



# NATIONAL CONGRESS OF AMERICAN INDIANS

April 15, 2019

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

The Honorable R.D. James  
Assistant Secretary of the Army  
of Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0108

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**Re: NCAI Comments in Response to Docket ID No. EPA-HQ-OW-2018-0149  
– Proposed Revised Definition of “Waters of the United States”**

Dear Administrator Wheeler and Assistant Secretary James:

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization made up of American Indian and Alaska Native tribal nations and their citizens, I write to oppose finalization of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corp of Engineers' (ACE) proposed rule revising the definition for the “Waters of the United States” under the Clean Water Act (CWA) (Revised Rule) and request that the comment period be extended 200 days. As discussed in detail below, extending the comment period is appropriate to allow for meaningful tribal consultation to address the substance of our comments herein.

### ***Background and Overview***

Water is vital to provide a sustainable homeland for tribal nations – and its quality is a critical concern for the health, security, welfare, self-governance, and existence of tribal nations on and off-reservation. Rivers, lakes, ponds, streams, and wetlands supply and cleanse drinking water; provide essential habitat and ecosystem services for fish and wildlife; enable physical flood protections for communities; and are vital to tribal spiritual and cultural practices.

The CWA, as the primary federal statute that regulates protection of the nation's water, recognizes the manifold<sup>1</sup> importance of water quality. It specifically prohibits “the discharge of any pollutant by any person,” except in express circumstances.<sup>2</sup> A “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source,” and the statutory term “navigable waters,” in turn, means “the waters of the United States” (WOTUS).<sup>3</sup>

While WOTUS is undefined, the courts and agencies – most recently under the 2015 Clean Water Rule – have traditionally interpreted this term broadly in accordance with the CWA's goal of preventing, reducing, and eliminating pollution in order to

<sup>1</sup> 33 U.S. Code §1251(a)(2) (referencing fish, shellfish, wildlife, and recreation).

<sup>2</sup> Id. at §1311(a).

<sup>3</sup> Id. At §1362(12); §1362(7).

“restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>4</sup>

The Revised Rule departs from this precedent, contravening the CWA’s express recognition of the interconnectivity of water resources by narrowing the scope of protected waters. As explained below, this drastic change would unduly affect tribal nations and raise jurisdictional issues related to fulfillment of the federal trust responsibility, treaty compliance, and violations of reserved rights.

### **A. The United States Has a Duty to Safeguard Tribal Waters and Water-Dependent Resources**

Federally recognized tribal nations have a unique legal and political relationship with the United States that is defined by the U.S. Constitution, history, treaties, statutes, and court decisions.

#### **i. The Federal Government Has Fiduciary Obligations Towards Tribal Nations**

The Constitution grants Congress plenary and exclusive authority to legislate on tribal affairs.<sup>5</sup> Supreme Court case law has long recognized that tribal nations are distinct political entities that pre-date the existence of the United States and that have retained inherent sovereignty over their lands and people since time immemorial.<sup>6</sup> Tribal nations’ status has been described as domestic nations within a nation, and they are beneficiaries of a fiduciary relationship with the federal government.<sup>7</sup>

Unless expressly authorized by Congress, states have no jurisdiction over tribal matters. In exchange for ceding certain tribal resources, the United States obligated itself to act as a trustee for tribal rights, land and water resources, and assets. In fulfillment of this tribal trust relationship, the United States “charged itself with moral obligations of the highest responsibility and trust” toward tribal nations.<sup>8</sup> The EPA and ACE, as federal agencies, are obligated to fulfill this legally enforceable trust responsibility.

In recognition of the federal trust responsibility, Executive Order 13175 and agency policies require the EPA and ACE to engage in full and meaningful consultation regarding actions that may impact tribal nations.<sup>9</sup> Further, both EPA and ACE policy mandates consideration of tribal treaty rights in agency decision-making. Thus, “if a treaty reserves to tribes a right to fish in the water body, then

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<sup>4</sup> Id at §1251(a).

<sup>5</sup> *U.S. v. Lara*, 541 U.S. 193, 200 (2004)(explaining that “[t]his Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that [plenary and exclusive] power.”).

<sup>6</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>7</sup> *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831).

