House Committee hearings and a U.S. Small Business Administration roundtable.[25] The U.S. Small Business Administration's Office of Advocacy agreed with this conclusion, publicly advising the agencies that they improperly certified the WOTUS proposal under the Regulatory Flexibility Act.[26] Failure to take into account impacts to small entities is incredibly concerning and by not calling a small business advocacy review panel, the agencies have missed valuable input from small entities, like ready mixed concrete producers; 85% of which are small entities. NRMCA believes a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is needed to provide more complete, accurate, timely and relevant information on how small businesses will be affected by the proposal. The agencies must do this

[25] List all the hearings/round table date

[26] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of "Waters of the United States" Under the Clean Water Act. (October 1, 2014)

outreach before moving forward with this proposed rulemaking in order to better assess the impacts on and reduce the impacts to small entities.

NRMCA believes it is important for the agencies to do a better, more thorough analysis of the economic impacts of changes to jurisdiction under the CWA. NRMCA is extremely disappointed that the agencies failed to do the proper outreach to small entities and that their economic analysis did not fully take into account compliance costs for §402, §311 oil spill prevention, as well as federal and state water quality standard under § 401, §303, §304, and §305. Without obtaining information on how the proposal will impact small businesses, NRMCA believes the current proposal lacks complete, accurate, timely and relevant data and information to craft and eventually finalize the proposal. EPA needs to appropriately and further consider the rule's affects on all the small businesses it intends to regulate.

Conclusion:

In order to have an effective rule, everyone must understand how to comply with it. The proposed rule's vague and confusing definitions make it nearly impossible for ready mixed concrete producers to determine what they will need to do to meet federal requirements for doing every day, routine tasks around their facility and on construction sites. Furthermore, ready mixed concrete producers already have to, and do, comply with numerous requirements to ensure that all waters on and around ready mixed concrete facilities are not subject to harmful pollutants and discharges; begging the question of why such a confusing "clarification" is needed at all.

NRMCA is greatly concerned about how the rule is being interpreted. If the regulated community can read the rule to mean nearly every place where water falls on the ground after it rains, could be subject to federal jurisdiction and that is not the agencies' intent, as representatives for the EPA and Corps have repeatedly asserted in stakeholder meetings and hearings, then this rule needs to be pulled back and the agencies need to try again. While it may not be the agencies' intent to regulate so expansively, they are ultimately not in control of what they

regulate. §505 of the Clean Water Act provides that "any citizen may commence civil action on his own behalf – against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." [27] Failing to properly regulate discharges of pollutants into a feature that any third party can, using the imprecise, broad, new terms in this rule, show is a water of the United States will force the agencies reach to be as broad as the courts will uphold.

NRMCA appreciates the opportunity to comment on this proposed rule. While we understand the agencies attempt to better clarify CWA jurisdiction, we remain concerned that the proposed rulemaking as currently written will further confuse and add additional legal and regulatory uncertainty to the ready mixed concrete industry and other businesses and regulated entities. Simply put, the proposed rule is too broad, imprecise, and leaves too much up to agency and third party interpretation to provide the regulated community with the certainty the agencies are seeking to give them. NRMCA requests that the agencies withdraw the rule and work with their state and local co-regulators, and stakeholders like NRMCA, to come up with a clearer definition of waters of the United States.

Should you have any questions or need more information please feel free to contact NRMCA's Senior Director of Government Affairs, Elizabeth Fox, at efox@nrmca.org or (240) 485-1156.

Sincerely,

Robert G. Garbini

Robert Garbini
President
National Ready Mixed Concrete Association

[27] Federal Water Pollution Control Act §505(a)(2)