<sup>8</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

<sup>9</sup> “ACE Tribal Consultation Policy and Related Documents”

[https://www.spk.usace.army.mil/Portals/12/documents/tribal\\_program/USACE%20Native%20American%20Policy%20Obrochure%202013.pdf](https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20Obrochure%202013.pdf); “1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations” <https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf>; “EPA Policy on Consultation and Coordination with Indian Tribes” <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed.”<sup>10</sup>

In addition to the trust responsibility, Executive Order 12898 mandates that federal agencies and EPA policy address the environmental justice impact of their actions. The EPA’s implementing policy provides that tribal communities should have meaningful involvement in “the administrative review process, and any analysis conducted to evaluate environmental justice issues.”<sup>11</sup>

### **1. Treaty Rights Could be Violated By Water Quality Degradation**

Treaties between tribal nations and the United States establish contractual obligations and regulate political relations between sovereigns. The Supreme Court has held that treaties were “not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted.”<sup>12</sup> Under the Constitution, treaties, like statutes, are the “supreme law of the land.”<sup>13</sup> Federal agencies are thus obligated to comply with treaties and to protect tribal resources pursuant to their trustee responsibilities.<sup>14</sup>

Treaties frequently include hunting, gathering, and fishing rights on and off-reservation and the Supreme Court has held that tribal nations possess aboriginal water rights that are necessary to exercise these reserved protections.<sup>15</sup> Use of a water dependent treaty right, such as a fishing right, or a hunting and gathering right, or other subsistence right, is integrally connected to water quality. Degradation of water quality which interferes or constructively prevents the exercise of such a treaty right may be subject to legal action for a treaty violation and breach of the federal government’s fiduciary responsibilities.

### **2. Federally Reserved Rights May be Impaired by Diminished Water Quality**

Indian federally reserved water rights exist when a reservation has been created whether by treaty, executive order, or through statute and can cover groundwater and perennial, ephemeral, and intermittent surface waters.<sup>16</sup> The priority date and quantity for these rights are affected by the purposes of the reservation, its date, and method of creation. Reserved water rights are protectable even when unquantified.<sup>17</sup>

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<sup>10</sup> “EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights” [https://www.epa.gov/sites/production/files/201602/documents/tribal\\_treaty\\_rights\\_guidance\\_for\\_discussing\\_tribal\\_treaty\\_rights.pdf](https://www.epa.gov/sites/production/files/201602/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf)

<sup>11</sup> “Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples” <https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf>.

<sup>12</sup> *U.S. v. Winans*, 198 U.S. 371, 378 (1905).

<sup>13</sup> U.S. Const. art. VI, cl. 2.

<sup>14</sup> *Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *N.W. Sea Foods, Inc. v. U.S. Army Corp of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *Wash. v. Wash. State Comm. Passenger Fishing Vessel Assn*, 443 U.S. 658 (1979); *Menominee v. U.S.*, 391 U.S. 404 (1968).

<sup>15</sup> *Winans*, 198 U.S. 371 (holding that tribal water rights were necessarily and impliedly reserved by tribal nations in order to give effect to their treaty rights); *Wash. v. U.S.*, 138 S. Ct. 1832 (2018) (fishing rights include prevention of off-reservation degradation of salmon habitat); *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Baley v. U.S.*, 134 Fed.Cl. 619 (2017).

<sup>16</sup> *Winters v. United States*, 207 U.S. 564, 577 (1908); *Adair*, 723 F.2d at 1414.

<sup>17</sup> *Winters*, 207 U.S. 564 (affirming injunction restraining appellants from diverting water away from Fort Belknap Indian Reservation based on the unquantified tribal reserved rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irr.*

While water rights are typically focused on quantity, degradation of water quality can impact the exercise of a federally reserved water right. In an Arizona case concerning a decades-old decree apportioning the Gila River, a federal court found that the San Carlos Apache Tribe had a right to natural flows from the Gila River because return flows were inferior due to degraded water.<sup>18</sup>

As shown below, the Revised Rule will reduce federal baseline protections for waterways affecting tribal communities. As a result, a company would not require a permit to discharge fracking waste into an ephemeral stream on forest service land that feeds into, or otherwise supplies water for domestic or agricultural use by downstream tribal nations. In such case, the domestic or agricultural use of a federally reserved water right would be obstructed and a tribal nation could have a legal cause of action for the resulting harm. Despite the likelihood of these harms, the Revised Rule contains no evaluation of the proposal's impact on fulfillment of the agencies' federal trust responsibilities and its intersection with legally enforceable federally reserved rights.

### **3. Tribal nations will be forced to protect their rights in biased state venues**

In general, NCAI opposes any resulting delegation to states over important water resource regulations. The Revised Rule, as advertised, would leave states and tribal nations "free to manage [their waters] under their independent authorities."<sup>19</sup> However, tribal nations and states are often at odds on how best to manage shared resources, such as water. The broad sweeping reduction in federal protections for water features, such as wetlands, ephemeral streams, and other hydrologically connected resources will require tribal nations to seek protections under state laws that often do not adequately consider tribal interests.

Further, the federal government maintains a fiduciary duty to tribal nations to preserve and protect tribal lands, natural resources, and historic, sacred and cultural sites. These duties are enshrined in the Constitution, federal statutes, executive orders, treaties, Supreme Court precedents, and other law. State governments do not have this duty to tribal nations and, even if well-intentioned, do not have local statutes and regulations in place that are commensurate with federal statutes and regulations to provide strong protections for tribal interests. Put simply, the fiduciary duties owed tribal nations necessitate serious discussion and consideration of how tribal interests can be protected under any Revised Rule, but with particular attention to regions where tribal nations and states have historically fought over water resources.

#### **B. Meaningful Consultation Should Occur on the Revised Rule and the Comment Period Should be Extended**

##### **i. Meaningful Consultation Has Not Occurred on the Revised Rule**

Despite the significant ramifications of the Revised Rule, the EPA and ACE have not conducted meaningful consultation with tribal nations on its content, which was just released on February 14,

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*Dist.*, 763 F.2d 1032, 1034–35 (9th Cir. 1985) (affirming district court's order requiring that water be released from a reservoir in order to preserve nests of salmon eggs based on unquantified tribal fishing rights); *Baley*, 134 Fed.Cl. 619.

<sup>18</sup> *U.S. v. Gila Valley Irrigation Dist.*, (Gila III), 920 F. Supp. 1444 (D. Ariz. 1996).

<sup>19</sup> 84 Fed. Reg. 4154.

2019. To date, some individual consultations and just four half-day discussions have occurred in Kansas City, Albuquerque, Seattle, and Atlanta on the Revised Rule.

The agencies largely claim to have satisfied their consultation obligations by having communicated with tribal nations about the *possibility* of revising the 2015 Clean Water Rule in a two-step process. The agencies' own summary of these "consultations" document that tribal nations expressed a series of substantive and procedural concerns, the latter of which relate to the non-disclosure of the proposed rule and the lack of scientific data on the impacts of reducing WOTUS coverage.<sup>20</sup>

The omission of such critical information is the antithesis of full and meaningful consultation as required by the agencies' consultation policies. Further, agency policies require that they consult with tribal nations *before* taking action or implementing decisions that may impact them. Here, the agencies have not adequately consulted with tribal nations on the Revised Rule as documented by the neglect of Regions 9, 8, 5, 3, 2, and 1 after the release of the Revised Rule. In accordance with agency policy, full and meaningful consultation should occur with tribal nations prior to issuance of the final rule. Further, because full consultation has not occurred on the Revised Rule, NCAI's comment letter hereby incorporates by reference all tribal concerns that were raised in Step 1<sup>21</sup> and Step 2<sup>22</sup> of the proposed WOTUS revision process and requests that they be incorporated into the Revised Rule record and adequately addressed before issuance of a final rule.

**ii. The 60-Day Comment Period Does Not Provide an Opportunity for Meaningful and Informed Public Comment**

The comment period on the proposed Revised Rule should be extended to 200 days to enable meaningful consultation and careful analysis by affected tribal nations and communities. The 2015 Clean Water Rule received more than one million comments during its 200-day comment period and reflects the significant effect that re-defining WOTUS jurisdiction has on communities.

Further, an extension of the comment period is especially merited because of the non-disclosure of scientific data showing the impact of the Revised Rule on affected watersheds. A 60-day comment period is insufficient to allow for a thorough analysis of the proposed rule. Relatedly, tribal hearings should be held to gather input on this proposed rule which – as presently proposed – would have disparate impacts on tribal nations that rely on waters slated to lose jurisdictional protections. Lastly, the comment period should be extended, because as explained below, it is unclear whether it satisfies the requirement that the public have an opportunity for "meaningful and informed" comment on federal rulemaking.

**C. The Proposed Rule Will Degrade The Water Quality of Tribal Communities**

The Revised Rule would make the following subject to CWA protection: (1) Traditional Navigable Waters (TNWs), (2) some tributaries of TNWs, (3) some drainage channels ("ditches"), (4) lakes and

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<sup>20</sup> "Summary Report of Tribal Consultation and Engagement for the Proposed Rule: Revised Definition of 'Waters of the United States' Proposed Rule." <https://www.epa.gov/wotus-rule/tribal-consultation>.

<sup>21</sup> Federal Register Docket: EPA-HQ-OW-2017-0203.

<sup>22</sup> Federal Register Docket: EPA-HQ-OW-2018-0149.

ponds that flow perennially or intermittently into categories (1) – (5); (5) impoundments of the above, and (6) wetlands directly adjacent to the above.<sup>23</sup>

Excluded from protection under the Revised Rule are: (1) all waters not expressly identified above; (2) groundwater, including water that is hydrologically interconnected with surface water; (3) ephemeral streams that flow after precipitation; and (4) non-navigable interstate waters.

**i. Non-Disclosures of Environmental Effects May Violate the APA, NEPA, and ESA**

Presently, the agencies have claimed that they lack adequate data to assess the impact of the Revised Rule on the nation’s waterways.<sup>24</sup> The rushing of this rulemaking, without adequate scientific review, may constitute arbitrary and capricious conduct in violation of the Administrative Procedures Act (APA).<sup>25</sup> Relatedly, the scarcity of data raises APA concerns as the public lacks information necessary for submission of meaningful and informed comments.<sup>26</sup>

Moreover, the inadequate scientific review may violate the National Environmental Protection Act (NEPA) and the Endangered Species Act (ESA). NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.”<sup>27</sup> While the CWA exempts the EPA from types of NEPA compliance, the ACE has no similar exemptions.<sup>28</sup>

The ESA requires federal agencies to engage in consultation with the Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (the Services), as appropriate, to ensure that rulemaking does not jeopardize an endangered or threatened species or reduce critical habitats.<sup>29</sup>

As shown below, EPA’s prior analysis illustrates that a reduction in WOTUS coverage would significantly affect human-, fish-, and wildlife-dependent waters, which would require the preparation of an EIS and an ESA consultation. Despite this impact, ACE did not complete an EIS and the Revised Rule contains no reference to NEPA and does not even explain whether a baseline Environmental Assessment was performed.<sup>30</sup> Likewise, neither the EPA nor the ACE engaged in an ESA consultation. It is unclear how the agencies can credibly assert they lack data to evaluate the impact of the Revised Rule but simultaneously determine their proposed action would have no significant effect on the human environment or endangered species.

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<sup>23</sup> 84 Fed. Reg. 4154.

<sup>24</sup> *Id.*

<sup>25</sup> *Motor Vehicle Mfrs. Ass’n of U.S., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (holding that [a]n agency’s view . . . may change. . . . But an agency changing its course must supply a reasoned analysis.”).

<sup>26</sup> *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530-31 (D.C. Cir. 1981) (“An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”), cert. denied, 495 U.S. 835 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir.) (proposed rule must provide sufficient information to permit informed “adversarial critique”), cert. denied, 434 U.S. 829 (1977).

<sup>27</sup> 42 U.S.C. § 4332(C).

<sup>28</sup> 33 U.S.C. § 1372(c)(1).

<sup>29</sup> 16 U.S.C. § 1536(a)(2).

<sup>30</sup> 84 Fed. Reg. 4154.

## **ii. Existing Data Shows the Revised Rule Will Reduce Environmental Protections for Watersheds**

The agencies' assertions that they lack scientific data to assess the environmental impact of the Revised Rule is contradicted by their prior analysis. Agency records show that at least 18 percent of stream miles and 51 percent of wetlands nationwide would lose CWA protections if a narrower definition is adopted.

Similarly, agency data shows that within the arid West, an estimated 35 percent of streams will lose federal protection.<sup>31</sup> Likewise, the EPA's prior data shows that the drinking water of more than 117 million Americans could be imperiled because they receive water from public systems that draw supply from headwater, seasonal, or rain-dependent streams that are slated to lose jurisdictional coverage.<sup>32</sup>

Most waters flowing through or adjacent to tribal lands originates elsewhere and may be a mixture of ephemeral waters that hydrologically interconnect to perennial water. The reduction in federal protection for streams, wetlands, and ephemeral waters will significantly impact tribal communities. Wetlands are essential to a healthy watershed and provide pollution filtration, groundwater recharge, flood protection, and vital ecosystem services for fish and wildlife. Similarly, protection of upstream headwaters, particularly those supplied by ephemeral streams is a critical source of drinking water for downstream communities, provides needed water for agricultural uses, and provides critical habitat for fish and wildlife. Further, the Revised Rule's requirement that intermittent streams continuously flow during certain periods of a year may result in some intermittent waters being reclassified as non-protected ephemeral streams. To this point, such streams are even more vital in the arid West, home to many large land-based tribal nations, where drought impacts are more severe and where ephemeral streams are a critical component of the local water cycle. These identified impacts, based on prior agency data, illustrate that degradation of tribal waters will result from the Revised Rule to the detriment of tribal drinking water, agricultural water, cultural resources, and other tribal water-dependent resources such as fish and wildlife.

## **iii. The Revised Rule Harms Tribal Regulation of Water Resources**

Tribal water resources are disproportionately impacted by the removal of a baseline standard for the nation's waters because tribal lands are more likely to abut other federal lands. The Revised Rule ignores this fact and instead cursorily states, as noted earlier, that waters will not lose environmental protection under the proposal because "States and Tribes are free to manage [their waters] under their independent authorities."<sup>33</sup> This sentence oversimplifies a jurisdictionally complex regulatory structure and does not address tribal treatment as a state authority under Section 518 of the CWA.

Tribal nations are authorized to receive a "treatment as a state" designation to implement sections of the CWA on their trust lands only for waters that constitute WOTUS. Tribal standards can go above

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<sup>31</sup> "GIS Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S." <https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent>; "Breakdown of Flow Regimes in NHD Streams Nationwide" [https://www.eenews.net/assets/2018/12/11/document\\_gw\\_05.pdf](https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf) [https://www.eenews.net/assets/2018/12/11/document\\_gw\\_05.pdf](https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf)

<sup>32</sup> Id.

<sup>33</sup> 84 Fed. Reg. at 4169.

the federal baseline standard, but TAS cannot convey federal jurisdiction where it has otherwise been excluded. The process for receiving this designation and running a CWA program is administratively costly. While only a few tribal nations have implemented TAS for water quality standards, the EPA acknowledges that “at the present, no tribes administer the section 402 or 404 programs.”<sup>34</sup>

Presently all tribal nations rely on the EPA to ensure compliance with applicable tribal or federal water quality standards prior to the issuance of a 402 or 404 permit. Narrowing the WOTUS definition cedes important jurisdictional coverage to states because the EPA can only approve a TAS designation for waters defined as WOTUS. Thus, fewer permits will be issued for pollutant discharges resulting in increased pollution to waterways and impairment and violation of tribal water quality standards because of the Revised Rule.

A tribal nation exercising its inherent sovereignty to regulate its waters could not substitute for the extensive protections and inter-governmental operating structure provided by TAS. Further, the extent to which a tribal nation can exercise its inherent regulatory authority to prevent off-reservation harm is jurisdictionally unclear. If the Revised Rule is implemented, a company could lawfully discharge mining waste into a previously protected isolated wetland that filters tribal drinking water without the need for federal approval. A tribal nation would be left with no clear legal recourse to protect its water resources since it would be required to assert jurisdiction over a non-tribal entity for off-reservation conduct that violates a tribal standard, but under a state law framework that has historically worked against tribal interests.

#### **D. Conclusion**

For the aforementioned reasons, NCAI cannot support the Revised Rule in its current form. All available data shows that the Revised Rule will overburden tribal nations and likely violate the federal trust responsibility, treaties, and impair the exercise of reserved water and water dependent rights. Accordingly, NCAI requests that any definitional change to WOTUS include a comprehensive evaluation of EPA and ACE’s federal trust responsibility, impacts to treaty rights, reserved rights, and other trust resources including those of Alaska Native tribes and Alaska Native villages; and evaluate cumulative impacts to tribal jurisdiction, economies, tribal government(s) and environmental resources. Further, NCAI requests that prior to the issuance of a final rule, full and meaningful tribal consultation occur on the Revised Rule and that the comment period be extended 200 days to accomplish this requirement.

In closing, we thank you for your time and consideration, and please feel free to contact Fatima Abbas, NCAI Policy Counsel, at [fabbas@ncai.org](mailto:fabbas@ncai.org) or (202) 466-7767, if you have any questions.

Sincerely,



Jefferson Keel  
NCAI President

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<sup>34</sup> 84 Fed. Reg. at 4157.